

ARIZONA COURT OF APPEALS

DIVISION ONE

ABC SAND AND ROCK COMPANY INC.,

Plaintiff/ Appellant,

v.

FLOOD CONTROL DISTRICT OF
MARICOPA COUNTY

Defendant/ Appellee.

Court of Appeals

Division One

No. 1 CA-CV 19-0652

Maricopa County

Superior Court

No. LC2016-000324-001

**PLAINTIFF/APPELLANT'S COMBINED OPENING BRIEF
AND APPENDIX**

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INTRODUCTION

This administrative appeal asks the Court to enforce basic statutory protections against administrative agency overreach: that an agency may only take action that the legislature has authorized and that an agency's enforcement decisions are subject to full and fair judicial review under § 12-910. Appellant ABC Sand and Rock Company has so far been denied both protections.

Appellee, the Maricopa County Floodplain Control District, issued civil penalties for violations it believed the evidence showed had occurred and, at a pre-determined rate of \$1,000 per day without regard to any additional facts that may occur in the future, violations that it believed would occur in the future. The legislature, however, has authorized the District to issue fines for violations that have occurred, not future expected violations. Those now-massive future fines should be vacated as a matter of law.

The Court should also reverse because ABC has not received full and fair judicial review under § 12-910. That statute requires a superior court deciding an administrative appeal to consider supplemental evidence and testimony presented to the court on equal footing with evidence presented

to the agency. Here, the superior court refused to consider any evidence occurring after the administrative hearing or any legal argument based on that new evidence, even while affirming an order imposing fines for alleged violations occurring hundreds of days after the administrative hearing.

The full judicial oversight that § 12-910 requires is needed in this case. The District held an administrative hearing in January 2016. Its rules prohibit any discovery of evidence before the hearing and prohibit any additional evidence before the District's governing body makes its final, appealable enforcement decision. Since January 2016, ABC has turned up considerable evidence that puts the District's decisions and the extreme amount of its penalty in grave doubt.

The evidence presented below shows that the District's enforcement decision is unjustified under the full facts and exceeds its statutory authority. In other words, the agency's "action is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion," A.R.S. § 12-910(E), and the Court should grant ABC relief.

STATEMENT OF FACTS AND CASE*

I. Statutory and Regulatory Framework

A. The Maricopa County Flood Control District

The Maricopa County Flood Control District is a political taxing subdivision of the State of Arizona and is responsible for regulating floodplains in Maricopa County. [A.R.S. § 48-3603\(A\), \(C\)](#). The District “appoint[s] a chief engineer and general manager.” [A.R.S. § 48-3603\(C\)\(14\)](#).

The law also requires the District to create regulations governing its oversight of floodplain activity, including the issuance of permits for regulated activity in the floodplain. [A.R.S. § 48-3603\(D\)](#); [A.R.S. § 48-3609\(B\)\(1\)](#); [A.R.S. § 48-3613](#). The District’s regulations are known as the Floodplain Regulations of Maricopa County (“FRMC § __”). The version in force during the relevant period is at [APP178](#) (Ex. 121).

* Selected record items cited are included in the Appendix attached to the end of this brief, cited by page numbers (e.g., APP001), which also match the PDF page numbers and function as clickable links. Other record items are cited with: “IR-” followed by the record number, “Ex. __” followed by the exhibit number as admitted in the superior court, or “MM/DD/YY Tr. __” followed by the page and line of the cited transcript.

B. The Law and Regulations for Processing Floodplain Use Permits

Mining for sand and gravel is a regulated activity in the floodplain and requires authorization via a “floodplain use permit.” See [FRMC § 401\(A\)](#). To obtain a floodplain use permit, a sand-and-gravel mine operator must submit an application and pay an associated application fee. [FRMC §§ 401\(A\), 402, 403\(B\)](#). The application requires certain information, including a “plan of development for the extraction of sand and gravel or other materials.” [FRMC § 403\(B\)\(1\)\(e\)](#).

The law requires the District to process permit applications within fixed time periods. The District has 90 business days overall to grant or deny a permit application, split into two phases: the “administrative completeness review” and the “substantive review”. [A.R.S. § 48-3645\(B\)](#); [FRMC § 404\(D\)](#) & [FRMC Appendix C – Licensing Time Frames](#). These time frames apply to the District, not the applicant. When information is requested from the applicant during the permitting process, the applicant has one year to respond. The permit application “automatically expire[s]” one year after “the notice of request for additional information if no response has been received from the applicant.” [FRMC § 404\(D\)\(3\)](#).

During the first phase, the “administrative completeness review,” the District must determine whether an application is “complete” —i.e., does it have all the information required under [FRMC § 403\(B\)\(1\)](#). The District has 30 days to issue a written notice of administrative completeness or provide a list of deficiencies. [A.R.S. § 48-3645\(D\)-\(E\)](#); [FRMC Appendix C](#). If not completed within 30 days, the application “is deemed administratively complete.” [A.R.S. § 48-3645\(F\)](#).

Once complete, the process moves to the “substantive review” second phase. During that period, the District and applicant engage in a back-and-forth to resolve any substantive issues with the plan of development or other matters. The District may issue a comprehensive “request for corrections,” to which the applicant must respond within one year, and the District may follow-up with supplemental requests. The District has 60 business days for the second phase, though the time is suspended while the District waits for the applicant to submit a response, and the law allows for agreed extensions. [A.R.S. § 48-3645\(G\), \(I\)](#).

If the District denies a permit, it must provide the applicant with a “[j]ustification for the denial . . . with references to the [law] on which the denial . . . is based,” “[a]n explanation of the applicant’s right to appeal,” and

“[a]n explanation of the applicant’s right to resubmit the application.”

[A.R.S. § 48-3645\(J\)\(1\)-\(3\); § 48-3642\(5\)\(a\).](#)

C. Permits of Short Duration

The District issues five-year floodplain use permits for sand-and-gravel mining. To allow businesses to operate while going through the application process, the District may also issue a floodplain use “permit of short duration for an applicant participating in an ongoing application process.” [FRMC §§ 403\(B\)\(3\), 404\(B\)\(4\)](#). The regulations do not set a duration, fee, or other parameters for issuance of a short-term permit. In its history (before this matter), the District has never denied a permit of short duration to a mining operation. See [Facts and Case § II.B.2\(c\)](#) below.

D. The District’s Enforcement Authority and Process.

A party that mines in a floodplain without a permit may be fined, and the District is authorized to take enforcement action and impose civil penalties. See [A.R.S. § 48-3603\(C\)\(24\); A.R.S. § 48-3615.01; A.R.S. § 48-3615\(C\)](#). The fine for unauthorized floodplain mining activity cannot “exceed the fine chargeable for a class 2 misdemeanor.” [A.R.S. § 48-3615\(C\)](#). In addition, “[e]ach day the violation continues constitutes a separate violation.” *Id.*

The District's administrative enforcement process begins with service of a "Notice of Violation." [A.R.S. § 48-3615.01\(A\)](#); [FRMC §§ 703\(A\)\(2\) & 704](#). The notice must "identify the violations observed," among other things. [A.R.S. § 48-3615.01\(A\)](#). The party served with the notice may request a hearing before a hearing officer, who makes findings of fact and recommendations to the District's chief engineer. [A.R.S. § 48-3615.01\(B\)\(2\), \(E\)-\(F\)](#); [FRMC §§ 705\(3\)-\(4\), 706 & 707\(E\)\(1\)](#).

The District's regulations prohibit any discovery before the hearing. [FRMC § 707\(B\)\(1\)](#) ("[p]re-hearing discovery shall not be permitted") and disclosure of evidence does not occur until "[i]mmediately prior to the public hearing." [FRMC § 707\(B\)\(2\)](#).

After receiving the hearing officer's findings and recommendations, the chief engineer issues a "Final Decision and Order." [FRMC § 707\(E\)](#). There is no separate hearing before the chief engineer.

The chief engineer's decision may be appealed to the District's Board of Hearing Review. [A.R.S. § 48-3615.01\(H\)](#); [FRMC § 707\(F\)\(1\)](#); *see* [A.R.S. § 48-3603\(C\)\(25\)](#) (authorizing District to "[e]stablish a board of hearing review to review decisions of hearing officers that are issued pursuant to [§ 48-3615.01](#)"). The Board does not allow new evidence. *See* Resolution FCD

2016R004(A)¹. After oral argument, the Board issues a written final decision and order. The Board's final decision may be appealed to the superior court. [FRMC § 707\(F\)\(2\)](#).

II. Factual Background.

A. ABC Sand & Rock Company

ABC is a small, family-owned business that, among other things, mines sand and gravel. ABC received its first permit for mining along the Agua Fria River in 1985. [APP418-19](#). From 1985 through 2011, ABC had a positive, functional relationship with the District's regulators, and routinely received renewed permits.

B. ABC's Permit Application Process Since 2015

1. Before January 2015 (fine period 1)

(a) ABC and the District disputed the status of ABC's renewal of its 2006 permit in 2011.

ABC's permit status between 2011-2015 has been the subject of dispute, including before this Court. *See ABC Sand and Rock Co. v. Flood Control Dist. of Maricopa Cty.*, 1 CA-CV 16-0294, [2017 WL 6558741](#) (App. Dec. 21, 2017). In brief: in February 2011, ABC applied to renew its 2006 five-year permit. A

¹ The Board's resolution is available at <https://www.maricopa.gov/DocumentCenter/View/8190>.

dispute arose between ABC and the District over certain aspects of the application and the 2006 permit lapsed. ABC contended it successfully renewed its permit through 2016; the District contended that it had not, and that ABC operated without a permit between May and November 2011 (the District issued short-term permits through July 2012). The chief engineer issued an order in November 2011 concluding that “ABC had never successfully renewed its permit and imposing a fine of \$169,000,” (or, \$1,000 per day). *Id.* at *1, ¶¶3-5. In 2012, the Board of Hearing Review denied the chief engineer’s decision. *Id.* ¶ 5. Appeals to the superior court and the Court of Appeals followed and eventually the matter was remanded back to the Board.

(b) In January 2015, the Board wipes out any past fines but concludes that ABC needs to obtain a permit.

On January 28, 2015, the Board issued on remand a new order dismissing the \$169,000 fine against ABC as arbitrary and concluded that “a complete permit application was still needed.” *Id.* at *2, ¶ 8. The Court of Appeals affirmed that decision in 2017, while this case was pending in the superior court. *Id.* at *3, ¶ 16.

Although the District has sought to impose fines for alleged violations occurring between 2012 and January 2015, the Board did not impose fines for any alleged violations occurring before January 28, 2015. [APP377](#) (Ex. 203 at 10 ¶ 3). That aspect of the Board's order is not on appeal.

2. January 2015 – July 2015 (fine period 2)

- (a) After the Board's January 2015 decision, the District offers to forbear any enforcement and issue a permit of short duration and ABC accepts the offer.**

Two weeks after the Board's January 2015 decision, the District's Chief Engineer Wiley wrote ABC with a proposal to move forward:

Per [the Board's January 2015 order], ABC Sand and Rock is required to pursue a Floodplain Use Permit and pay appropriate fees. **If the application is filed and the fees are paid by March 6, 2015, we will forebear any enforcement action for operating without a permit, and per [FRMC § 403(B)(3)], will issue a permit of short duration during the application process if required.**

[APP251](#) (Ex. 140) (emphasis added).

ABC readily took up the District on its offer. After all, by the time of the Board's January 2015 decision, ABC had already retained an engineer to help ABC amend its previously approved plan of development so that ABC could expand its operations. [APP253](#) (Ex. 142 at 16); [APP431](#) (1/4/2016 Tr. at 112:21-113:5). On February 27, ABC submitted an application for its

“proposed amended plan of development for the above-referenced permit and” a filing fee. [APP252](#) (Ex. 141); [APP431](#) (1/4/2016 Tr. at 112:3-14).

(b) The District prepares a permit of short duration but buries it and begins threatening ABC after learning of ABC’s political speech.

Internally, it seems that the District began processing the application consistent with the Chief Engineer’s February 12 letter offer. As ABC would only learn long after the January 4, 2016 hearing, District staff drafted a permit of short duration and circulated it for internal review on March 10, 2015. [APP395](#) (Ex. 363).

But (as ABC would also learn much later), just two days later things would change. On March 12, a sand-and-gravel trade group representative forwarded to Chief Engineer Wiley an email ABC’s principal sent to many legislators urging them to reject proposed legislation that the District strongly supported. [APP400](#) (Ex. 364). The District has feigned ignorance about the bill at issue (HB2559, 1st Reg. Sess. 2015). Mr. Wiley testified that he thinks it was sent to him and Mr. Hathaway (the email’s other recipient) because Mr. Hathaway, “a flood control employee, had some history on this in the past” but he also said that it “wasn’t our bill.” [APP498](#) (8/28/2017 Tr. at 95:16-96:5). And the District argued below that “the bill ABC was

lobbying against was not the District's bill. It was a bill brought by ABC's fellow sand and gravel operators in the Agua Fria River. ABC's argument is not based on facts." IR-25 at 30.

Here are the facts: the bill is about creating mining districts to pay for development along the river, and the District was very much behind it. *See* Ex. 224 (competing mining company stating that District proposed the concept). Indeed, the bill's sponsor brought Mr. Hathaway (a District employee) to the legislature to speak in favor of the bill and answer questions.² Mr. Hathaway told the Appropriations Committee that the Chief Engineer hired him out of retirement specifically for this project, which he called his "legacy project," and he explained to the committee why he thought the bill made good sense. The fact is that the District cared about this bill that ABC's principal was publicly urging legislators to vote down.

Despite the internal draft and the Chief Engineer's promise to issue a permit of short duration, ABC never heard a word about the draft permit

² *See* 2/25/2015 House Appropriations Comm., at 02:30:39-02:58:00, http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=15299&meta_id=302041.

and no one can explain what happened to it. [APP561](#) (8/30/2017 Tr. at 143:4-21); [APP597-98](#), [621-26](#), [628-30](#) (8/31/2017 Tr. at 19:22-20:6, 109:20-114:24, 116:8-118:4); [APP493-95](#), [499](#) (8/28/2017 Tr. at 86:5-88:8, 96:18-97:16). Mr. Beuché, who drafted the permit, testified he had no memory of it or what happened to it. [APP522-24](#) (8/29/2017 Tr. at 78:8-80:16).

(c) The District refuses to process ABC's February permit application.

The District never processed ABC's February 2015 permit application. The District did not issue a written notice of administrative completeness or provide a list of deficiencies as required by A.R.S. § 48-3645(D)-(E). In addition, the District never told ABC that there would be no permit of short duration, despite the Chief Engineer's February letter and despite that ABC was "an applicant participating in an ongoing application process." [FRMC § 404\(B\)\(4\)](#).

Instead, three days after the internal draft short-term permit and one day after the Chief Engineer learned of ABC's lobbying, the District's outside counsel wrote to ABC's lawyer that ABC's submission was a nullity because it was labeled an "amended" plan and criticized the plan of development as "not credible." [APP254](#) (Ex. 143). The March 13 letter stated that if ABC was

mining, “it is in violation of law and subject to fines,” and that ABC would need to submit a “new application and pay the appropriate fee.”

The letter does not address the District’s February letter or the permit of short duration. Thus, rather than follow the administrative completeness review process under § 48-3645, and issue a permit of short duration, the District just shelved the application and threatened ABC for operating without a short-term permit it had promised to give but was (silently) refusing to give.

There are not credible explanations for the failure to process the February permit application as required by law. The Chief Engineer admitted that if the cover letter’s description had been different—if it had said “new” rather than “amended” — the District would have processed it as normal. [APP489](#) (8/28/2017 Tr. at 81:14-82:13). And the fact is, the District had “allow[ed] mine operators to apply for renewals after their permit had expired.” [APP572](#) (8/30/2017 Tr. at 180:21-181:11).

(d) ABC submits a new application and requests the promised short-term permit, which the District ignores.

Next, the District’s lawyer sent another letter that on one hand suggested the District believed ABC was unlawfully mining without

authorization and on the other confirmed the Chief Engineer's earlier offer by demanding that ABC submit a new permit application by May 1, 2015 or the District would "be forced to commence a new enforcement action." [APP252](#) (Ex. 144). The letter also states, the District "hopes that it will not need to bring an enforcement action and that ABC will file the necessary documents and pay the necessary fees to obtain a permit and then work diligently toward obtaining a permit." *Id.*

Like before, ABC followed the District's instruction and submitted a new application and new permit fee on May 1, 2015. Ex. 145. In its cover letter to the Chief Engineer, ABC's new counsel expressly requests the promised short-term permit: "you have also indicated that a permit of short duration would be issued upon your receipt of the enclosed submission, and I ask that you send a copy of that permit to my attention as soon as possible." [APP262](#) (Ex. 146).

This request was ignored. It was not denied, it was not processed as required for all floodplain use permits, and it was not granted. District staff admit that they did not act on the request, even while recognizing that the District had a legal duty to do so. [APP526](#) (8/29/2017 Tr. at 83:12-89:3).

(e) The District issues its Notice of Violation and complains about ABC's lobbying activity.

Instead, the District issued the May 8, 2015 Notice of Violation. [APP264](#) (Ex. 149). ABC was astonished at the reversal. [APP433](#) (1/4/2016 Tr. at 119:17-120:9). ABC's counsel thought there must be a mistake. She wrote to the District's lawyer that ABC had not received anything about administrative completeness review, that ABC understood the District would forbear enforcement, and that ABC "requested a permit of short duration while working through the application process . . . as proposed in Bill Wiley's February 12, 2015 letter." [APP268](#) (Ex. 151); [APP433](#) (1/4/2016 Tr. at 119:17-120:9). She requested a meeting with key District employees and county officials. [APP268](#) (Ex. 151). The District's lawyer responded by refusing to put off the Notice of Violation and warning that "we are aware that Tim LaSota is lobbying elected officials concerning the outstanding NOV." [APP270](#) (Ex. 152).

(f) The parties meet and agree on a path forward on June 15, 2015.

On June 15, ABC met with the Maricopa County manager, the deputy county manager, and District employees to discuss how to move forward. On June 17, ABC's counsel sent the attendees an email to "memorialize"

what occurred at the meeting. [APP272](#) (Ex. 154). At the meeting, the following was agreed:

- ABC's May 1 application was "administratively complete";
- The parties would "work in good faith to diligently proceed through the substantive review process"
- Because the parties were "moving diligently to process the permit application, a temporary permit [was] not necessary and [would] not be pursued."
- "A hearing on the Notice of Violation would not be set at this time to allow the parties to focus their attention on the permit application."

Id. The deputy county manager responded, "We agree that you have accurately summarized our meeting." *Id.* The Chief Engineer agreed he and the District were bound by the deputy county manager's assent; he reviewed the email summary as well. [APP503-07](#) (8/28/2017 at 129:3-132:6, 133:7-17); [APP403](#) (Ex. 377). That is, the top management of the County, the top management of the District, and ABC all agreed that a "temporary permit" was "not necessary."

(g) The District finally begins the substantive review process with June 30, 2015 Request for Corrections.

Seemingly back on track, on June 30, the District sent ABC its Request for Corrections, detailing 37 technical issues the District wanted addressed. [APP274](#) (Ex. 155). The Request for Corrections included a "Notice of Permit

Rights,” stating that ABC had one year from the date “of this notice” to respond to the District. [APP287](#) (Ex. 155 at ABCSR00000664). That is what the District’s regulations require. *See* [FRMC § 404\(D\)\(3\)](#).

3. July 2015 - December 23, 2015 (fine period 3)

(a) ABC works to respond to the Request for Corrections

After receiving the June 30 Request for Corrections, ABC worked on a response and did not make explicit requests for a short-term permit, consistent with the June 15 agreement. ABC’s counsel and the District staff stayed in touch and discussed technical requirements concerning ABC’s plans. [APP288, 292, 299](#) (Ex. 156, 161, 163); [APP436-39](#) (1/4/2016 Tr. at 127:5-14, 129:3-17). In none of these exchanges did anyone from the District set a deadline (other than the one set by law), and no one said the District would refuse to issue a short-term permit and seek fines for operation during that time period.

Meanwhile, the parties’ lawyers still had to deal with the pending appeal of the January 2015 Board of Hearing Review decision. The parties agreed to push out the appeal briefing schedule while ABC and the District worked toward reaching agreement on a permit. In those exchanges, the

District's counsel held out the threat of fines for unpermitted mining activity, but also made clear that litigation was being extended in the expectation that ABC would be permitted and the parties' dispute resolved, consistent with the June 2015 agreement. See APP164 (Ex. 28) (County agreeing to extend schedule "with the expectation that the [District] will be receiving" a response about ABC's plan soon, and stating that "ABC should not expect a subsequent extension will be granted unless it has a permit"); APP170 (Ex. 29) (County agreeing to additional extension, though rejecting an indefinite one, "to allow ABC time to prepare a new plan and for the parties to continue to negotiate").

Outside of lawyer's letter exchanges, however, District employees knew that the substantive review process would take time for ABC. Internally, District staff acknowledged in August that the plans being discussed would mean that ABC's "submittal date **will likely be October at the earliest.**" APP293 (Ex. 162) (emphasis added). Sand-and-gravel mines are technical operations, and the engineering work involved requires significant time and resources. See APP601-20 (8/31/2017 at 41, 44:20-62:24).

(b) The District serves its November 2 Notice of Hearing.

Without any warning or message, on November 2, 2015, the District issued ABC a Notice of Hearing on its Notice of Violation. The Notice states that the hearing's purpose is to determine "whether a violation . . . **has occurred,**" not whether one **will** occur. [APP301](#) (Ex. 164) (emphasis added). In effect, the District was telling ABC it wanted to fine ABC for any days of alleged unpermitted mining activity. The Notice does not mention the February 2015 unfulfilled promise to issue a permit of short duration, the promise to forbear enforcement, nor the details of the June 2015 agreement that "no [short-term] permit would be pursued or required." The Notice also does not copy the county officials who attended that meeting. The hearing on the alleged violations was eventually scheduled for January 4, 2016.

Around the same time, ABC changed counsel. ABC's new (and current) counsel tried to return the parties to the June 2015 agreement, telling the District that ABC still intended to honor the agreement and hoped the District would too. [APP305](#) (Ex. 165). The District—through the county attorney—took a combative tone and made clear that it would no longer

honor its forbearance agreement because, says the District, “no progress” had been made on ABC’s permit application process. [APP307](#) (Ex. 166). Other than the one-year regulatory deadline, the District had never provided any deadlines that ABC failed to meet.

(c) ABC responds to the Request for Corrections.

Despite the District’s changed course of action, ABC continued working to respond to the Request for Corrections. On November 13 and 30, ABC responded in two phases with additional engineering analyses and legal questions about the Request for Corrections. Exs. 167-68. The District sent ABC an extensive follow-up Request for Corrections on December 23, 2015. Ex. 170.

4. December 23, 2015 – August 2017 (fine period 4)

(a) The January 4 evidentiary hearing

The original evidentiary hearing in this case was on January 4, 2016. As discussed above, there was no discovery of any kind permitted before the hearing. In addition, the hearing officer did not hear evidence prior to July 2012 or after December 31, 2015. [APP427-30](#) (1/4/2016 Tr. at 25:21-22; 36:13-37:8).

The District sought maximum fines of \$10,000 per day going back to July 2012 (at the time, more than \$12 million). The hearing officer rejected the District's company-closing, vindictive position. [APP338](#) (Ex. 174 at 8). Instead, the hearing officer faulted ABC for not being diligent enough in responding to the June 30, 2015 Request for Corrections, concluding that ABC should have been able to respond by July 30. [APP339](#) (*Id.* at 9). Accordingly, the hearing officer recommended fines of \$500 per day between July 30 and November 30 (i.e., for past violations, not future violations). [APP338](#) (*Id.* at 8.).

(b) Meanwhile, ABC continues working with the District.

Despite the incredibly aggressive enforcement efforts (essentially trying to put ABC out of business), ABC continued to work to respond to the issues raised in the District's Request for Corrections. One of the significant issues expressed by the District was that ABC's proposed plan of development did not rely on the Federal Emergency Management Agency (FEMA) floodplain map but instead relied on more recent data suggesting that the FEMA map could be amended. *See, e.g.,* [APP555](#) (8/30/2017 Tr. 77:22-79:18) (discussing so-called Fuller Study hydrology); *see* [APP312](#) (Ex.

170 at ABCSR00000983-84) (taking issue with use of Fuller Study because it is not FEMA-approved, and stating that the mining plan must be based on FEMA-approved hydrology).

In February 2016, a report came out that concluded that the Fuller Study, while technically feasible, would be too costly to implement. [APP559](#) (8/30/2017 Tr. at 84). ABC then hired a highly qualified engineering expert to assist with ABC's proposed plan of development using FEMA-approved hydrology. [APP599](#) (8/31/2017 Tr. at 35:22-24). From March 2016 through August 2017, the record reflects significant work and substantive back-and-forth between the expert Mr. Williams, ABC, and the District, with ABC striving to satisfy all of the District's requests, including highly technical engineering issues that were the subject of debate. ABC met with District engineers, communicated regularly, and submitted at least five revisions to satisfy the District. [APP601](#) (8/31/2017 Tr. at 41:19-21); [APP359, 407-08](#) (Exs. 184, 398, 403)

On top of the complex engineering back-and-forth, the District took actions that delayed the process, including by changing its mind on certain technical issues. [APP353](#) (Ex. 181). To further drag things out, the District's lawyer prohibited in-person meetings on engineering issues, requiring

everything to be exchanged in writing. [APP364](#) (Ex. 196); *see also* Ex. 401 (lawyers' email exchange of engineer comments and questions).

Finally, on August 10, 2017, the District issued a new five-year permit to ABC. [APP409](#) (Ex. 411).

(c) Throughout 2016-2017, ABC repeatedly asked for permits of short duration.

It was obvious from the enforcement proceedings that the District no longer agreed that a “temporary permit is not necessary.” [APP272](#) (Ex. 154). Starting with its response to the December 23, 2015 Request for Corrections, ABC repeatedly requested permits of short duration only to be either ignored or denied for ever-changing reasons. It also became apparent that ABC was being treated unlike any other mine operator:

- April 11, 2016: “ABC requests it be issued a permit of short duration to govern the duration of the permit application process.” [APP359](#) (Ex. 184).
- April 11, 2016: “What do we need to do to get a permit of short duration”? [APP360](#) (Ex. 186).
- April 12, 2016: requesting permit in letter to Chief Engineer Wiley. [APP362](#) (Ex. 187).
- July 1, 2016: Renewing request and noting that ABC has “not found a single other instance where a permit of short duration was denied,” and permits were often granted long after five-year permits had expired. [APP366](#) (Ex. 202).

- December 1, 2016: renewing request for a permit of short duration. [APP407](#) (Ex. 398).
- February 28, 2017: Renewing request and stating that “[t]here can be no doubt that this plan has been designed to secure the District’s approval.” [APP408](#) (Ex. 403).

The District never issued a permit of short duration to ABC since its February 12, 2015 letter, despite that ABC was plainly “an applicant participating in an ongoing application process.” [FRMC §§ 403\(B\)\(3\), 404\(B\)\(4\)](#).

ABC received (for the first time) a written denial on April 15, 2016. [APP363](#) (Ex. 191). The Chief Engineer said that ABC’s request was denied because (1) ABC “does not have an existing permit,” (2) that the District needed more time to review ABC’s new plan of development, and (3) because ABC had not yet paid the fees the Chief Engineer had assessed in his March 2016 order (*see* [§ II.C](#) below). *Id.* The District (through the County Attorney) also sent a denial on July 7, 2016. [APP379](#) (Ex. 205).³ The second

³ ABC challenged the sufficiency of the July 7 letter and the Floodplain Review Board concluded that it was a denial. [APP384](#) (Ex. 335). The Floodplain Review Board is a different entity from the Board of Hearing Review. This brief uses the term “Board” to refer to the Board of Hearing Review.

time, the reasons for denial were different. In neither case did the denials give ABC any notice of a right to appeal or seek other review of the denial.

Besides ABC, the District has never refused to issue a permit of short duration. [APP564](#) (8/30/2017 Tr. at 172:23-173:10). The record shows that the District has regularly extended temporary permits, including to operators with the same issues that the District cited to explain its denial of ABC's permit. *See* [APP381-83](#) (Ex. 207, 208, 210) (permit and extensions given despite expired five-year permit); Ex. 246 (permit issued despite expired permit); Exs. 223, 225 (multiple permits issued despite mining with expired permit since 2003); [APP268](#) (8/30/2017 Tr. at 176:23-177:18) (no enforcement action and grants short term permit to company operating without permit for seven years); [APP582](#) (*Id.* at 190:5-23) (short term permit given even though permit had expired years earlier and company was unresponsive in the renewal process); [APP193](#) (*Id.* at 193:1-12) (gave six short term permits over 23 months to give time to try to change FEMA requirements for an amended plan). *See generally* [APP564-89](#) (*Id.* at 172-197).

The District's refusal to issue a short-term permit had major consequences, as the District understood. *See* [APP502](#) (8/28/2017 Tr. at

128:21-129:2 (Q: if the short-term permit were offered and ABC accepted it, “game’s over, right?” A: “They would not be subject to the penalties.”).

C. The Chief Engineer’s March 2016 Decision

In March 2016, the Chief Engineer issued his decision agreeing in part and rejecting in part the hearing officer’s recommendation. [APP341](#) (Ex. 177). The Chief Engineer took no new evidence. When he issued the decision, the Chief Engineer was the main decisionmaker on whether ABC would get a permit (temporary or otherwise), the chief prosecuting decisionmaker on what fines the District would seek, and the decisionmaker on the District’s requested fines.

He agreed that fines before January 2015 should not be imposed. But rather than limit fines to the alleged violations for which evidence was taken at the January 4 hearing, he concludes that ABC should be fined from January 2015 and into the future until ABC either ceased operations or was granted a permit. [APP351](#) (*Id.* at 11). He thought the ongoing, future fines should be set at \$2,500 per day. *Id.*

The Chief Engineer’s decision does not mention his February 12 promise to issue a permit of short duration or the District’s ignoring of the May 1, 2015, request for a short-term permit. Nor does the decision explain

why a future fine is okay but a short-term permit (which would stop any such fine) is not. The Decision does, however, justify its punitive fine amount in part by noting that ABC's assertion of its legal rights has cost "considerable resources in staff time and the payment of legal fees." [APP348](#) (*Id.* at 8).

D. The Board of Hearing Review's July 1, 2016 Decision

ABC appealed to the Board of Hearing Review. The Board took no new evidence. The Board accepted part and rejected part of the Chief Engineer's decision. [APP368-78](#) (Ex. 203) (the "**Board's Order**").

In its findings of fact, the Board's Order concluded that ABC "was operating without a Floodplain Use Permit" and that "the conduct of the District as described by ABC has not created a permit." The Board also concluded that the District's "stay of enforcement" after January 2015 "did not permit ABC to operate without a permit." The Board found that ABC did not respond to the District's June 30 Request for Corrections quickly enough, but also found that the "District . . . did not provide concrete dates" for responses. *Id.* ¶¶ 47, 49. As a result, the Board found, "the parties did not, and still may not share expectations on when and how a Floodplain Use Permit should be issued." *Id.* ¶ 49. Finally, the Board found that "there is a

reasonable possibility that ABC will continue to operate” after the Board’s decision. *Id.* ¶ 50.

The Board’s findings of fact do not mention or make any findings concerning the District’s offer and subsequent refusal to issue a permit of short duration, although ABC repeatedly argued the point to the Board. *See APP100-02* (IR-8 at 172, 177-80); *APP444-52* (6/16/2016 Tr. at 9, 11-12, 16-17).

In its final order, the Board agreed with the Chief Engineer that “ABC is subject to penalties for operating in a floodplain without a valid Floodplain Use Permit and that penalties are appropriate.” *APP377* ¶ 2 (Ex. 203 at 10). The Board broke the fines out into four time periods and imposed fines as follows:

- **Period 1**, July 2012 – January 28, 2015: No fines.
- **Period 2**, January 28, 2015 – July 30, 2015: \$5,000.
- **Period 3**, July 30, 2015 – December 23, 2015: \$500 per day totaling \$73,000.
- **Period 4**, December 23 and forward: “\$1,000.00 per day . . . until the District determines to issue or deny a Floodplain User Permit.”

Id. The Period 4 fines thus included fines for conduct after the January 4 evidentiary hearing and into the future. The District did not issue a new

five-year permit until August 10, 2017 (596 days after December 23, 2015). Between those dates, the District repeatedly either denied or constructively denied (by ignoring) requests for permits of short duration. See [Facts and Case § II.B.4\(c\)](#); see also [APP388](#) (Ex. 335 at 5) (Floodplain Review Board deeming ignored requests to be constructive denials).

As to the future fines in Period 4, the Board's Order also directs the parties to "cooperate to arrive at the decision to issue or deny within a reasonable period of time," and provides that "[i]f the District denies the permit, penalties . . . shall cease." [APP377](#) ¶¶ 2, 4 (Ex. 203 at 10).

As authority for the fines, the Board's Order cites [A.R.S. § 48-3615](#) and [§ 13-803](#). [APP376](#) ¶ 9 (*Id.* at 9). The Board also stated that "statements made by ABC" about continuing operations "form a reasonable basis for imposition of continuing penalties until such time as ABC comes into compliance." *Id.* ¶ 11.

E. The appeal to superior court and the supplemental record.

1. The supplemental record and arguments below.

ABC appealed the Board's decision. IR-1. By that point, it had been eight months since any new evidence was presented at the January 4, 2016 hearing. ABC requested an evidentiary hearing under [A.R.S. § 12-910\(A\)](#) to

supplement the record. IR-3. No discovery was allowed before the January 4, 2016 hearing and the subsequent decisions of the Chief Engineer and Board of Hearing Review were made without any additional evidence (including for fines for alleged conduct post-dating both decisions).

While its administrative appeal was pending, however, ABC had filed suit in federal court seeking an injunction. Through that proceeding, ABC was able to conduct discovery, including document discovery and an evidentiary hearing. IR-10 at 4. In its motion for an evidentiary hearing in the superior court, ABC explained that substantial new evidence had come to light supporting ABC's position, including:

- Records showing that the District prepared a permit of short duration in March 2015 (§ II.B.2(b), above);
- Records showing that the Chief Engineer was told about ABC's lobbying activity in March 2015 (§ II.B.2(b)-(c), above);
- Records showing how other competing mines had received permits of short duration (§ II.B.4(c), above);
- Evidence of post-hearing refusals to consider or issue permits of short duration (*Id.*).

The superior court (Judge Hegyi) granted the motion and scheduled an evidentiary hearing, which eventually occurred on August 28-31 before Judge LeMaire. *See* [APP095](#) (3/22/2017 Order in CV 2016-010095).

In its briefing below, ABC asserted that this new evidence—combined with the existing record—established additional bases to find that the Board’s Order is contrary to law, an abuse of discretion, and arbitrary and capricious. IR-10 at 2, 4-10. For example, in addition to the other arguments made to the Board, ABC argued that the entire record shows that: (1) the District arbitrarily and illegally failed to process or decide requests for permits of short duration before and after the administrative hearings; (2) the District’s post-Board-decision conduct was unlawful, arbitrary and capricious; (3) the District sought fines in violation of ABC’s First Amendment rights; (4) the District sought fines while denying a short-term permit in violation of equal protection; (5) and the imposition of future fines was unlawful and in any event should be considered ceased as of the denial of a short-term permit. IR-22 at 25-33; IR-30 at 12-22.

2. The superior court affirms but will not consider new evidence or arguments based on new evidence.

After hearing and briefing, the superior court affirmed the Board's Order. [APP090](#) (IR-41). The court concluded that ABC operated "without the requisite permit from July 2012 until August 10, 2017," seemingly affirming fines at \$1,000 per day through August 10, 2017. [APP093](#) (*Id.* ¶ 32). If affirmed, this adds up to a total fine of \$674,000 (\$0 in fine period 1; \$5,000 in period 2; \$73,000 in period 3; and \$596,000 for period 4, including \$583,000 in fines for conduct after the January 4 hearing). The court made no findings about the multiple requests and denials of permits of short duration throughout that time.

In reaching its decision, the court stated that the admission of new evidence "does not expand issues on appeal or permit reference to evidence that occurred after said administrative hearing." [APP093](#) (*Id.* ¶ 38). Further, the court concluded that any arguments "not made by ABC before the administrative hearing or before the Board of Hearing review are waived and will not be considered." [APP093](#) (*Id.* ¶ 42). With those restrictions in place, the Court concluded that "[s]ubstantial evidence exists to support the

BOHR decision” and that it was not “contrary to law, arbitrary and capricious” or “an abuse of discretion.” *Id.* ¶ 43.

The Court later made the order final in a signed Rule 54(c) judgment and ABC now appeals. IR-47; IR-49.

STATEMENT OF THE ISSUES

1. Is the Board of Hearing Review’s order contrary to law because the Board does not have authority to impose fines based on future conduct?

2. Did the superior court err by affirming fines for alleged violations occurring after April 15, 2016, the date the District denied a permit?

3. Did the superior court err by refusing to consider evidence discovered or occurring after the January 4, 2016 administrative hearing, and refusing to consider arguments based on evidence not available at the administrative hearing?

4. Is the Board’s Order arbitrary and capricious, contrary to law, and not supported by substantial evidence?

STANDARD OF REVIEW

The Court may reverse, modify or vacate and remand an agency’s final decision if it is “contrary to law, is not supported by substantial evidence, is

arbitrary and capricious or is an abuse of discretion.” [A.R.S. § 12-910\(E\)](#). “Whether substantial evidence exists is a question of law for [the Court’s] independent determination.” *Gaveck v. Ariz. State Bd. of Podiatry Examiners*, [222 Ariz. 433, 436, ¶ 12](#) (App. 2009). “Substantial evidence” exists when the agency’s decision is supported by the record, even if the evidence could support another conclusion. *Id.* ¶ 11. Moreover, the “record in the superior court shall consist of the record of the administrative proceeding, and the record of any evidentiary hearing.” [A.R.S. § 12-910\(D\)](#). Before deciding, the Court “review[s] the administrative record and supplementing evidence presented at the evidentiary hearing.” [A.R.S. § 12-910\(E\)](#).

The Court does not defer to the agency’s or the superior court’s legal conclusions. *Gaveck*, [222 Ariz. at 436, ¶ 12](#). See [A.R.S. § 12-910\(E\)](#) (Court shall decide “all questions of law . . . without deference” to an agency’s previous determinations).

ARGUMENT

I. The Board’s Order imposing fines past January 4, 2016 is unlawful.

The vast majority of potential fines comes from period fine 4: the Board’s imposition of a \$1,000 penalty per day from December 23, 2015 indefinitely into the future. In briefing and argument below, ABC

continually disputed the period 4 future fines (which were not recommended by the hearing officer). See [APP097](#) (IR-6 at 20) (arguing Chief Engineer’s recommendation of post-December 2015 fines are unlawful, retaliatory, and baseless); [APP454](#) (IR-8 at 58) (arguing ongoing fines should not be imposed); [APP135](#) (IR-22 at 31-32) (arguing that future fines are unlawful); [APP160](#) (IR-30 at 21-23) (same).

The period 4 fines for alleged violations occurring after January 4, 2016 are unlawful for at least two reasons: (1) the District has authority to impose fines for violations that have occurred, not those that it thinks might occur; (2) the superior court’s order violates due process because it affirms more than \$575,000 in fines without ABC ever having an opportunity to be heard before the Board about whether the facts support those fines.

A. Fines past January 4, 2016 are unlawful because the Board does not have authority to impose future fines for future conduct

1. An administrative agency may only impose penalties to the extent the legislature has expressly authorized and no more.

Like any administrative agency, the District is a “creature[] of statute,” and “the degree to which [it] can exercise any power depends upon the legislature’s grant of authority to the agency.” *Facilitec, Inc. v. Hibbs*, [206 Ariz. 486, 488, ¶ 10](#) (2003). The District’s “powers and duties” are “strictly

limited by the statute creating them.” *Cleckner v. Ariz. Dep’t of Health Servs.*, 246 Ariz. 40, 43, ¶ 8 (App. 2019) (internal quotation marks and citation omitted). The rule applicable here is clear: an agency’s power to issue sanctions, like other agency “powers and duties,” are “strictly limited” to what a statute expressly authorizes.

The Court has applied this basic rule of administrative law to reign in agency enforcement actions. That was the case in *Anderson v. Arizona Game & Fish Department*, 226 Ariz. 39 (App. 2010). There, the Court strictly construed the agency’s authority to deny a license to a person convicted of certain unlawful acts. *Id.* at 40-41 ¶¶ 4-11. The statute at issue authorizes the department to deny a license for five years after a first offense and for ten years after a second offense. *Id.* ¶ 5. The statute also states that the penalties are “in addition to any other penalties prescribed by this title.” *Id.* (citing A.R.S. § 17-340(B)). Relying on that provision, the department contended that it could impose consecutive sanctions for multiple violations (for a total of much more than 10 years). *Id.* at 41 ¶ 7.

The Court rejected the agency’s expansive view of its own enforcement power, explaining that the statute “does not explicitly authorize consecutive sanctions.” *Id.* Legislative history confirmed the plain language: the

legislature had rejected a version of the bill allowing for consecutive penalties. *Id.* ¶ 9. Consequently, “[b]ecause the statute’s language does not grant the [agency] the express power to impose consecutive sanctions,” and because of the persuasive legislative history, the Court held that the statute “does not grant” the agency “authority to impose consecutive sanctions.” *Id.*

Also particularly relevant here, in *Whitmer v. Hilton Casitas Homeowners Association*, the Court held that an agency, unlike a court, has no “inherent contempt power.” 245 Ariz. 77, 80, ¶ 11 (App. 2018). The agency’s statutory authority allowed it to adjudicate “contested cases” and “appealable agency actions.” *Id.* This adjudicatory power does not, however, include authority to decide a “contempt proceeding” – a proceeding for “enforcement of the parties’ legal rights or duties that were previously determined.” *Id.*

Though the agency had some court-like powers, it did not possess the same inherent powers as a court unless expressly authorized by statute. Thus, for example, although the relevant statute allowed the agency to subpoena witnesses, the statute also required the agency to go to the superior court to enforce the subpoena. The agency had no implied authority to enforce the subpoena itself. *Id.* ¶ 12. An agency “only has the powers delegated to it by the legislature.” *Id.* ¶ 11.

2. The legislature authorizes the District to impose fines for violations that have occurred, not violations that have not yet occurred

When applied here, the rule applied in *Whitmer* and *Anderson* leads to one conclusion: the legislature authorizes the Board to impose fines for past violations only.

The Board's authority to impose fines here derives from [A.R.S. § 48-3615\(C\)](#). That section provides, "A person who violates this chapter or rules adopted pursuant to this chapter may be assessed a civil penalty not to exceed the fine chargeable for a class 2 misdemeanor." The provision further states, "Each day the violation continues constitutes a separate violation." *Id.* The amount "chargeable for a class 2 misdemeanor" is defined in [A.R.S. § 13-803](#), which establishes "fines against enterprises." The maximum penalty allowed for a class 2 misdemeanor is \$10,000 per offense. [A.R.S. § 13-803\(A\)\(3\)](#). That section also states that the court is to first consider statutory mitigating and aggravating factors and then "determine an appropriate fine." *Id.*

The statutory authority to assess civil penalties only allows penalties for past violations for several reasons.

First, the text of section 48-3615 unambiguously allows civil penalties only for a person “who violates,” not a person “who will” or “who may” in the future violate. *See Stambaugh v. Killian*, [242 Ariz. 508, 510-11, ¶¶ 10, 17](#) (2017) (in interpreting a statute’s intent, the court “start[s] with the statutory language” and if the meaning is unambiguous, the analysis stops there).

Although civil penalties for past violations may serve to deter future violations, nothing in the text supports issuing prospective penalties for unadjudicated, anticipated violations. *Cf. San Francisco BayKeeper, Inc. v. Tosco Corp.*, [309 F.3d 1153, 1160](#) (9th Cir. 2002) (explaining that civil penalties have a deterrent effect on future conduct, but that “[l]iability for civil penalties attaches at the time of the violation”). The statute authorizes the District to assess penalties, not injunctive relief. *See Reich v. Occupational Safety and Health Review Comm’n*, [102 F.3d 1200, 1202](#) (11th Cir. 1997) (“Unlike injunctive relief which addresses only ongoing or future violations, civil penalties address past violations.”); *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, [890 F.2d 690, 696](#) (4th Cir. 1989) (liability for civil penalties “is fixed by the happening of an event . . . that occurred in the past”).

Second, the “statute as a whole” in “context within the statutory scheme” confirms that civil penalties may be imposed for past violations only. *Stambaugh*, 242 Ariz. at 511, ¶ 17 (court applies plain meaning of statute’s text “based on” the statute “as a whole and its context within the statutory scheme”). In addition to allowing civil penalties, the legislature provides detailed procedures for adjudicating a violation and deciding on a penalty. See A.R.S. § 48-3615.01. These procedures make sense only with reference to violations that have occurred—that have been observed and proven through evidence—not future violations. To start an enforcement, the chief engineer’s “notice of violation shall identify the **violations observed**” and at a later hearing the “district shall present evidence of the **violation described.**” A.R.S. § 48-3615.01(A), (E) (emphasis added). And after a hearing officer hears evidence, the hearing officer is to make a finding based on “evidence of the violation” and a recommendation as to “the imposition of any civil penalties attributed to the violation.” A.R.S. § 48-3615.01(E).

Third, the law tells the District what to do about future violations in a different subsection, and it does not grant authority to issue prospective fines:

If the person . . . continues the violation [after the enforcement decision], the chief engineer may apply for a temporary restraining order or preliminary or permanent injunction from the superior court . . . A decision to seek injunctive relief does not preclude other forms of relief or enforcement against the violator. The remedies prescribed by this section are cumulative and do not prevent the district from seeking injunctive relief at any time.

[A.R.S. § 48-3615.01\(J\)](#). In other words, to address possible future violations, the District may seek injunctive relief in court, commence additional enforcement proceedings for new violations, or both. It may not, however, take upon itself the court's power to effectively enjoin future conduct through coercive, conditional fines. *See Whitmer*, [245 Ariz. at 81, ¶ 12](#) (holding that statutory authority to issue subpoenas did not include inherent authority to enforce subpoenas through contempt proceedings).

Fourth, a pre-determined fine for future non-compliance is nothing more than a coercive civil contempt fine. *See Shell Offshore Inc. v. Greenpeace, Inc.*, [815 F.3d 623, 629](#) (9th Cir. 2016) (a court's inherent civil contempt powers may be used to "coerce the defendant into compliance," and "coercive civil sanctions . . . generally take the form of conditional fines"). The District, however, has no implied or "inherent contempt power." *Whitmer*, [245 Ariz. at 80, ¶ 11](#).

Like in *Whitmer* and *Anderson*, the Board has no inherent or implied enforcement powers. [Section 48-3615\(C\)](#) authorizes the District to assess a civil penalty only for “a person who violates” the statute or related rules, not one who “will” or “may” violate in the future.

3. The Board’s Order is contrary to law because it imposes fines for future alleged violations.

The Board exceeded its legal authority by imposing fines for future, yet-to-occur violations. Pursuant to its authority under [A.R.S. § 48-3615.01\(A\)](#), the District issued a notice of violation on May 8, 2015 based on inspections occurring between March 26 and May 5, 2015. [APP264](#) (Ex. 149). When the District decided to move forward with the hearing, its “Notice of Hearing” under [A.R.S. § 48-3615.01\(C\)](#) stated that “[t]he Hearing will be for the purpose of determining whether a violation . . . has occurred.” [APP174](#) (Ex. 31). That hearing took place January 4, 2016. The Board reviewed the resulting recommended orders “based on the information presented” to the hearing officer for the January 4, 2016 hearing. See [A.R.S. § 48-3615.01\(I\)](#). No new discovery or evidence was presented to the Board. At that point, the Board was authorized to “assess[] a civil penalty” for violations that had

occurred. Instead, the Board also assessed a \$1,000-per-day penalty for violations that had not yet occurred or been alleged.

The Board's deliberations show that the Board's purpose for the future fines was to coerce future compliance (i.e., a coercive civil contempt fine) and force the parties to a decision on ABC's permit request. Initially, the Board considered a future fine that would "accumulate[] but would be waived back to today's date [b]ecause . . . that shows both parties intending to commit to meet that time frame." [APP463](#) (6/16/2016 Tr. at 67). The Board's counsel (Mr. Hiser) suggested that the District "terminate [the Chief Engineer's] order as of today and" disapprove of "the continued penalty. And then it becomes the [Chief Engineer's] decision whether to file another [Notice of Violation] . . . for the next period of time." [APP465](#) (*id.* at 69). Board members, however, worried that going through the enforcement process again would take "more staff time and attorney time and does not get to the point of the engineering time necessary to get the permit." [APP468](#) (*Id.* at 72).

In settling on the final amount, the Board chair thought that "continuing a penalty of \$1,000 a day is enough incentive in and of itself." [APP468](#) (*Id.*). At that point, ABC objected that this provided a coercive

incentive to ABC but no incentive to the District. *See generally* [APP455-78](#) (*Id.* at 59-82).

Regardless of the wisdom of the Board's motive (and how perverse an incentive it creates for the District), the Board's statutory "mandate does not include . . . contempt powers." *Whitmer*, [245 Ariz. at 80, ¶ 12](#). The Board may deter future violations through civil penalties for past violations, and if that deterrence is ineffective, the District may pursue an injunction in court. [A.R.S. § 48-3615.01\(J\)](#).

But the Board may issue penalties only for violations proven at a hearing. That hearing occurred on January 4, 2016 and the Board could only impose penalties up to that point. Any penalty for future alleged violations—violations for which there is no notice of violation and no notice of hearing—is contrary to law and must be vacated. Those are "separate violations," [A.R.S. § 48-3615\(C\)](#), and must be adjudicated separately, not assumed or prejudged without a hearing. The superior court therefore erred in affirming future fines from January 4, 2016 through August 10, 2017.

B. The Board's Order also violates due process.

The Board's future fines are also contrary to law because, as ABC argued below, the future fines violate due process. IR-22 at 31-32; IR-33 at

22. Although the Court need not reach this constitutional issue because the agency lacks statutory authority to impose the future fines, it is evident that the future fines (now affirmed through August 10, 2017) do not satisfy due process.

In the administrative enforcement context, “procedural due process requires notice and an opportunity to be heard in a meaningful manner and at a meaningful time.” *Gaveck*, 222 Ariz. at 437, ¶ 14 (internal quotation marks, alterations, and citation omitted). The right to an opportunity to be heard includes a “right to offer evidence and confront adverse witnesses.” *Id.*

Here, the imposition of future fines fails to provide adequate notice or an adequate opportunity to be heard. As to notice, with ongoing fines in place, if the District believes there is a violation, it need not issue a notice of violation, a description of the alleged violation, or hold a hearing, all of which would otherwise be required under § 48-3615.01.

As to the opportunity to be heard at a meaningful time, there is none. The fines are already imposed. Regardless whether evidence suggests that a fine is wrongfully imposed, unjustified under the facts, or otherwise improper, ABC does not have *any* hearing much less a meaningful hearing

at a meaningful time to present evidence to the Board for the fines it has already imposed. ABC cannot, for example, prove to a hearing officer or the Board that the District was arbitrarily and capriciously ignoring and denying its requests for a permit of short duration throughout 2016 and 2017, even though ABC was unquestionably “an applicant participating in an ongoing application process” under [FRMC §§ 403\(B\)\(3\) and 404\(B\)\(4\)](#).

Moreover, the process is doubly unfair because the agency controls whether and when ABC would receive a permit of short duration. That is, the District has a perverse incentive to slow down the permitting process, ignore or deny requests for permits of short duration, and balloon the continuing fine because it does not need to justify its conduct to the Board.

Post v. City of Tacoma, a recent Washington Supreme Court case, is directly on point. [217 P.3d 1179, 1185-87](#) (Wash. 2009). There, the Court held that due process was violated when a city’s fines for building code violations “provide[d] for an appeal only of the initial notice of violation and first monetary penalty, and not any penalties assessed thereafter.” [Id. at 1185, ¶ 22](#). The city was assessing daily fines for violations it said were continuing on a daily basis. [Id. ¶ 23](#). The city contended that it should not have to provide “an opportunity to be heard on each separate infraction,” and

instead the future penalties should be considered as related to the “initial violation” for which there is a hearing. *Id.* The court disagreed, concluding that the city’s fining scheme created an obvious “risk of erroneous deprivation” of rights without any right to be heard. *Id.* at 1186, ¶ 25. The court thus held that the city violated due process by having “no procedure” in place to allow an administrative challenge to each separate violation. *Id.* ¶ 27.

The Board’s future fines here do precisely the same thing by pre-determining a fine for future alleged violations without any process in place for ABC to be heard and challenge any alleged violation. *See also Hale v. Morgan*, 584 P.2d 512, 520-21 (Cal. 1978) (ruling that a mandatory \$100 per day violation is unconstitutional under due process for lack of notice and collecting similar cases).

The Court should vacate post-January 4, 2016 fines for this separate reason.

II. The superior court erred to the extent it affirmed fines past the District’s denial of a short-term permit in 2016.

To the extent the superior court’s order implicitly affirms fines of \$1,000 per day between December 23, 2015 and August 10, 2017, the court

erred for an additional reason: the daily fines are calculated to run from December 23, 2015 until they cease under the terms of the Board’s order on the date “the District determines to issue or deny a Floodplain User Permit” to ABC. [APP377](#) (Ex. 203 at 10, ¶ 2). This occurred on April 15, 2016. [APP363](#) (Ex. 191). Thus, even if all other fines are somehow upheld, the total amount should include 114 days in period 4 fines, not 596 days.

The superior court’s order ([APP093](#) IR-41 at ¶¶ 30-32) implies that the fines do not end until August 10, 2017. The order, however, totally ignores evidence regarding the many, repeated denials of permits of short duration. (Ignoring this evidence was error, *see* [§ III](#) below.) As explained above ([Facts and Case § II.B.4\(c\)](#)), in April 2016, ABC pleaded with the District for a permit of short duration. *See* [APP359, 360, 362](#) (Exs. 184, 186, 187). The Chief Engineer denied the permit in writing on April 15, 2016.

A “permit of short duration” is a “floodplain use permit.” *See* [FRMC § 404\(B\)\(3\)](#) (stating that a “Floodplain Use Permit . . . shall include” and describing permit of short duration among other things). The Floodplain Review Board confirms this interpretation. [APP387](#) (Ex. 335 at 4). The District also concedes the point. *See* [APP379](#) (Ex. 205 at 1 (“a permit of short duration is a floodplain use permit”). Accordingly, under the plain terms of

the Board's Order, the period 4 fines of "\$1,000 per day" should be calculated "from December 23, 2015 until" April 15, 2016, the date "the District determine[d] to issue or deny a Floodplain Use Permit." [APP377](#) (Ex. 203 at 10).

The District argued below that this date cannot apply because it is before the Board's Order in July 2016. But no evidence was taken or allowed at the Board hearing in June 2016 and so the Board did not take evidence that the District had already "determined to issue or deny" a permit after December 23, 2015. In any event, the District again denied a permit on July 7, 2016. [APP379](#) (Ex. 205).

The District also contended that the Board must have been referring to a full five-year Floodplain User Permit. That contradicts the plain text of the Board's Order and the record. Indeed, when describing the period 4 fines, the Board chair stated that he wanted the fines to continue "until a permit, that could be a temporary permit[,] issues." [APP474](#) (6/16/2016 at 78:6-15). The District's view also does not make sense: does the District contend that period 4 fines would continue accruing had the District granted the request for a short-term permit?

Under the plain terms of the Board's order, the fines in period 4 ceased on April 15, 2016, not August 10, 2017. To the extent the superior court held otherwise, its order should be vacated.

III. The superior court erred by refusing to consider post-hearing evidence or arguments based on new evidence.

The superior court's order narrowed the scope of its review by (1) refusing to consider supplemental evidence discovered and introduced after the January 2016 regulatory hearing; and (2) refusing to consider new arguments based on the supplemental record. [APP093](#) (IR-41 ¶¶ 37-39, 42). The superior court's decision on these points is incorrect as a matter of law and is subject to de novo review. This case should be remanded so that new evidence and arguments may be considered.

A. The superior court should have considered the entire supplemental record.

1. Under § 12-910, the record on appeal includes testimony, evidence, and argument presented at the supplemental evidentiary hearing.

When a party appeals an agency action, a party may supplement the record with evidence, testimony, and argument that was not presented to the agency. Under [A.R.S. § 12-910\(A\)](#), "[i]f requested by a party . . . , the court shall hold an evidentiary hearing, including testimony and argument,

to the extent necessary to make the determination required by subsection E of this section.” That supplemental record may include “testimony from witnesses who testified at the administrative hearing and witnesses who were not called to testify” at the earlier hearing. *Id.* In addition, “[r]elevant and admissible exhibits and testimony that were not offered” previously “shall be admitted” in most circumstances. [A.R.S. § 12-910\(B\)](#). The court should allow the evidentiary hearing if the new evidence and testimony “is of such a character as would be calculated to have changed the decision of the [hearing officer] or the agency decision.” *Curtis v. Richardson*, [212 Ariz. 308, 310, ¶ 6](#) (App. 2006).

Furthermore, the reviewing court must “review[] the administrative record and supplementing evidence presented at the evidentiary hearing.” [A.R.S. § 12-910\(E\)](#). “The record in the superior court shall consist of the record of the administrative proceeding, and the record of any evidentiary hearing.” [A.R.S. § 12-910\(D\)](#).

This expansive definition of the record was not always the law. Before 1996, the presumption was the opposite. Under the old version of [§ 12-910\(A\)](#), “[n]o new or additional evidence . . . shall be heard by the court, except in the event of a trial de novo or in cases where in the discretion of

the court justice demands the admission of such evidence.” A.R.S. § 12-910(A) (1995); *see* [1996 Ariz. Sess. Laws, ch. 102, § 16](#) (2d. Reg. Sess.) (showing changes from prior version).

In 1996, the legislature deleted that limitation and replaced it with the broad language now in [§ 12-910\(A\)](#). *Id.* The 1996 change also added the provision requiring admission of “[r]elevant and admissible exhibits and testimony that were not offered during the administrative hearing,” [§ 12-910\(B\)](#), defined the record on appeal to include “the record of any evidentiary hearing,” [§ 12-910\(D\)](#), and directed courts to decide the appeal “after reviewing the administrative record and supplementing record,” [§ 12-910\(E\)](#). Those provisions remain today.

2. The superior court erred by excluding new evidence and testimony presented at the supplemental evidentiary hearing.

In its ruling, the superior court concluded that it would not consider post-administrative-hearing evidence because “[t]he admission of new evidence . . . does not expand issues on appeal or permit reference to evidence that occurred after said administrative hearing.” [APP093](#) (IR-41 ¶ 38.) As authority, the court cited *Hatch v. Arizona Department of*

Transportation, [184 Ariz. 536](#) (App. 1995). The superior court’s legal conclusion is incorrect under [§ 12-910](#).

Hatch’s gloss on § 12-910 does not and cannot control here for several reasons. **First**, *Hatch* is a 1995 case that interprets and applies the pre-1996 version of § 12-910. See [184 Ariz. at 539](#) (block-quoting pre-1996 version of § 12-910(A)). Indeed, *Hatch* expressly relies on the very language that has changed concerning the admissibility of new evidence.⁴ *Hatch* relies on the now-repealed language referencing “[n]o new or additional evidence in support of or in opposition to” the agency’s decision. See [184 Ariz. at 539](#). That sentence no longer exists. The current version now makes clear (in a seeming rebuke of *Hatch*) that testimony and evidence should be admitted regardless of whether it was part of the administrative hearing, and that the court should consider both the administrative and the supplemental record.

[A.R.S. § 12-910\(A\)-\(B\)](#)

⁴ *Hatch*’s precedential value is nil. Only one published decision has cited *Hatch* ever, and the Supreme Court vacated that case. See *Stagecoach Trails MHC, LLC v. City of Benson*, [229 Ariz. 536](#) (App. 2012) vacated by [231 Ariz. 366](#) (2013).

Second, the relief actually granted in *Hatch* conflicts with the superior court's and the District's position. Here, the superior court ignored new evidence and affirmed the Board's decision (including future fines) without regard to new evidence and changed circumstances. In *Hatch*, the court faulted the lower court for deciding based on new facts rather than remanding the case back to the agency "for rehearing based on the facts as they now exist." [184 Ariz. at 540](#).

Third, *Hatch* does not address the unusual administrative process that the District uses. District regulations prohibit any discovery before the administrative hearing, and then do not permit introduction of additional evidence at any point after the administrative hearing, even though the decision and penalty can change dramatically at later stages before the Chief Engineer and the Board (as happened here). See [Facts and Case § II.C](#). In this case, the supplemental record is ABC's only opportunity to challenge the legal and factual basis of the civil penalties that the Board ultimately assessed.

Fourth, applying *Hatch*'s interpretation to § 12-910 here produces an absurd and manifestly unjust result. See *Sell v. Gama*, [231 Ariz. 323, 327, ¶ 16](#) (2013) (courts should not interpret statute to cause "an absurdity or

constitutional violation”). More than 80% of the fines affirmed in the superior court relate to alleged violations after January 4, 2016. Section 12-910 cannot be interpreted to mean that ABC may *never* impeach the decision to impose those fines with evidence related to the parties’ conduct over the exact same time period as the alleged violations.

Consequently, the superior court’s refusal to consider new evidence, including evidence occurring after the administrative hearing, is contrary to law, fundamentally unfair, and is an abuse of discretion.

B. The superior court should have considered ABC’s arguments, including those based on new evidence.

1. A party need not specify precise legal theories to preserve them for appeal, and new arguments based on newly discovered evidence are not waived.

A party in an administrative proceeding can sometimes waive an argument by not raising it before the agency. In general, a “[f]ailure to raise an issue at an administrative hearing that the administrative tribunal is competent to hear waives the issue.” *Neal v. City of Kingdom*, [169 Ariz. 133, 136](#) (1991).

The waiver rule, however, is not a technical trap. The rule does not “require[] . . . any ‘magic words’” or that a party “specify the precise legal theory or theories.” *Id.* at [136](#). Instead, the party must “give fair notice,”

including by “setting forth the facts which form the basis of the complaint.” [Id. at 136](#) (holding waiver occurred only when the party did not mention the legal theory or the “facts which would arguably give rise to the application of such a theory”).

Furthermore, a party cannot waive an argument that was unavailable before the agency. Although “belatedly raised issues may” be waived in the “typical case,” they are not waived if the party could not raise the issue earlier because of unavailable evidence. *See All. for the Wild Rockies v. Savage*, [897 F.3d 1025, 1033-34](#) (9th Cir. 2018) (holding that objection to agency action was not waived when the basis for the objection was only recently revealed and the party “raised its objection at the first available opportunity”).

The cases the District relied on below do not hold otherwise. *See* IR-25 at 13. In *DeGroot v. Arizona Racing Commission*, the regulated party waived an untimely argument because he failed to raise the issue despite having the evidence available and having numerous opportunities to raise the issue before the administrative agency – that is, the evidence and argument were available. [141 Ariz. 331, 339-40](#) (App. 1984). *See also* *Rouse v. Scottsdale Unified Sch. Dist. No. 48*, [156 Ariz. 369](#) (App. 1987) (late-raised issue not waived because it went to “competency” of agency and because the “failure

to raise the issue . . . does not deprive [the courts] of any essential facts necessary to resolve the issue”).

2. The superior court erred by excluding all arguments not precisely made to the hearing officer or the Board.

The superior court stated that all arguments not raised before the January 2016 hearing, or before the Board in 2016, were waived. [APP093](#) (IR-41 ¶ 32). As the court saw it, the only issue on appeal was “whether ABC and the District entered into” an agreement “where the District would not bring an enforcement action against ABC for operating without a permit” while the parties negotiated a new permit. [APP091](#) (*Id.* ¶ 16). This was error.

ABC’s other arguments below are not waived. First, ABC gave more than “fair notice” of its arguments that the District acted unlawfully by seeking punitive fines despite its promises to issue a permit of short duration and otherwise forbear enforcement. It has always contended that the Board’s decision was arbitrary and capricious, not supported by substantial evidence, contrary to law, and an abuse of discretion under [§ 12-910](#). It “set[] forth the facts which form the basis” of its arguments during the January 4

hearing and in briefs, even though ABC's ability to do so was hamstrung by the agency's rule prohibiting any discovery before or after the hearing.

Before the Board, ABC raised a range of arguments based on the evidence then available to it, including that ABC acted in reasonable reliance on the District's promises to issue a permit and forbear enforcement, that the ongoing fines were unlawful and retaliatory, and that each period of fines imposed should be reversed, among other arguments. *See* 6/16/2016 Tr. at 6, 16-19 (IR-8 at PDF pages 238-241); [APP443](#) (6/16/2016 Tr. at 6:9-10); IR-8 at PDF pages 188-193. That these arguments have been enhanced by additional evidence discovered after the hearing does not mean that the District lacked "fair notice" of the issues it would face on appeal.

Second, many of ABC's arguments on appeal had been unavailable because ABC discovered troubling new evidence after the Board's decision in 2016. *See* [Facts and Case § II.E.1](#). For example, discovery obtained after the hearing and evidence of the parties' post-hearing conduct support the following claims, all deemed waived by the superior court:

- The District violated [A.R.S. § 48-3645](#) by refusing to process and decide requests for short-term permits before and after the administrative proceeding, even though such a permit would have stopped any fines. *See* [Facts and Case § II.B.2\(c\)](#).

- The District is equitably estopped from seeking fines from ABC because ABC relied, to its detriment, on the District's promises to forbear enforcement and to issue permits of short duration. *See Valencia Energy Co. v. Ariz. Dep't of Revenue*, [191 Ariz. 565, 576-77, ¶ 35](#) (1998) (listing elements).
- The District arbitrarily refused to issue a short-term permit and instead sought penalties in 2015 in retaliation for ABC's political speech in violation of ABC's First Amendment rights. *See Soranno's Gasco, Inc. v. Morgan*, [874 F.2d 1310, 1314](#) (9th Cir. 1989) ("It is clear that state action designed to retaliate against and chill political expression strikes at the heart of the First Amendment."). New evidence shows that the District started preparing a short-term permit only to bury it after learning that ABC was advocating against legislation the District supported. The next day, the District launched an aggressive campaign against ABC. *See Facts and Case § II.B.2(b)*.
- The District's disparate treatment of ABC violates equal protection. A "class of one" may bring an equal protection claim if the evidence shows that the plaintiff was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Thornton v. City of St. Helens*, [425 F.3d 1158, 1167](#) (9th Cir. 2005). Newly discovered evidence shows that the District has *never* denied another mine a permit of short duration and routinely granted short-term permits to ABC's competitors who were operating for years without a permit. ABC is alone in being denied a permit and in being pursued for punitive fines. *See Facts and Case § II.B.2(c)*.

Third, ABC's arguments concerning future fines plainly were not fully available before the Board hearing because the facts concerning any alleged future violations did not yet exist. These arguments are thus nothing like the waived argument in *Degroot*. The information and argument there was

available, ignored, and raised only on appeal. The information and argument here was unavailable and unknown until well after the administrative hearing and raised immediately upon discovery. *See Savage*, 897 F.3d at 1034 (finding no waiver because the party “raised its objection at the first available opportunity”).

The superior court should have considered these arguments as well as the full range of evidence admitted at the supplemental evidentiary hearing. This case should be remanded.

IV. The superior court erroneously concluded that the Board’s Order is supported by substantial evidence and otherwise lawful under § 12-910(E).

In addition to erroneously narrowing its consideration of evidence and argument, the superior court’s ultimate conclusion affirming the Board’s order is incorrect for many other reasons.

A. The District’s misuse of the attorney-client privilege leaves the Board’s fines unsupported by substantial evidence.

A key factual dispute in this case is why the District continually refused to issue a temporary permit. If the District issued one when it first promised in February 2015, there would be no fines; if it had issued one when requested in 2016, there would be minimal period 4 fines. If the District wrongfully denied ABC a temporary permit, then the Board’s

decision should be vacated or modified to remove the fines that would have never accrued. *See* [APP502](#) (8/28/2017 Tr. at 128:21-129:2 (if a temporary permit issued, ABC “would not be subject to the penalties.”)).

But the District used the attorney-client privilege to prevent ABC from developing evidence about why the District ignored or denied its permit requests. Throughout the relevant time period (January 2015 – August 2017), the District has taken the position that all decisions regarding ABC’s permit were done in coordination with counsel and are protected by privilege, often leaving ABC with only the written record. *See* IR-30 at 6. The District used this to prevent questioning about internal discussions concerning ABC’s permits. *Id.*; [APP485](#), [510](#), [512](#) (8/28/2017 at 73:6-74:6, 142:11-143:2, 175:3-16; [APP538](#), [540](#) (8/29/2017 at 97:6-98:6, 130:3-131:20)).

The privilege may not be used as a sword and shield. *State Farm Mut. Auto Ins. Cas. Co. v. Lee*, [199 Ariz. 52, 56, ¶ 9](#) (2000). A party may not rely on a “defense based on factual assertions that . . . incorporate the advice or judgment of its counsel” and also “deny an opposing party the opportunity to discover the foundation for those assertions in order to contest them.” *Mendoza v. McDonald’s Corp.*, [222 Ariz. 139, 153, ¶ 42](#) (App. 2009). Consequently, having shielded internal decision making from discovery, the

District cannot rely on testimony about its intent or internal reasons for denying ABC a permit.

Without such evidence, the District cannot rebut inferences that its permitting decisions are either arbitrary or unlawfully motivated by retaliation. For example, the only evidence explaining why the District backed out of its February 2015 promise to issue a temporary permit and instead buried the draft permit is that the District was retaliating for ABC's political speech. *See* [Facts and Case § II.B.2\(b\)-\(e\)](#). There is also no evidence available to explain why ABC was singled out for different treatment when numerous other mine operators received temporary permits even when they had been operating for years with an expired permit. *See* [Facts and Case § II.B.4\(c\)](#).

Without such evidence, the Board's decision should be vacated because there is no substantial evidence in the record to explain why the District's denials and the resulting fines are justified or lawful. Indeed, the Board's Order makes no findings about the District's persistent refusal to provide ABC a temporary permit.

B. The Board's Order is contrary to law because it imposes fines for operating without a permit when the District unlawfully refused to process ABC's requests for short-term permits.

Had ABC received the promised temporary permit, the civil penalties would either be gone or substantially lower. It is arbitrary and capricious for the District to impose fines when, wearing its other regulatory hat, it arbitrarily denies and ignores permit requests.

As discussed above, a permit of short duration is a floodplain use permit for "applicants participating in an ongoing application process." FRMC §§ 404(B)(4); 403(B)(3). See Argument § II. All such permits are subject to numerous statutory protections applicable to entities flood control districts regulate. For instance, § 48-3645 requires a district denying a permit to provide a written "[j]ustification for the denial" and "an explanation of the applicant's right to appeal the denial." A.R.S. § 48-3645(J)(1)-(2). The "regulatory bill of rights," A.R.S. § 48-3642, provides similar and additional protections. See A.R.S. § 48-3642(5) (written notice and justification of denial); § 48-3642(3) (no licensing decision based on "conditions or requirements that are not specifically authorized").

The District did not adhere to any of these requirements. In February 2015, the Chief Engineer told ABC that if it submitted a five-year permit

application, it would “forebear any enforcement action” and would “issue a permit of short duration during the application process if required.” [APP251](#) (Ex. 140). ABC submitted an application. The District never issued a permit, a denial, or provided any justification for the purported denial. When ABC followed up on May 1, 2015, and explicitly asked for a copy of the temporary permit, the District ignored the request again. This pattern continued in 2016 and 2017, when ABC repeatedly requested a temporary permit only to be ignored or denied for shifting, contradictory reasons that seemed to apply to ABC and no one else. *See* [Facts and Case §§ II.B.2, II.B.4\(c\)](#).

The District’s explanation for this is unclear and hidden behind the privilege (*see* [§ IV.A](#) above). What is clear is that the District is seeking to affirm fines for alleged violations occurring on days for which permits of short duration — permits the District controls and decides whether to issue — would have been in force. The District’s failure to follow the law in denying the permits makes the decision to impose fines over the same period arbitrary, capricious, and an abuse of discretion.

C. The Board's fines are contrary to law, unsupported by evidence, and arbitrary and capricious for other reasons.

Each of the Board's fines should be reversed or vacated for other reasons.

1. Fine period 2: January 2015-July 2015

The Board's Order imposes a fine of \$5,000 for operating without a permit between January 28 and July 30, 2015. This fine is not supported by substantial evidence and is arbitrary and capricious.

First, the District failed to comply with [§ 48-3645](#) in processing the February 27, 2015 permit application. Instead, the District treated the application as a nullity because it was titled an "amended" rather than "new" application. [Facts and Case § II.B.2](#). This violated [§ 48-3645](#) and delayed the processing of ABC's application.

Second, the fine is arbitrary because the District expressly agreed to "forebear enforcement" and issue a temporary permit if required. Although the District would later pursue enforcement and would never issue a temporary permit, it is arbitrary to punish ABC for the District's noncompliance with its own promises.

2. Fine period 3: July 2015-December 2015

The Board's \$500-per-day fine for July 30 to December 23, 2015, is arbitrary and capricious and lacks evidence.

First, the Board's decision accords essentially no weight to the parties' June 2015 agreement that a "temporary permit [was] not necessary and [would] not be pursued," and the District would continue delaying any enforcement. The Chief Engineer conceded that this agreement bound him and the District. See [Facts and Case § II.B.2\(f\)](#). The fact that the District's lawyers would continue to threaten ABC with the possibility of penalties does not change what the parties agreed to in June.

Second, although the Board states that the fees are justified in part because ABC "took an unreasonable amount of time," this rationale for \$73,000 in fees is not supported by the record and not based on any articulable legal standard. The District never provided a deadline to ABC that ABC missed. The District's June 30 request for corrections is the only evidence with a concrete deadline, and it states that the applicant needs to respond in *one year*. [APP287](#) (Ex. 155 at ABCSR00000664). Moreover, the supplemental evidence reveals that, internally, the District knew that ABC

would likely be unable to respond quickly and would take several months. [APP293](#) (Ex. 162).

Third, the daily fine penalizes ABC for days that ABC was waiting for District responses. As noted in the Order, ABC responded to the request for corrections on November 30, 2015 but fines are imposed through December 23 for this period. See [APP372](#) (Ex. 203 at 5).

3. Fine period 4: December 2015-August 2017

The Board's \$1,000-per-day future fines fail because they are contrary to law for numerous reasons, as argued above. The fines also lack evidentiary support and are arbitrary and capricious.

First, the evidence indicates that these fines are driven by an antipathy or frustration with ABC, not legal reasoning or an unbiased assessment of the facts. The Board adopted the Chief Engineer's assessment (which in turn adopted the hearing officer's) that ABC had a "poor attitude" which "justif[ied] the imposition of civil penalties." [APP377](#) (Ex. 203 at 10); Ex. 177 at 9; Ex. 174 at 10. A "poor attitude" is not a legal basis for a fine, particularly not *future* fines.

Second, at the time of the Board's decision, there was **no** evidence in the record regarding the propriety of these fines because the alleged

violations had not yet occurred. The record now contains substantial evidence that undermines the imposition of harsh daily penalties, including that ABC hired a prominent expert to help move its long-term application forward, that the District unjustifiably rejected ABC's repeated requests for a permit of short duration throughout 2016 and 2017, and that ABC is the only mine ever to be refused a temporary permit. Put another way, when the Board imposed these fines there were **no facts** much less **substantial evidence** to support the civil penalties. The period 4 fines should be vacated.

REQUEST FOR ATTORNEYS' FEES AND COSTS

Pursuant to [ARCAP 21\(a\)](#), ABC requests an award of its attorneys' fees and costs under [A.R.S. § 12-348\(A\)\(2\)](#), [§ 12-342](#), and any other applicable law.

CONCLUSION

The Court should vacate the fines imposed.

RESPECTFULLY SUBMITTED this 22nd day of January, 2020.

OSBORN MALEDON, P.A.

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**APPENDIX
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22	Plaintiff/ Appellant’s Opening Brief (filed Nov. 1, 2017)	APP105 – APP139
30	Plaintiff/ Appellant’s Reply Brief (filed Jan. 29, 2018)	APP140 – APP163
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	Trial Ex. 29 – Tully email exchange with Berberian	APP170 – APP173

* The appendix page number matches the electronic PDF page number. Counsel has added emphasis to selected pages in this Appendix using yellow highlighting to assist the Court with its review of the record. Some record items included in the Appendix contain only a limited excerpt. This Appendix complies with the bookmarking requirements of ARCAP 13.1(d)(3).

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	Trial Ex. 121 – Floodplain Regulations for Maricopa County (“FRMC”)	APP178 – APP250
	Trial Ex. 140 – Wiley letter to ABC (dated Feb. 12, 2015)	APP251
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	Trial Ex. 143 – Tully letter to ABC counsel (dated Mar. 15, 2015)	APP254 – APP259
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	Trial Ex. 149 – Notice of Violation (dated May 8, 2015)	APP264 – APP267
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	Trial Ex. 163 – Beuché email to DeBlasi (dated Aug. 25, 2015)	APP299 – APP300
	Trial Ex. 164 – Notice of Hearing (dated Nov. 2, 2015)	APP301 – APP304
	Trial Ex. 165 – Grabel letter to Beuché (dated Nov. 5, 2015)	APP305 – APP306
	Trial Ex. 166 – Peck letter to Grabel (dated Nov. 10, 2015)	APP307 – APP308
	Trial Ex. 170 – Request for Correction (dated Dec.23, 2015) [excerpt]	APP309 – APP330
	Trial Ex. 174 – Hearing Officer Recommendation (dated Mar. 7, 2016)	APP331 – APP340
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	Trial Ex. 181 – Email exchange re PCD changes	APP353 – APP358
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	Trial Ex. 364 – Internal FCD email re lobbying (dated Mar. 12, 2015)	APP400 – APP401
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6	Transcript – Board of Hearing Review Meeting Jan. 4, 2016 [excerpts]	APP421 – APP439
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	Trial Transcript Aug. 28, 2017 [excerpts]	APP480 – APP516
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	Trial Transcript Aug. 31, 2017 [excerpts]	APP592 – APP631

**Electronic Index of Record
MAR Case # LC2016-000324-001**

No.	Document Name	Filed Date
1.	NOTICE OF APPEAL FOR JUDICIAL REVIEW OF ADMINISTRATIVE DECISION	Aug. 4, 2016
2.	LC APPEALS COVER SHEET	Aug. 4, 2016
3.	REQUEST FOR AN EVIDENTIARY HEARING	Aug. 5, 2016
4.	ME: ORDER ENTERED BY COURT [08/09/2016]	Aug. 11, 2016
5.	NOTICE OF APPEARANCE	Aug. 25, 2016
6.	[PART 1 OF 3] CERTIFICATION OF RECORD	Aug. 26, 2016
7.	[PART 2 OF 3] CERTIFICATION OF RECORD	Aug. 26, 2016
8.	[PART 3 OF 3] CERTIFICATION OF RECORD	Aug. 26, 2016
9.	ACCEPTANCE OF SERVICE OF PROCESS	Aug. 30, 2016
10.	MOTION FOR AN EVIDENTIARY HEARING AND IDENTIFYING EVIDENCE TO BE PRESENTED	Sep. 6, 2016
11.	ME: CASE CONSOLIDATION [09/01/2016]	Sep. 9, 2016
12.	ME: HEARING [09/08/2016]	Sep. 16, 2016
13.	ME: CASE REASSIGNED [05/03/2017]	May. 4, 2017
14.	NOTICE OF SUBSTITUTION OF COUNSEL WITHIN FIRM	May. 9, 2017
15.	JOINT NOTICE TO THE COURT	May. 17, 2017
16.	PREHEARING MEMORANDUM	Aug. 23, 2017
17.	APPELLANT'S PREHEARING MEMORANDUM	Aug. 24, 2017
18.	ME: HEARING [08/28/2017]	Sep. 5, 2017
19.	ME: HEARING [08/29/2017]	Sep. 5, 2017
20.	ME: MATTER UNDER ADVISEMENT [08/31/2017]	Sep. 5, 2017
21.	ME: HEARING [08/30/2017]	Sep. 7, 2017
22.	PLAINTIFF/APPELLANT'S OPENING BRIEF	Nov. 1, 2017

**Electronic Index of Record
MAR Case # LC2016-000324-001**

No.	Document Name	Filed Date
23.	ORIGINAL TRANSCRIPT OF PROCEEDING HD 08/31/2017	Dec. 15, 2017
24.	ORIGINAL TRANSCRIPT OF PROCEEDING HD 08/30/2017	Dec. 15, 2017
25.	DEFENDANT/APPELLEE'S RESPONSE BRIEF	Dec. 15, 2017
26.	NOTICE OF FILING TRANSCRIPTS	Dec. 15, 2017
27.	NOTICE TO THE COURT OF RECENT APPELLATE COURT DECISION	Dec. 22, 2017
28.	STIPULATION TO EXTEND TIME TO FILE REPLY BRIEF	Jan. 5, 2018
29.	ORDER GRANTING EXTENSION FOR PLAINTIFF TO FILE REPLY BRIEF	Jan. 9, 2018
30.	PLAINTIFF/APPELLANT'S REPLY BRIEF	Jan. 29, 2018
31.	PLAINTIFF/APPELLANT'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW	Jan. 29, 2018
32.	ME: ORAL ARGUMENT SET [02/01/2018]	Feb. 2, 2018
33.	PLAINTIFF/APPELLANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW	Feb. 16, 2018
34.	ME: MATTER UNDER ADVISEMENT [02/20/2018]	Feb. 23, 2018
35.	DEFENDANT/APPELLEE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW	Mar. 2, 2018
36.	DEFENDANT/APPELLEE'S OBJECTION TO PLAINTIFF/APPELLANT'S PROPOSED FINDINGS OF FACT AND CONCLUSION OF LAW	Mar. 2, 2018
37.	PLAINTIFF/APPELLANT'S MOTION TO STRIKE DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW	Mar. 7, 2018
38.	DEFENDANT/APPELLEE'S RESPONSE TO PLAINTIFF/APPELLANT'S MOTION TO STRIKE DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF	Mar. 18, 2018
39.	ME: RULING [05/01/2018]	May. 8, 2018



Electronic Index of Record
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No.	Document Name	Filed Date
40.	PLAINTIFF/APPELLANT'S NOTICE OF FILING OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW	May. 8, 2018
41.	ME: RECORD APPEAL RULING/REMAND [07/18/2018]	Jul. 23, 2018
42.	EXHIBIT WORKSHEET HD 08/28/2017	Jul. 27, 2018
43.	ME: ORDER ENTERED BY COURT [08/07/2018]	Aug. 13, 2018
44.	MOTION FOR ENTRY OF RULE 54(C) JUDGMENT AND NOTICE OF LODGING PROPOSED FORM OF RULE 54(C) JUDGMENT	Feb. 27, 2019
45.	DEFENDANT'S RESPONSE IN OPPOSITION TO ABC'S MOTION FOR ENTRY OF RULE 54(C) JUDGMENT	Mar. 6, 2019
46.	REPLY IN SUPPORT OF MOTION FOR ENTRY OF RULE 54(C) JUDGMENT	Mar. 18, 2019
47.	RULE 54(C) JUDGMENT	Aug. 7, 2019
48.	ME: RULING [08/07/2019]	Aug. 13, 2019
49.	NOTICE OF APPEAL	Sep. 5, 2019
50.	NOTICE OF TRANSCRIPT ORDER AND STATEMENT OF ISSUES ON APPEAL	Sep. 19, 2019

APPEAL COUNT: 1

RE: CASE: UNKNOWN

DUE DATE: 10/03/2019

CAPTION: ABC SAND & ROCK CO. VS FLOOD CONTROL



**Electronic Index of Record
MAR Case # LC2016-000324-001**

EXHIBIT(S): HD 08/28/2017 LIST# 3 9 10 11 15 20 22 28 29 31 86 87 90
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133 134 135 136 137 138 140 141 142 143 144 145 146 147 149 150 151
152 153 154 155 156 157 161 162 163 164 165 166 167 168 169 170 174
177 178 180 181 184 186 187 191 196 202 203 205 207 208 210 223 224
225 244 246 282 283 284 306 327 335 341 346 351 359 360 361 362 363
364 365 366 367 368 369 370 377 394 397 398 399 401 403 405 408 409
411 412 414 415 416 417 419 420 421 422 423 IN A BOX

LOCATION ONLY: NONE

SEALED DOCUMENT: NONE

DEPOSITION(S): NONE

TRANSCRIPT(S): ORIGINAL TRANSCRIPT(S) INCLUDED IN INDEX OF
RECORD

COMPILED BY: chestangc on October 2, 2019; [2.5-17026.63]
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CERTIFICATION: I, JEFF FINE, Clerk of the Superior Court of Maricopa County, State of Arizona, do hereby certify that the above listed Index of Record, corresponding electronic documents, and items denoted to be transmitted manually constitute the record on appeal in the above-entitled action.

The bracketed [date] following the minute entry title is the date of the minute entry.

CONTACT INFO: Clerk of the Superior Court, Maricopa County, Appeals Unit, 175 W Madison, Phoenix, AZ 85003; 602-372-5375

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2016-000324-001 DT

07/18/2018

HONORABLE KERSTIN LEMAIRE

CLERK OF THE COURT
C. Avena
Deputy

A B C SAND AND ROCK COMPANY INC

COLIN F CAMPBELL

v.

FLOOD CONTROL DISTRICT OF MARICOPA
COUNTY (001)

STEPHEN W TULLY

JUDGE LEMAIRE
OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

MINUTE ENTRY

This matter came before the Court for an evidentiary hearing spanning August 28 through August 30, 2017. Since the hearing, there have been myriad hearings and briefings regarding what this court's ultimate conclusion should be on this appeal of the Flood Control District of Maricopa County's (the District) final decision and order fining A.B.C. Sand and Rock Company, Inc. (ABC) for mining sand and gravel within Maricopa County without a formal floodplain permit. After reviewing the transcripts and the Court's own notes from the evidentiary hearing, painstakingly reading and rereading the pleadings and supportive exhibits filed throughout this case, and carefully considering the applicable rules, case law and statutes, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. ABC operates a sand and gravel mine situated at the confluence of the New River and Agua Fria River in Maricopa County.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2016-000324-001 DT

07/18/2018

2. The mine is in the river bottom and is completely within the federally designated floodplain.
3. As it is in the floodplain, ABC's mine must be permitted by the District.
4. In February 2011, ABC applied to renew its 2006 five-year permit and a dispute arose. The Chief Engineer found that ABC was operating without a permit and imposed fines. ABC appealed that decision to the Board of Hearing Review which denied the Chief Engineer's decision.
5. The Board of Hearing Review for the District, on remand from the Superior Court, issued an order dated January 28, 2015, that confirmed ABC did not renew its permit to operate in 2011. Said order was later affirmed by the Superior Court (LC2015-0000096) and then the Court of Appeals. (1 CA-CV 16-0294). The fine was vacated.
6. Even after receiving the Board's decision, ABC continued to operate in the floodplain without a permit
7. On February 27, 2015, ABC submitted an application for a permit. Said application included original engineering approved by ABC's engineer.
8. After receiving ABC's application, a District employee prepared and circulated a permit of short duration.
9. The District never approved the permit. Although ABC believes that the District's actions were politically motivated, insufficient evidence exists to support the inference that the withdrawal of the permit was retaliatory.
10. The District deemed the February 27, 2015 application a nullity. On March 13, 2015, the District wrote ABC that it must submit a new plan of development rather than an amended one.
11. On May 1, 2015, ABC submitted the same plan, recast as a new one and requested a permit of short duration.
12. The District did not process the request for a permit of short duration.
13. On May 8, 2015, the District issued a "Notice of Violation" which directed ABC to cease and desist operating in the floodplain.
14. ABC continued to operate in the floodplain.
15. ABC requested a meeting with the District to discuss the permit of short duration and the Notice of Violation.
16. The issue on this appeal is whether ABC and the District entered into another agreement where the District would not bring an enforcement actions against ABC for operating without a permit so the parties could negotiate how to get a new permit. Thus, ABC

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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07/18/2018

claims it had a de facto permit and was unaware that it would be subject to sanctions until it received the notice of violation.

17. ABC argued that from the meeting which took place on June 16, 2015 between ABC and the District until the issuance of the Notice of Violation on November 2, 2015, it had an agreement with the District to operate without a permit. No argument was presented as to why operating without a permit was acceptable prior to June 16, 2018 or after the November 2, 2018 letter.
18. ABC questioned their accountant, Mr. Dietrich, regarding the agreement.
19. On June 17, 2015, Mr. DeBlasi, ABC's attorney, sent an email confirming that the parties "agreed to work in good faith to diligently proceed through the substantive review process." He also indicated that the County agreed to "forebear enforcement action once the permit application was submitted." The email also indicated that the County would not set a hearing on the Notice of Violation to allow the parties to focus on the permit application.
20. This email does not confirm that ABC could operate without a permit. Ex. 153
21. After the June 16, 2015, meeting, the attorneys for the parties exchanged emails confirming that fines were being assessed for ABC's operation in the floodplain.
22. On June 20, 2015, the District's counsel emails ABC's counsel to remind him that ABC was operating without a permit and that fines were not waived.
23. On August 21, 2015, ABC's Counsel sent an email to the District indicating that if they were unable to reach a settlement that the County could and would assert fines for time that had passed and that there was precedent for doing so.
24. On November 2, 2015, the District filed a notice of hearing regarding the notice of violation.
25. On January 4, 2016, an administrative hearing was conducted. ABC had three chief arguments, two dealing with claims related to ABC's operations prior to January 2015. Those two arguments are not subjects of the instant appeal.
26. On March 7, 2016, hearing officer Merkow issued findings and recommended that the District order ABC to cease and desist its sand and gravel mining operations and impose financial penalties on ABC.
27. On March 21, 2016, Defendant Wiley issued a Final Decision and Order that endorsed the hearing officer's findings and imposed fines.
28. On April 4, 2016, ABC filed a Notice of Appeal to the Flood Control District of Maricopa county board of Hearing Review (BOHR).
29. On June 16, 2016, BOHR heard ABC's appeal of the order issuing fines.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2016-000324-001 DT

07/18/2018

30. On July 1, 2016, BOHR entered its Final Decision and Order and found that: 1) ABC has not had a valid floodplain use permit since July 16, 2012, and must cease and desist operation, and 2) ABC must pay \$78,000.00 in penalties plus \$1000.00 per day beginning December 23, 2015 until it ceases operations in the floodplain or the District determines to deny or issue a permit.
31. ABC was issued a Floodplain Use Permit on August 10, 2017.
32. ABC operated a sand and gravel mine in a federally designated floodplain without the requisite permit from July 2012 until August 10, 2017.

Conclusions of Law

33. This administrative appeal is governed by A.R.S. § 12-901 et. seq.
34. The Court is required to affirm the action taken by the agency unless said action is contrary to the law, is not supported by substantial evidence, is arbitrary and capricious, or is an abuse of discretion. A.R.S. § 12-910(E).
35. The Court is required to defer to the agency's factual findings and affirm them if supported by substantial evidence, even if a different conclusion is also possible. *Gaveck v. Ariz. State Bd. Of Podiatry Exam'rs*, 222 Ariz. 433, 436 (Ct. App, 2009).
36. The Court is not to substitute its judgment for that of the agency. *Blake v. Phoenix*, 157 Ariz. 93
37. Failure to raise an issue at an administrative hearing waives the issue. *Neal v. City of Kingman*, 169 Ariz. 133 (1991)
38. The admission of new evidence at an administrative hearing does not expand issues on appeal or permit reference to evidence that occurred after said administrative hearing. *Hatch v. Arizona ADOT*, 184 Ariz. 536 (App. 1995).
39. The standard for reviewing administrative appeals was not changed by the change to the statute which allowed for the supplementation of the record. *Shaffer v. Arizona State Liquor Bd.* 197 Ariz. 405 (App. 2000)
40. Arizona law prohibits the operation of a sand and gravel mine in a floodplain without a permit. A.R.S. § 48-3613(c). The permit process is governed by the Floodplain Regulations of Maricopa County sections 401 – 404.
41. Operation in a floodplain without a permit may be punished by fines of up to \$10,000.00 per day. A.R.S. § 48-3615(B) and A.R.S. § 13-803(A)(2).
42. Those arguments not made by ABC before the administrative hearing or before the Board of Hearing Review are waived and will not be considered.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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07/18/2018

43. Substantial evidence exists to support the BOHR decision. The BOHR decision was neither contrary to law, arbitrary and capricious, nor an abuse of discretion.

IT IS ORDERED AFFIRMING the Board of Hearing Review's Final Decision and Order dated July 1, 2016.

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. **Therefore, you will have to deliver to the Judge a conformed courtesy copy of any new filings.**

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-010095

03/22/2017

HONORABLE HUGH HEGYI

CLERK OF THE COURT
C. Mai
Deputy

A B C SAND AND ROCK COMPANY INC

JANA L SUTTON

v.

MARICOPA COUNTY, et al.

STEPHEN W TULLY

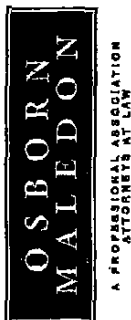
CARLOS B GUTIERREZ
CHARLES E TRULLINGER

MINUTE ENTRY

The Court has considered the September 16, 2016 Motion for Evidentiary Hearing and Identifying Issues to be Presented (hereafter referred to as the "Motion") filed by ABC Sand and Rock ("ABC") in LC2016-000324 (the "LCA Case"), the County's September 29, 2016 Response to the Motion, and ABC's October 18, 2016 Reply in support of the Motion. The Motion was filed at a time when the LCA Case was assigned to a different Division of this Court.

IT IS ORDERED, granting ABC's request for evidentiary hearing. The hearing shall be heard April 3-6, 2017 together with the other hearings presently set in this matter on those dates.

IT IS FURTHER ORDERED, granting ABC's request to admit additional evidence at the evidentiary hearing. The Court will consider that evidence for its weight, and the parties may argue the appropriate weight, or lack thereof, at the time of the hearing.



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10 Attorneys for ABC Sand and Rock Co., Inc.
11

12 BEFORE THE MARICOPA COUNTY FLOOD CONTROL DISTRICT
13 BOARD OF HEARING REVIEW
14

15 In re the Matter of)	Permit No. FA 95-048A
)	
16 ABC Sand and Rock Co., Inc.)	OPENING BRIEF
)	
17)	
18)	(Oral Argument Requested)

19 ABC Sand and Rock Co., Inc., ("ABC") respectfully requests this Board to reject, in
20 full, the March 21, 2016 Final Decision and Order of the Chief Engineer and General Manager
21 ("Chief Engineer") of the Flood Control District of Maricopa County ("District") because the
22 Chief Engineer clearly erred (1) in finding that ABC was required, despite the District's
23 multiple express assurances otherwise, to obtain a permit for the period of January 28, 2015 to
24 the present, and (2) by assessing arbitrary and capricious fees for that same time period. As the
25 administrative record shows, ABC spent 2015 working with the District in good faith to obtain
26 a permit, and because the District continuously represented throughout that time that ABC was
27
28

1 broadly about the interactions between ABC and the District "since the June 16 meeting," the
2 Chief Engineer ignores that there was no evidence submitted about the status of ABC's permit
3 application process after November. (HO at 9; CE at 9:13-18.)

4 The Chief Engineer's decision to look outside the record is made even more absurd by
5 the fact that, between November 30 and December 23, there was nothing ABC could do to
6 advance its permit. In accordance with § 48-3645(G), responding to the District's request for
7 corrections put the ball back in the District's court to respond to ABC by either approving the
8 application, denying the application, or issuing a supplemental request for corrections. As
9 allowed by the statute, the District did issue another request for corrections on December 23,
10 2015.⁷ The Chief Engineer was arbitrary and capricious in assessing daily fines during the
11 period in which the District had complete control over the speed of the application process.

12 d. The fines imposed by the Chief Engineer from December 23 through the
13 present are retaliatory, unwarranted, and baseless.

14 But the Chief Engineer's willingness to step outside the record did not end on
15 December 23. Rather, in the final part of his Order, the Chief Engineer focuses extensively on
16 the supplemental comprehensive request for corrections sent to ABC on December 23, 2015 to
17 justify his imposition of a \$2,500 *per day* penalty and a complete moratorium on ABC's ability
18 to obtain a permit. (CE at 9:9-10:14.)

19 Nothing in the record supports a fine for this period of time. Nevertheless, the Chief
20 Engineer states that fines were justified because nothing was resolved through the responses
21 ABC provided in November to the District's initial request for corrections. First, § 48-3645
22 expressly contemplates that the applicant and the District may engage in the type of back-and-
23 forth request and response process that ABC and the District have been engaging in since June
24 30. *See id.* § 48-3645(G) ("If the applicant fails to resolve an issue identified in a request for
25 corrections, the district may make supplemental written or electronic requests for corrections
26 that are limited to issues previously identified in a comprehensive request for corrections.").

27
28 ⁷ As this document is not in the administrative record, a copy is attached to this brief as
Appendix A.

1 Again, if the District were truly concerned about costs, it could have simply expedited
2 the process by telling ABC to send its substantive responses by a specific date. But it did not.
3 Rather, it reached an agreement with ABC that ABC could continue its business operations
4 while pursuing a permit application that its own rules allowed one year to complete, and then
5 unilaterally revoked that agreement without notice to ABC when it subjectively determined that
6 ABC was not being sufficiently "diligent" in the process.


7 **III. CONCLUSION**

8 The District has not established any period of time for which daily violations are
9 warranted and has failed to establish that the imposition of any fine would be reasonable under
10 the circumstances. ABC reasonably relied on the District's representations that ABC could
11 continue to operate during its permit application process. And ABC reasonably believed that
12 the "application process" is the one described in the applicable statutes and regulations. The
13 Chief Engineer's Order must therefore be denied, and ABC respectfully requests an award of
14 fees and costs in defending the District's unjustified action. *See* A.R.S. § 41-1001.01(A)(2).
15

16 DATED this 4th day of April, 2016.

17 OSBORN MALEDON, P.A.

18
19 By


Meghan H. Grabel
Jana L. Sutton
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793

22 Attorneys for ABC Sand and Rock Co., Inc.

23
24 The original and copies hand-delivered
25 this 4th day of April, 2016, to:

26 Jolene Maiden
27 Clerk of the Board of Directors
28 Maricopa County Flood Control District
301 W. Jefferson Street, Suite 1000
Phoenix, AZ 85003



A PROFESSIONAL ASSOCIATION
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Attorneys for ABC Sand and Rock Co., Inc.

BEFORE THE MARICOPA COUNTY FLOOD CONTROL DISTRICT
BOARD OF HEARING REVIEW

In re the Matter of)	Permit No. FA 95-048A
)	
ABC Sand and Rock Co., Inc.)	OPENING BRIEF
)	
)	(Oral Argument Requested)

ABC Sand and Rock Co., Inc., ("ABC") respectfully requests that this Board reject, in full, the March 21, 2016 Final Decision and Order of the Chief Engineer and General Manager ("Chief Engineer") of the Flood Control District of Maricopa County ("District") because the Chief Engineer clearly erred (1) in finding that ABC was required, despite the District's multiple express assurances otherwise, to obtain a permit for the period of January 28, 2015 to the present, and (2) by assessing arbitrary and capricious fees for that same time period. As the administrative record shows, ABC spent 2015 working with the District in good faith to obtain a permit, and because the District continuously represented throughout that time that ABC was not required to obtain a permit during the permit application process, no violation or fine is warranted.

1 District] will forebear any enforcement action for operating without a permit, and . . . will issue
2 a permit of short duration during the application process if required.” (*See also* HT at 112.)

3 • **February 27, 2015** (Exh. 50, 51, 56) – ABC accepts the District’s offer by submitting a
4 permit renewal application and paying what it believed were the appropriate fees. The District
5 concedes that this application was submitted in response to Mr. Wiley’s February 12 letter and
6 was submitted prior to Mr. Wiley’s deadline. (HT at 54:4-11, 56:25-57-1, 58:7-10, 69:21-
7 70:2.) Per the District’s adopted timeframes, the District then had 30 working days to respond
8 to ABC’s application. *See* FCD Time Frames Appendix.²

9 • **March 13, 2015** (Exh. 52) – The District, through counsel, rejects ABC’s application
10 and clarifies that ABC must submit a “new” permit application rather than an application to
11 amend or renew its prior permit. There is nothing in the administrative record that indicates
12 that ABC’s mistake regarding the type of application that should be filed was inappropriate
13 under the circumstances or that ABC submitted its initial application in bad faith. To the
14 contrary, ABC’s February 27 letter expressed ABC’s optimism about working collaboratively
15 with the District under Mr. Wiley’s administration, (Exh. 50) and testimony from the hearing
16 indicates that this misunderstanding was based on the reasonable assumption that ABC could
17 begin the application process by improving upon its most recent valid permit rather than taking
18 the more time-consuming approach of starting from scratch. (*See* HT at 112:8-115:11.)

19 • **April 15, 2015** (Exh. 53) – The District, again through counsel, offers to forebear
20 enforcement if ABC makes a “good faith submittal” of “necessary paperwork and fees,” and
21 provides an application deadline of May 1, 2015.

22 • **May 1, 2015** (Exh. 55) – By the District’s May 1, 2015 deadline, ABC supplements its
23 prior application with an engineering plan and pays appropriate fees.

24 • **May 8, 2015** (Exh. 58) – Despite the District’s duty to respond to a permit application
25 by either issuing a letter of administrative completeness or providing the applicant with notice

26 ² The time frames the District has adopted in accordance with A.R.S. § 48-3645 are
27 presented in a document attached to the end of its current Floodplain Regulations. That
28 document is not labeled, but will be referred to in this brief as the “FCD Time Frames
Appendix.”

1 permit when the District specifically told ABC that it need not obtain a permit to continue
2 operations while its permit application was being processed would be the height of arbitrary
3 and capricious behavior, and in patent violation of ABC's due process rights.

4 Contrary to the Chief Engineer's sweeping mischaracterizations of the communications
5 between ABC and the District throughout 2015, ABC was never hostile or disrespectful in its
6 communications, and, other than perhaps in its March 13th letter (which was written by the
7 District's counsel, not the District itself), the District reciprocated ABC's cordial tone. There is
8 absolutely no basis for characterizing the District's interactions as a constant barrage of cease
9 and desist orders, demands, and animus—rather, for the vast majority of 2015, the record
10 clearly shows that ABC and the District have been working together to complete ABC's permit
11 application.

12 **II. DISCUSSION**

13 ABC has complied with the requirements of A.R.S. § 48-3645 (titled "Licensing time
14 frames; compliance; consequence for failure to comply with time frame; exemptions;
15 definitions"), as well as the District's regulations adopted in accordance with that statute,
16 throughout the permit application process. ABC has also complied with the few expedited
17 deadlines the District has expressly imposed. Despite ABC's compliance, the Chief Engineer
18 rejected large portions of the Hearing Officer's recommendation and has imposed fines for
19 three separate time periods: January through July 30, 2015; July 30 through December 23; and
20 December 23 through the present.

21 Because the District notified ABC that it could continue to operate without the threat of
22 an enforcement action if it initiated the application process by a certain date, and ABC *did*
23 initiate the application process by the District's deadline, ABC was justified in expecting that it
24 could continue to operate throughout the application process under the terms of the parties'
25 agreement. And because ABC, after submitting its application by the District's proposed
26 deadline, continued to comply with all of the applicable deadlines prescribed by regulation or
27 statute and was never put on notice either that (1) any shorter deadlines applied or (2) the
28

1 District did not believe that ABC was acting sufficiently “diligent” in the application process,
2 there is no basis in the record to impose any of the Chief Engineer’s ordered fines.

3 **A. Based on the applicable regulations and statutes governing the permit**
4 **application process, offering ABC a grace period to apply for a permit and**
5 **forbearing enforcement during the application process was appropriate.**

6 After this Board held, on January 28, 2015, that ABC had not been granted a valid long-
7 term permit as of early 2011 (Exh. 47), the District offered—both verbally and in writing—to
8 allow ABC to continue mining so long as it simultaneously worked with the District to obtain
9 new long-term permit. (Exh. 49, 52, 62, 63; HT 44, 48-50, 111-12.) Specifically, the initial
10 offer stated: “If [ABC’s permit] application is filed and the fees are paid by March 6, 2015,
11 [the District] will forebear any enforcement action for operating without a permit, and . . . will
12 issue a permit of short duration during the application process if required.” (Exh. 49; HT at
13 112.) The offer to forebear enforcement and issue a permit of short duration illustrates two
14 issues at the heart of this dispute: (1) the permit application process can take a significant
15 amount of time, and (2) it is vital for a sand and gravel mining business that it be able to
16 continue operating.

17 The application process to which the District referred in its letter is a multi-step process
18 that, as anticipated by the District’s regulations, can take over a year to complete. *See* FCD
19 Regulations § 404(D)(3). First, when the District receives a mining an application, it “*shall*
20 issue a written or electronic notice of administrative completeness or deficiencies to an
21 applicant for a license within the administrative completeness review time frame.” A.R.S. §
22 48-3645(D) (emphasis added). The District has established a 30 workday administrative
23 completeness review time frame, which only applies to the District, not the applicant. *See* FCD
24 Time Frames Appendix. If the District determines that the application is not administratively
25 complete, it “*shall* include a comprehensive list of the specific deficiencies” contained in the
26 application. A.R.S. § 48-3645(E) (emphasis added). If the District fails to provide the
27 applicant with this list of deficiencies and the opportunity to supplement the application, the
28 application is automatically deemed administratively complete at the end of the administrative
review time frame. *Id.* § 48-3645(F).

1 Second, if the application is deemed administratively complete, the “substantive review
2 time frame” begins. *See id.* § 48-3645(D), (G). The District has set a 60 workday substantive
3 review time frame, which also only applies to the District, not the applicant. *See* FCD Time
4 Frames Appendix. During its substantive review period, the District “may make one
5 comprehensive written or electronic request for corrections.” A.R.S. § 48-3645(G). “If the
6 applicant fails to resolve an issue identified in a request for corrections, the district may make
7 supplemental written or electronic requests for corrections that are limited to issues previously
8 identified in a comprehensive request for corrections.” *Id.* The substantive review time frame
9 is “suspended from the date the request is issued until the date the district receives the
10 corrections from the applicant.” *Id.* Thus the overall 90 workdays the District has to review an
11 application does not include any of the time it takes an applicant to respond to the District’s
12 requests for information. *See* FCD Time Period Appendix. If the District, during this process,
13 “denies or withdraws an application for a license,” it must notify the applicant and include
14 certain specific information regarding the denial or withdrawal. *Id.* § 48-3645(J).

15 The above-described process can take months or a year or more, making it clear why
16 the District’s offer to forebear enforcement and issue a permit of short duration was important
17 to ABC. The District’s regulations similarly demonstrate that the District understands the
18 importance of forbearance during the application process. When a mining operation’s permit
19 comes up for renewal, the operation is encouraged by the District’s regulations to submit
20 renewal applications “prior to the expiration date of the permit with sufficient time to allow for
21 the review and approval of the permit” in order to avoid risking a lapse of permit coverage.
22 FCD Regulations § 401(D). To further mitigate the risks of having to cease operations, the
23 regulations also provide that the District may issue permits of short duration “for an applicant
24 participat[ing] in an ongoing application process.” FCD Regulations § 403(B)(3). And the
25 District acknowledged at the hearing that its normal practice was to issue permits of short
26 duration “to allow the permittee time to gather technical and other data he needs to complete
27 the permit application and remain in operation.” (HT at 35:23-26:7.)

1 By indicating its willingness to forebear any enforcement action and issue a permit of
2 short duration, if required, it is clear that the District recognized the unusual circumstances
3 both the District and ABC found themselves in after this Board's January 28, 2015 decision.
4 ABC was ordered "to obtain and maintain a Floodplain Use Permit and pay the appropriate fee
5 to do so," but was not ordered to cease and desist its operations. (Exh. 47 at 5.) If the District
6 *had* ordered ABC to cease its operations from the date of this Board's ruling without providing
7 any grace period, ABC would have been left in an unsustainable financial position that would
8 have transformed this Board's decision ordering ABC to obtain a permit and pay the
9 appropriate fee into a death blow that would have forced ABC to permanently close its doors.
10 Allowing ABC a degree of immunity to comply with this Board's order and fulfill ABC's
11 permit application requirements was both prudent and reasonable.

12 **B. ABC complied with the District's instructions regarding initiation of the**
13 **permit application process and has since appropriately and timely complied**
14 **with the statutes and regulations governing the application process.**

15 As described above, the permit application process has two parts: administrative review
16 and substantive review. During the administrative review process (February 12 through June
17 16), the District notified ABC that it expected ABC to comply with specific, expedited
18 deadlines, and ABC abided by those expectations. During the substantive review process (June
19 16 through the present), however, the District notified ABC that the standard deadlines applied
20 and never proposed an expedited schedule. (Exh. 64 at 14.) Nevertheless, but for a brief few
21 weeks during which it underwent change of counsel, ABC stayed in constant contact with the
22 District regarding its application process and submitted a lengthy response to the District's 37
23 complex requests for correction not five months after they were received—less than half of the
24 time permitted by law absent an extension of time. That the District might have been
25 dissatisfied with some of ABC's responses does not make ABC's attempt to work with the
26 District any less diligent. ABC's expedited compliance with the regulatory framework is
27 exactly the good faith, diligent effort that should have been reasonably expected throughout this
28 atypical permit application process. Had the District expected something else, it could and
should have said so.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ABC SAND AND ROCK COMPANY,
INC., an Arizona corporation,

Plaintiff,

vs.

FLOOD CONTROL DISTRICT OF
MARICOPA COUNTY, a political
subdivision,

Defendant.

No. LC2016-000324-001

Plaintiff/Appellant's Opening Brief

**(Assigned to the Honorable Kerstin
LeMaire)**

(Oral Argument Requested)

Pursuant to Rules 7 and 8 of the Rules of Procedure for Judicial Review of
Administrative Decisions, Plaintiff/Appellant ABC Sand and Rock Company, Inc.,
("ABC") submits its opening brief.

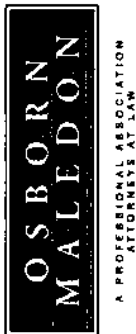


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INTRODUCTION

This is an administrative appeal from a decision of the Maricopa County Flood Control District Board of Hearing Review, which imposed substantial fines against ABC for mining in the Agua Fria floodplain without a permit. Pursuant to A.R.S. § 12-910(a), and Rules 10 and 12 of the Rules of Procedure for Judicial Review of Administrative Decisions, the Court (Judge Hegyi) granted a motion allowing the introduction of new and additional evidence, some limited discovery, and an evidentiary hearing. The evidentiary hearing was conducted by this Court over four days from August 28, 2017 through August 31, 2017. The record on appeal consists of the record from the Flood Control District and the new and additional evidence admitted during the evidentiary hearing.

This is an unusual case, with unique facts. The Flood Control District currently issues five-year permits for sand and gravel operators to mine in the floodplain. In the normal course of events, the District grants a permit of short duration to bridge an operating sand and gravel mine from one five-year permit to a new five-year permit. ABC was repeatedly denied a permit of short duration to bridge it from one five-year permit to the next. The District admits that this is the only time in the history of the District that it has denied a permit of short duration to a sand and gravel mine. (8/30/2017 Transcript at 172:23-173:10; 8/31/2017 Transcript at 18:1-13.)

The record in this case abundantly demonstrates that ABC was treated wrongfully and differently from other sand and gravel operators. The District was upset with ABC's "attitude," its willingness to assert its rights in court, and its continual lobbying against the District politically. The evidence establishes that the District did not follow the statutes, rules, and regulations with respect to ABC's permit applications and requests for a permit of short duration, that it affirmatively misled ABC as to the need for a permit of short duration, and that it retaliated against ABC because it thought ABC was a "bad actor" with respect to its attitude towards the District and its petitions to the Board of Supervisors, the legislature, and the courts for relief. At best, the

1 District has acted arbitrarily and incompetently in its ham-handed efforts to make it as
2 difficult as possible for ABC to obtain a valid mining permit. At worst, the District has
3 deliberately and maliciously violated ABC's constitutional rights. And either way, any
4 of the fines imposed by the District's Board of Hearing Review while ABC was trying
5 to navigate the District's traps should be reversed.

6 The District seeks to collect over \$630,000 in fines against ABC. The Board of
7 Hearing Review's decision to fine ABC should be reversed in its entirety. The decision
8 is arbitrary and capricious, contrary to law, and retaliatory, and denied ABC equal
9 protection of the laws.

10 STATEMENT OF FACTS AND CASE

11 I. ABC Sand & Rock Company

12 ABC is a small, family-owned business that was formed in 1974 and received its
13 first mining permit along the Agua Fria River in 1985. (Waltemath Testimony at
14 282:25-283:13.) Its principal is David Waltemath, and its mining operations are
15 regulated by the District.

16 ABC currently has approximately 20 employees and pays millions in royalties to
17 the Arizona State Land Department. (*Id.* at 283:25-284:21.) Like most mining
18 operations, ABC is heavily leveraged, and the sand and gravel industry in Arizona—
19 which supplies the ingredients of concrete for construction projects—is highly
20 competitive. (*See id.*) Stopping operations, even for short bursts of time, would destroy
21 ABC's business: ABC would lose customers, lose its state land leases, risk the
22 repossession of its equipment, find itself in breach of its contract with a concrete batch
23 plant that operates on the property, and would have to lay off devoted employees. (*See*
24 *id.* at 283:23-285:16.) In short, ABC would go out of business. (*Id.* at 284:1-6.)

25 From 1985 through 2011, ABC had a positive relationship with the District and
26 consistently received superb inspection reports: "very clean and well maintained site"
27 (3/14/11); "neat and clean as always" (7/17/09); "a showcase as usual" (5/30/08);
28 "model operation, clean and neat" (4/24/07). (Exh. 122 at ABCSR00000726-731.)

1 ABC's relationship with the District changed, however, after ABC became increasingly
2 outspoken regarding the District's regulatory practices beginning in approximately
3 February 2011. For example, ABC, through its principal and other agents of the
4 company, wrote politically charged letters to the District (e.g., Exh. 101), attended
5 numerous meetings before the District's Board of Directors, submitted criticisms of the
6 District's proposed amendments to its regulations, hired a lobbyist to oppose the District
7 before the Maricopa County Board of Supervisors and the Arizona Legislature, and
8 challenged the District's regulatory actions in court. (8/30/2017 Transcript at 8:14-9:25;
9 11:2-13:23; 17:25-20:13).

10 Once ABC began to exercise its free speech right, right to petition the
11 government for redress of grievances, and right to seek court rulings on disputed legal
12 and factual issues, the District began retaliating against ABC, including ignoring
13 requests for a permit of short duration throughout 2015, holding an *ex parte* hearing
14 during which members of the District's Board of Hearing Review and the District's
15 Chief Engineer disparaged ABC's principal (Exh. 124 (calling Mr. Waltemath a "jerk of
16 a guy" among other colorful phrases)), and ignoring and arbitrarily denying ABC's
17 requests for permits of short duration throughout 2016 and 2017. And finally, the
18 District initiated and pursued the administrative enforcement action that is the subject of
19 this administrative appeal.

20 **II. The District's Permitting System and Process**

21 To mine in the floodplain, a mining company must obtain a Floodplain Use
22 Permit. See Floodplain Regulations of Maricopa County ("FRMC") §§ 401, 403.
23 Under the regulations, an "applicant" seeking to extract sand and gravel is required to
24 submit certain information, including "[a] plan of development for the extraction of
25 sand and gravel or other materials." See *id.* § 403(B)(1).

26 The regulations allow applicants to submit a "plan" that is based, substantially or
27 in any part, on previously approved plans of development. See *id.* Once an application
28 is filed, the first question for the District is only whether the application is "complete"—

1 that is, whether the submitted plan includes all the information listed in
2 § 403(B)(1)(e)(1)-(5), such as an engineering report, a mining plan, and a closure plan.
3 If all the required information is presented, then the application is complete and second
4 phase of the review process—the “substantive review” of the plan—then commences.

5 This process is governed by certain time limits, as required by statute.
6 Specifically, A.R.S. § 48-3645(B) requires the District to set an “overall time frame” for
7 the application process that includes an “administrative completeness review time
8 frame” and a “substantive review time frame.” Accordingly, the District has
9 implemented a 90-day overall application time frame, which includes 30 working days
10 for the administrative review process and 60 working days for the substantive review
11 process. *See* FRMC, Time Frames Appendix at .pdf page 79 (providing the same time
12 frames for permit applications and permit amendments).

13 These time limits apply to the District, not the applicant. If the District “does not
14 issue a written or electronic notice of administrative completeness or deficiencies within
15 the administrative completeness review time frame, the application is deemed
16 administratively complete.” A.R.S. § 48-3645(F). If the District “does not issue to the
17 applicant the written or electronic notice granting or denying a license within the overall
18 time frame . . . the district shall refund to the applicant all fees charged for reviewing
19 and acting on the application[, and t]he district shall continue to process the
20 application.” *Id.* § 48-3645(K). And if the District ultimately rejects an application for
21 any reason it must provide the applicant with notice of the reasons for the rejection, as
22 well as notice of the applicant’s rights to appeal and to resubmit the application. *Id.* §
23 48-3645(J).

24 The statutes also provide that a sand and gravel company that mines in a
25 floodplain without a permit can be fined. *See generally* FRMC §§ 701–09. The
26 administrative process for a fine begins with the Chief Engineer issuing a notice of
27 violation. *See id.* § 703(A)(2). The party served with a notice of violation may request
28 a hearing before a Maricopa County administrative hearing officer, who makes findings

1 of fact and recommendations to the Chief Engineer. *Id.* §§ 705, 707. The Chief
2 Engineer can adopt or modify the finding and recommendations of the hearing officer.
3 *Id.* § 707(E). Once the Chief Engineer makes a final decision, the decision can be
4 appealed to the District's Board of Hearing Review. *Id.* § 707(F). The decision of the
5 Board of Hearing Review is the final administrative action, subject to administrative
6 appellate review by the Superior Court. *See id.*

7 **III. ABC's 2015 Permit Application Process: January 2015 to June 2015**

8 In February 2011, ABC applied to renew its 2006 five-year permit. As it had
9 done in the past, ABC filed a short form application with the required fee. A dispute
10 arose between ABC and the Flood Control District over, among other things, who had
11 to sign for a permit. The District said the landowner needed to sign; ABC said the mine
12 operator needed to sign. ABC mined on two properties that were leased from the State
13 Land Department. Because of the dispute, ABC could not sign a permit application, the
14 2006 permit lapsed, and the District took the position that the permit was lapsed from
15 May 2011 to November 2011. In November 2011, the District issued a permit of short
16 duration, conceding ABC's contention that the mine operator, not the landowner, signed
17 for the applicant.

18 The District issued ABC a notice of violation, however, seeking fines for its
19 operation of a sand and gravel mine without a permit from May 2011 to November
20 2011. The notice went to a hearing before a Maricopa County hearing officer, and the
21 Chief Engineer reviewed the hearing officer's findings and imposed a fine. On appeal,
22 however, in July of 2012, the Board of Hearing Review reversed the Chief Engineer's
23 decision without explanation.

24 ABC, believing the Board of Hearing Review decision meant its permit was
25 renewed for five years beginning in May 2011, continued to mine in the floodplain.
26 ABC had argued in the appeal before the Board that its permit was renewed as a matter
27 of law upon filing the application with the fee. After years of administrative appeals,
28 the decision was ultimately remanded back to the Board of Hearing Review. In January

1 2015, the Board concluded that the District was arbitrary in fining ABC \$1,000 per day
2 during the five-month period ABC purportedly operated without a permit from May to
3 November 2011, but concluded that ABC “must obtain and maintain a Floodplain Use
4 Permit.” (Exh. 138 at 5.) ABC appealed that decision, which remains pending in the
5 Court of Appeals.

6 As of January 2015, ABC had been working with an engineer, Pedro Calza, to
7 amend its previously approved, and still on file, plan of development. (Exh. 142 at 16
8 (retaining Mr. Calza in July 2014); *see also* 1/4/2016 Transcript at 112:21-113:5.)
9 ABC was planning to propose expanding its operation so that it could mine deeper into
10 the Agua Fria riverbed.

11 While Mr. Calza worked on an updated new plan for the ABC mine, the
12 District’s Chief Engineer, William Wiley, sent ABC a letter. (Exh. 140.) In it, Mr.
13 Wiley offered ABC a permit of short duration “if required.” (*Id.*) Specifically, the
14 three-sentence letter states:

15 Now that the Board of Hearing Review has issued its Final Decision and
16 Order on Remand on January 28, 2015, it is important that the Flood
17 Control District follow up on the remaining order of business. Per item 1
18 of the Final Order, ABC Sand and Rock is required to pursue a Floodplain
19 Use Permit and pay appropriate fees. **If the application is filed and the**
20 **fees are paid** by March 6, 2015, we will forebear any enforcement action
for operating without a permit, and per Floodplain Regulations Section
403.B.3, **will issue a permit of short duration** during the application
process if required.

21 (emphasis added.) Inasmuch as the District is now seeking hundreds of thousands of
22 dollars in fines from ABC for “operating without a permit,” it is abundantly clear that a
23 permit of short duration *was* required.

24 ABC gladly took Mr. Wiley up on his offer. (1/4/2016 Transcript at 112:3-14;
25 Exh. 141 (noting ABC’s hope that working with Mr. Wiley will be productive and
26 “refreshing”).) On February 27, well ahead of the March 6 deadline, ABC submitted an
27 application (Exh. 142), and the District actually began preparing a permit of short
28 duration (*see* Exh. 363 (draft circulated on 3/10/2015).) The permit of short duration

1 was prepared and circulated by Tony Beuche. (*Id.*) However, only two days after the
2 draft permit of short duration circulated to the team of District employees tasked with
3 handling ABC's application, the District received notice that ABC was lobbying the
4 state legislature to abandon a bill the District favored. (Exh. 364.) The drafted permit
5 was apparently scrapped and never heard of again. (8/30/2017 Transcript at 143:4-21;
6 8/31/2017 Transcript at 19:22-20:6, 109:20-114:24, 116:8-118:1; 8/28/2017 Transcript
7 at 86:5-88:8, 96:18-97:16.) From this point on, the District treated ABC with the
8 utmost hostility.

9 After receiving ABC's February permit application, the District did absolutely
10 nothing. The District did not follow through on its written offer of a permit of short
11 duration. (8/31/2017 Transcript at 116:8-118:1.) The District could not even explain at
12 the August 2017 hearing before this Court why it took no action on a short term permit.
13 For example, Mr. Wiley testified that ABC did not apply for a permit of short duration
14 (8/28/2017 Transcript at 111-112:3, 112:19-115:14, 118:14-120:15¹); but Mr. Beuche
15 testified that no written application for a permit of short duration was required
16 (8/29/2017 Transcript at 104:18-105:5). Mr. Beuche initially testified he had no
17 memory at all of the permit of short duration he prepared, and still had no memory of
18 what happened to it. (8/29/2017 Transcript at 78:8-80:16.) When Ms. DeBlasi later
19 asked in writing for a permit of short duration, Mr. Beuche readily admitted that he did
20 not act upon it at all, even while recognizing that the District had a legal duty to act on
21 it. (*Id.*; 8/29/2017 Transcript at 83:12-89:3.)

22 Further, the District did not follow through on its *statutory obligations* to process
23 the permit application. See A.R.S. § 48-3645(D)-(F). Rather than initiate
24 administrative completeness review, the District simply deemed the application a
25 nullity. (Exh. 143.) To date, including during the August 2017 hearing before this

26 ¹ "Q: You understand you have a lawful duty to rule to say yes or no on an application
27 for a permit of short duration? [See Exh. 335 (Floodplain Review Board's interpretation
28 of the regulation regarding permits of short duration)]

A: The application is a – just a request. . . . And I'm supposed to respond to that?"

1 Court, the District has yet to come up with any cohesive explanation for arbitrarily
2 rejecting the application without going through the statutory administrative review
3 process. (8/30/2017 Transcript at 123:5-126-8,² 127:6-128:24; 8/28/2017 Transcript at
4 79:16-81:2, 81:14-82:13.³) At best, the District seems to imply that ABC, by using the
5 title “Engineering Report for an Amendment to Permit (FA 95-048A),” somehow
6 absolved the District of acknowledging the application at all. (See 8/28/2017 Transcript
7 at 79:16-81:2, 81:14-82:13 (testimony of William Wiley); *but see* 8/30/2017 Transcript
8 at 123:5-126-8 (testimony of Tony Beuche).)

9 Even assuming, despite the contradictory testimony, that it is the District’s
10 position that it is only obligated to process a permit application that uses specific, but
11 undefined, report titles, there is no basis in law for taking such a position. The
12 application was clearly an “application,” and applications for a “new” permit and to
13 “amend” a permit go through the same 90-day application process under the District’s
14 regulations. FRMC, Time Frames Appendix at .pdf page 79; *see also* A.R.S. § 48-
15 3645(M) (listing narrow exceptions to the District’s permit processing obligations).
16 Errors in titles, fees, or paperwork can be easily disposed of during the administrative
17 review process.

18 But rather than complying with law, the District issued threatening letters written
19 by its lawyer, Mr. Tully. The first letter asks ABC to submit all the information
20 required by FRMC § 403(B)—the same items that ABC had just submitted in February,
21 but noting that ABC should submit a slightly higher fee. (Exh. 143.) The second letter
22 sets a deadline of May 1 to resubmit the application. (Exh. 144.)

23
24 ² “Q: You said that the application should have said new permit, not amended permit?
25 A (Mr. Beuche): It doesn’t have to say new permit. They just need to file for a new
26 permit.

26 Q: Okay. Well, was the application form you received okay?

27 A: I don’t recall any deficiencies with the application form.”

28 ³ “Q: If this report had said engineering report for a new permit, would you have
accepted it?

A (Mr. Wiley): Counselor, we likely would have, and -- and we did later.”

1 At this point, ABC hired counsel of its own, Ms. Michelle DeBlasi, to help guide
2 it through the application process. (Exh. 146.) ABC chose wisely—Ms. DeBlasi had
3 extensive experience in administrative law, and even had experience working
4 productively with the District’s Chief Engineer, Mr. Wiley, in other cases. (DeBlasi
5 Transcript at 8:15-10:10.) But even Ms. DeBlasi struggled to push the District back into
6 line with the applicable statutes.

7 When Ms. DeBlasi came on board, she immediately spoke with Mr. Wiley to
8 verify that he would accept a new application, would process the application pursuant to
9 the applicable statutes, and would work out any issues in the engineering through the
10 statutory substantive review process. (DeBlasi Transcript at 10:25-13:20; Exh. 146.)
11 She confirmed this in writing with an e-mail, which Mr. Wiley did not respond to.
12 (Exh. 146.) Accordingly, ABC resubmitted its application on May 1 with some minor
13 modifications. (8/30/2017 Transcript at 140:15-24.) The only significant change was
14 raising the included fee to \$12,800, as requested by Mr. Tully.

15 In other words, from January 2015 through May 2015, ABC consistently
16 followed the District’s instructions. But instead of issuing a permit of short duration, or
17 even simply processing ABC’s application and completing an administrative
18 completeness review, the District issued a Notice of Violation for operating without a
19 permit on May 8. (Exh. 149.)

20 ABC was astonished. (1/4/2016 Transcript at 119:17-120:9; DeBlasi Deposition
21 at 19:24-20:7, 27:4-21.) Noting that there was clearly some mistake or
22 miscommunication, ABC requested a meeting with key District employees and top
23 county officials to get everyone on the same page moving forward. (1/4/2016
24 Transcript at 122:2-125:2; DeBlasi Deposition at 34:9-35:25; Exh. 151.)

25 **IV. ABC’s 2015 Permit Application Process: June 2015 to November 2015**

26 At the June 15, 2015 meeting with the county manager and deputy county
27 manager, everyone agreed that ABC’s March application was administratively complete
28 and that the parties would “work in good faith to diligently proceed through the

1 substantive review process.” (Exh. 154.) The parties also agreed that “[s]ince the
2 parties are moving diligently to process the permit application, *a temporary permit*
3 *[was] not necessary and [would] not be pursued.*” (*Id.*)

4 Ms. DeBlasi memorialized this agreement in a written e-mail to the deputy
5 county manager Joy Rich, who sent it to District representatives who attended the
6 meeting for their comments. (Exh. 396; 8/30/2017 Transcript at 122:4-124:22.) Mr.
7 Beuche and Mr. Vogel made some redline comments—none of which changed the
8 agreement that “no permit would be pursued or required” (*Id.*)—and Ms. Rich, who has
9 authority to bind the District, ultimately approved Ms. DeBlasi’s written summary
10 without changes (Exh. 154).

11 In the time between the June 15 meeting and early November 2015, Ms. DeBlasi
12 and Mr. Beuche touched base and discussed technical requirements and options related
13 to ABC’s ongoing application. (*E.g.*, Exhs. 157, 161-63.) On June 30 the District
14 finished its first substantive review of ABC’s application and issued ABC a “Request
15 for Corrections” to the application. (Exh. 155.) The “Notice of Permit Rights” attached
16 to the Request for Corrections form indicated that ABC had “one (1) year” from the
17 date “of this notice” to respond to the District’s requests. (*Id.* at ABCSR00000664.) At
18 no time between June 15 and November 2, 2015, did anyone at the District provide
19 ABC any alternative deadlines or otherwise clarify its expectations.

20 Yet on November 2, 2015, the District issued ABC a Notice of Hearing
21 informing ABC for the first time of the District’s intent to fine ABC for operating
22 without a permit after the June 15 agreement. (Exh. 164.) The notice, issued by Mr.
23 Wiley, does not address the District’s prior agreement that “no permit would be pursued
24 or required,” does not copy Ms. Rich or Mr. Manos, and makes no mention of the prior
25 promises of a permit of short duration. (*Id.*)

26 **V. ABC’s 2015 Permit Application: November 2015 to January 2016**

27 In October and November 2015, ABC changed counsel due to prior counsel’s
28 health problems and, as new counsel was rapidly getting up to speed, ABC received the

1 District's Notice of Hearing for operating without a permit. (1/4/2015 Transcript at
2 132:25-133:25; Exh. 164.) Surprised, counsel attempted to negotiate with the District,
3 but her efforts were summarily rejected. (Exh. 165-66.) Instead, because the District
4 sought fines from back to mid-2012, both parties' attention was ripped from the ongoing
5 application process and became focused on a hearing reiterating the past.

6 Nevertheless, ABC worked diligently to respond to the District's Request for
7 Corrections with engineering analyses and legal questions as to what the District was
8 authorized to require. (Exhs. 167-68.) ABC submitted its responses on November 15
9 and 30. (*Id.*) The District did not provide ABC with an updated Request for
10 Corrections until December 23, 2015—just before the January 4 hearing. (Exh. 172.)

11 **VI. The January 4, 2016 Hearing Before Hearing Officer Harold Merkow**

12 The original evidentiary hearing in this case took place on January 4, 2016. (*See*
13 1/4/2016 Transcript.) The hearing officer, Harold Merkow, did not hear evidence prior
14 to July 2012 or after December 31, 2015 (*id.* at 25:21-22; 36:13-37:8), and his
15 recommendation did not address whether any fines were warranted after November 30,
16 2015 other than to state his hope that the parties could work together productively going
17 forward (Exh. 176).

18 At the hearing, not only did the District seek fines for "operating without a
19 permit" beginning in January 2015, but expressly sought maximum fines of \$10,000 per
20 day beginning in July of 2012—a total, at that time, of over \$12,000,000. Reason had
21 gone out the window.

22 Officer Merkow rejected outright the request for fines from July 2012 to January
23 2015. (Exh. 174 at 8.) He even noted that the Board of Hearing Review decision in
24 2012 gave ABC a putative right to mine. (*Id.*) Ultimately, Officer Merkow only
25 recommended fines from July 30, 2015 to November 30, 2015—mistakenly reasoning,
26 without any evidence whatsoever, that ABC could have responded to the District's
27 engineering analyses within only 30 days. (*Id.* at 9.)

1 As set out below, Officer Merkow's recommendations were not accepted by the
2 Chief Engineer, who by then was serving as the chief prosecutor and the decision maker
3 on fines while still retaining control on whether ABC would be granted either a short- or
4 long-term permit.

5 **VII. ABC's 2015 Permit Application: January 2016 Onward**

6 Pedro Calza's original engineering for the mining plan relied upon a recent,
7 promising report that strongly suggested that the Federal Emergency Management
8 Agency ("FEMA") flood plain map should be amended to account for the enormous
9 storage capacity for flood water in the many abandoned mines along the Agua Fria.
10 (8/30/2017 Transcript at 77:22-79:18 (characterizing the Fuller study as a "good idea"
11 with results that "did have merit").) In February 2016, a second report was issued that
12 concluded that, although using the abandoned mines as storage would be technically
13 feasible, it would ultimately be too expensive to implement. (8/30/2017 Transcript at
14 84:21-10.)

15 ABC then hired David Williams to assist in engineering a new plan of
16 development utilizing the existing FEMA flood plain map. (8/31/2017 Transcript at
17 35:22-24.) From March 2016 through August 2017, David Williams prepared five
18 revisions to ABC's proposed plan of development. (8/31/2017 Transcript at 41:19-21.)
19 In August 2017, after working through many complicated engineering issues, a new
20 five-year permit was ultimately granted to ABC. (Exh. 411.)

21 David Williams testified at the hearing about both his discussions with the
22 District and the complications presented by the confluence of the Agua Fria and New
23 River at the ABC mine site. (See 8/31/2017 Transcript at 45:3-58:1.) Although the plan
24 resulted in reasonable engineering disagreements, Dr. Williams never doubted that a
25 plan would be agreed to. (8/31/2017 Transcript at 62:4-10.⁴)

26
27
28 ⁴ "Q: Did you ever have any doubt that you could come up with a reasonable
engineering solution for mining on this property?"

1 Beginning with the first plan of development that Dr. Williams was involved
2 with, filed in April 2016, ABC continued to renew its requests for a permit of short
3 duration. (*E.g.*, Exhs. 187, 202.)

4 **VIII. Chief Engineer's March 2016 Decision**

5 In March 2016, the Chief Engineer issued his decision agreeing in part and
6 rejecting in part the Officer Merkow's recommendation. (Exh. 177.) He agreed that
7 fines prior to January 2015 should not be imposed. (*Id.*) However, he concluded that
8 ABC should be fined from January 2015 until such time that "ABC ceases to operate in
9 the floodplain without a valid floodplain use permit," which he announced would not be
10 granted until ABC could definitively establish "proof that no harm will come to the
11 public health, safety or general welfare," and only after ABC had paid all imposed
12 penalties in full. (*Id.* at 11.) On the date of the Mr. Wiley's Order, he calculated the
13 fine as \$265,500, which would grow indefinitely at a rate of \$2,500 per day. (*Id.*)

14 The Order never mentions the District's promises to issue a permit of short
15 duration, or District's failure to even process Michelle DeBlasi's request for a permit of
16 short duration. To the contrary, the Order instead complains of the "considerable
17 resources in staff time and the payment of legal fees" that the District had paid due to
18 ABC's prior exercise of its legal rights. (*Id.* at 8.)

19 **IX. The Board of Hearing Review's Decision**

20 ABC appealed to the Board of Hearing Review. The Board ruled that the Chief
21 Engineer was arbitrary in requiring the payment of fines before issuing a permit, and
22 modified downward the ongoing fines sought by the Chief Engineer. (Exh. 203.)

23 Although the Board issued future fines, it said fines would stop once the Chief
24 Engineer granted or denied a request for a permit. (*Id.* at 10.) From this ruling, ABC
25 filed its notice of appeal to this Court.

26
27 A: I've never failed in completing a project over my 40 years of experience in terms of
28 completing it to the satisfaction of my client. So keeping that in mind, I am very
optimistic that we eventually find a solution."

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1 attorney-client privilege, effectively denying cross-examination as to any internal
2 discussions.

3 It is hornbook law that the attorney-client privilege cannot be used as both a
4 sword and a shield. *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 56 ¶ 9 (2000)
5 (“In Arizona, a party will not be allowed to assert the privilege when doing so ‘places
6 the claimant in such a position, with reference to the evidence, that it would be unfair
7 and inconsistent to permit the retention of the privilege. It is not to be both a sword and
8 a shield[.]’” (citing 8 Wigmore on Evidence 2388, at 855 (J. McNaughton rev. ed.
9 1961))); *Mendoza v. McDonald’s Corp.*, 222 Ariz. 139, 153 ¶ 42 (App. 2009) (“[W]hen
10 an insurer raises a defense based on factual assertions that, either explicitly or
11 implicitly, incorporates the advice or judgment of its counsel, it cannot deny an
12 opposing party the opportunity to discover the foundation for those assertions in order
13 to contest them.”). The District has denied ABC the opportunity to discover the
14 foundation for its decisions regarding ABC’s permitting process and, having used the
15 privilege as an extensive shield, cannot now be permitted to turn around and use the
16 privilege as a sword. In sum, other than contemporaneous letters written to ABC, the
17 record is devoid of any reasons for the District’s decisions regarding ABC’s permit
18 applications—including its applications for a five-year permit and its numerous requests
19 for a permit of short duration.

20 On some issues, the shielding of its internal decision making by the attorney-
21 client privilege is fatal to the District. There is no written explanation, for example, as
22 to why the March 10, 2015, permit of short duration prepared by Tony Beuche vanished
23 after the District was informed that ABC was lobbying the legislature to reject a bill
24 supported by the District. The reasonable inference of withdrawing the permit as
25 retaliation for lobbying against the District cannot be rebutted. This is *per se* arbitrary
26 and capricious.

27 Further, the District cannot explain why ABC was treated differently from other
28 similarly situated sand and gravel mines with regard to the District’s decisions to bring

1 enforcement actions and to ignore and deny ABC's numerous requests for a permit of
2 short duration. A nearby mining operation, MR Tanner, for example, operated seven
3 years without a permit and was not ever fined by the District. (8/30/2017 Transcript at
4 174:1-179:16; Exhs. 223-25.) And although the District said publicly that it denied
5 ABC a permit of short duration in 2016 because its prior permit had lapsed, countless
6 other sand and gravel operators were given permits of short duration after their earlier
7 permits had lapsed. (8/30/2017 Transcript at 173:14-196:24.⁶)

8 **II. Any fines under the circumstances of this case would be arbitrary and**
9 **capricious and an abuse of discretion and contrary to the evidence.**

10 The sections below describe specific reasons that the Board of Hearing Review's
11 order was arbitrary or otherwise improper in imposing fines against ABC. As a
12 preliminary matter, however, it is worthwhile to examine the big picture.

13 **A. July 2012 to January 2015: ABC had a putative right to mine**

14 Every adjudicator that has heard this case, including the hearing officer, the
15 Chief Engineer, and the Board of Hearing Review, has agreed that ABC did not deserve
16 to be fined for operating without a permit from 2012 to January 2015. The hearing
17 officer, in fact, stated that ABC had a putative right to mine until January 2015.

18 **B. January 2015 to July 2015: The Administrative Review Process**

19 The Hearing Officer similarly assessed no fines from January 2015 until July 30,
20 2015, which in essence covers the time it took to complete the administrative review
21 process in light of the District's contradictory and confusing behavior during that
22 period.⁷ As discussed in greater detail below, the District offered ABC a permit of short
23

24 ⁶ Q: "[F]air to say that in the year 2011, you would allow renewal permits for people
25 whose permits had been expired, and you would give short-term permits of short
26 duration to bridge them to a new permit, right?

A (Mr. Raleigh): Yes, I would."

27 ⁷ Even the Board of Hearing Review's decision below admits that the District did
28 not communicate effectively during this period, but neglects to address that the District
actually has a statutory obligation to communicate with ABC that arises out of A.R.S. §
48-3645—a statute that the District frequently ignored.

1 duration in February 2015. ABC accepted the offer by submitting an application in late
2 February 2015, and the District drafted a permit of short duration in March 2015. But
3 that permit mysteriously disappeared, and instead the District demanded that ABC start
4 all over again with the application process.

5 ABC did so, again believing the District's promise that it would issue a permit of
6 short duration. But again no permit materialized, nor did any formal notice denying
7 ABC's requests for a permit of short duration. This exasperating dance continued on
8 until ABC requested and received a meeting with the County Manager and Deputy
9 County Manager, at which point the District represented a permit of short duration was
10 not necessary. That meeting took place on June 15, and ABC finally received its first
11 substantive review comments on its application on June 30.

12 The Hearing Officer concluded that no fines should be issued from January 2015
13 through July 30, 2015—30 days after ABC received its first substantive comments. The
14 Board of Hearing Review's decision to disregard the Hearing Officer's
15 recommendations for this period is simply arbitrary and capricious considering all the
16 evidence. The District's decision should be reversed and the Hearing Officer's
17 recommendation that ABC not be fined for this period of time should be reinstated.

18 **C. July 30 to November 30: The First Round of Substantive Review**

19 The Hearing Officer erred, however, in recommending fines for the four-month
20 period between July 30 and November 30, and the Board of Hearing Review erred by
21 adopting that recommendation. Although the Hearing Officer was correct that it was
22 reasonable to give ABC some period of time to evaluate the District's substantive
23 comments and produce a response, the 30-day period between June 30 and July 30 was
24 not an adequate space of time, and there is no lawful basis to impose *sua sponte* a 30-
25 day limit. The District, for example, was requesting that ABC retain a company to
26 produce an updated topographic survey, a time-consuming process dependent on
27 contractors' schedules, and that ABC produce complicated hydraulic modeling for a
28

1 particularly complex area: the confluence of two separate rivers. (8/31/2017 Transcript
2 at 39:12-40:5.)

3 But the Hearing Officer's error can be explained by the inadequate record
4 available during the January 2016 hearing. Since the time of that original administrative
5 hearing, ABC discovered that even the District itself agreed that ABC could not
6 reasonably have been expected to respond to the District's demands within that short
7 period of time. (See Exh. 162 (anticipating that ABC would respond to the District's
8 first Request for Corrections by October at the earliest)). And also since that time ABC
9 retained Dr. David Williams who testified that the amount of time it takes to respond to
10 a set of requests can vary considerably. (8/31/2016 Transcript at 107:14-108:11
11 ("[Y]ou can't rush through [the engineering and modeling] . . . because you have to be
12 very careful in your steps. . . . So sometimes, you just can't schedule that kind of a
13 complex project in terms I got to do it in two weeks. Well, it may take three weeks or it
14 may take three months.") That ABC had a necessary change of counsel due to health
15 problems during that period only further delayed the process.

16 **D. Post-November 30, 2015: Ongoing Substantive Review**

17 Finally, the Hearing Officer was correct to refuse to impose ongoing fines past
18 November 30, 2015. The substantive review process is a back-and-forth style process
19 in which the applicant supplies engineering analyses, the District issues comments, and
20 the applicant revises and resubmits its engineering analyses for further review. The
21 cycle begins again as many times as needed for both sides to come to an agreement.
22 Understandably, the time it takes to complete this process can vary wildly depending on
23 issues as innocuous as the communication styles of the engineers, the complexity of the
24 engineering, the engineers' availability, and the need to coordinate with third parties
25 who run engineering models or draft mining plan sheets.

26 In ABC's case, ABC submitted its first responses to the District's substantive
27 comments on November 30 and then had to wait for the District's responses, which
28 came on December 23, 2015. Based on the District's comments, and based on meetings

1 with the District's engineers in early 2016, ABC took the time to substantially overhaul
2 the technical aspects of its application, which it resubmitted in April 2016. From there
3 onward, ABC's application was just like any other. The engineers worked together,
4 talked through issues, and, after several iterations, reached a final resolution.

5 There was nothing unreasonable or extenuating about this process, and the Board
6 of Hearing Review's decision to uphold ongoing fines for this period was arbitrary and
7 capricious, an abuse of discretion, and contrary to the evidence.

8 **III. Imposing fines on ABC for operating without a permit was arbitrary and**
9 **capricious because the District's refusal to properly process ABC's short-**
10 **and long-term permit applications was contrary to law.**

11 The District failed to follow the procedures mandated by A.R.S. § 48-3645 when
12 evaluating most of ABC's requests for a Floodplain Use Permit, and the Board of
13 Hearing Review erred in fining ABC for operating without a permit during the periods
14 of time the District was actively mishandling ABC's requests for a permit.

15 **A. ABC's February 2015 Permit Application**

16 On February 12, 2015, the District offered ABC a permit of short duration if
17 ABC "filed an application" before March 6, 2015. There is no dispute that ABC filed
18 an application before that date, and submitting an application kicks off the 30 working-
19 day administrative completeness review process. A.R.S. § 48-3645(D) ("A district shall
20 issue a written or electronic notice of administrative completeness or deficiencies to an
21 applicant for a license within the administrative completeness review time frame.").
22 ABC's February application was therefore administratively complete on April 10—30
23 working days after it was submitted. *See id.* § 48-3645(F) ("If a district does not issue a
24 written or electronic notice of administrative completeness or deficiencies within the
25 administrative completeness review time frame, the application is deemed
26 administratively complete."). The full 90-day application period then terminated on
27 July 7, 2015, at which point the District remained obligated to "continue to process the
28 application." *See id.* § 48-3645(K).

1 There is no statute or rule or regulation that states the District can simply skip the
2 time limits set in § 48-3645 and reject an application outright without affording the
3 applicant the required notices. Nonetheless, the District did just that and argues that it
4 was entitled to disregard ABC's application either because the title on the cover page
5 was wrong,⁸ or that ABC's application was facially "not credible." Even assuming
6 *arguendo* that the engineering submitted under seal by Mr. Pedro Calza was somehow
7 not "credible," there is no threshold of "credibility" that such an application must pass
8 to qualify for review by the agency. *See generally* A.R.S. § 48-3645. In fact, the
9 detailed review process provided by statute provides avenues to allow agencies to
10 readily weed out unworthy submissions as necessary. *See id.* § 48-3645(J) (permitting
11 the District to deny or withdraw an application so long as it provides sufficient notice,
12 including "[j]ustification for the denial or withdrawal," an "explanation of the
13 applicant's right to appeal the denial," and "[a]n explanation of the applicant's right to
14 resubmit the application").

15 Yet the District has continuously doubled down in its argument that ABC's
16 February application was simply not a "good faith" application based on Mr. Calza's
17 engineering, and concludes that it was therefore under no obligation to afford ABC the
18 process provided by statute. *See id.* But this rationale is similarly without merit. Not
19 only is "good faith"—like "credibility"—not a condition for processing a permit in a
20 manner that complies with A.R.S. § 48-3645, the engineering used in the application is
21 not even ripe for examination during the administrative review process, which is clearly
22 demonstrated by the fact that the District accepted ABC's May 1, 2015 application even
23 though that application used Pedro Calza's same engineering.

24 ⁸ This reasoning was not provided to ABC in any document and is either simply a
25 *post hoc* rationalization for the decision to reject the application, or is covered by the
26 attorney-client privilege and should not be considered. *See supra* Part I. But even if the
27 Court were to consider this purported "rationale" for tossing out ABC's application
28 whole sale, ignoring statutory procedures based on a single word on the cover page of
an engineering report is an astonishingly arbitrary decision. Changing a word or two
should have properly been dealt with, if at all, during the administrative review process.

1 The District failed to properly process ABC's application in accordance with
2 law, and therefore no fines are warranted during the time ABC needlessly, and at the
3 District's mercy, struggled to get through the administrative review process.

4 **B. ABC's Requests for Permits of Short Duration**

5 As with ABC's February 2015 permit application, the District similarly refused
6 to properly process ABC's numerous requests for a permit of short duration, which
7 began in early 2015 and continued periodically through 2016 and 2017. As with most
8 of the District's decisions, the District now provides conflicting rationales for their
9 refusal to process ABC's requests.

10 **1. ABC's 2015 Requests for a Permit of Short Duration**

11 Regarding ABC's 2015 efforts to obtain a permit of short duration, the District
12 has fully shielded its rationale for ignoring those requests under the attorney-client
13 privilege, and the Court should therefore conclude that there is no basis in the record for
14 the District's repeated decisions to ignore ABC's requests for a permit of short duration.
15 The record indicates that the District offered ABC a permit of short duration in January
16 2015 on the condition that ABC submit an application. ABC did so, but no permit
17 issued. The record indicates that the District drafted a permit of short duration, but that
18 permit inexplicably disappeared. The record also indicates that the District offered
19 ABC a permit of short duration in April, during a meeting with Ms. DeBlasi, on the
20 condition that ABC submit an application by May 1. ABC did so, but again no permit
21 issued.

22 The procedures provided in A.R.S. § 48-3645 apply to all floodplain use permits,
23 including permits of short duration. (Exh. 335; *see also* 8/29/2017 Transcript at 106:24-
24 107:7.⁹) But as with ABC's February 2015 long-term permit application, the District

25
26 ⁹ The District acknowledged that ignoring a request for a permit of short duration at the
27 very least prejudices an applicant's right to appeal if the request is denied:

28 "Q: An applicant can appeal to the Floodplain Review Board the denial of a permit of
short duration, true?

A: Very true.

1 simply ignored ABC's requests for a permit of short duration, and never provided *any*
2 rationale for its decisions. Because the District refused to properly process ABC's
3 applications for a permit of short duration in accordance with state law, no fines are
4 justified in 2015.

5 **2. ABC's 2016 and 2017 Requests for a Permit of Short Duration**

6 In 2016, ABC again began to request permits of short duration. It made its first
7 request in April 2016. This time the District formally denied ABC's request via letter
8 from Mr. Wiley on April 15, 2016. Mr. Wiley's letter gave three reasons for denying
9 the request: (1) the District needed to be "comfortable that an application has only
10 minor corrections that can be resolved during the pendency of the short duration
11 permit"; (2) the District needed more time to process ABC's latest engineering
12 proposals; and (3) the District would not issue a permit of any kind until ABC paid all
13 fines that are the subject of this appeal. The letter did not include any notice of ABC's
14 appeal rights or right to resubmit its request.

15 ABC did, however, resubmit its request. In its resubmission, it pointed out (1)
16 that the District routinely issued permits of short duration to *other* mining companies
17 even where "minor corrections" could undeniably not be resolved during the pendency
18 of the short-term permit; (2) the District had had ample time to review ABC's latest
19 engineering reports; and (3) the District's Board of Hearing Review had struck the
20 Order that required ABC to pay all fines before it could receive a permit. But the
21 District again denied ABC's request. This time it gave a wholly new rationale: it
22 asserted that it would only issue a permit of short duration "once [ABC] demonstrates
23 that the on-going operation is substantially in compliance with the last plan of
24

25
26 Q: How would the applicant know his permit was denied if your district doesn't do
anything, sir?

27 A: With respect to a permit of short duration, good question.

28 Q: A very good question.

A: Yeah."

1 development.” This denial again came via letter without notice of ABC’s appeal rights
2 or right to resubmit its request.

3 Concluding that the District could not make up its mind as to the reasons ABC
4 was not entitled to a permit of short duration, ABC petitioned the District’s Floodplain
5 Review Board¹⁰ for an interpretation of the regulations. (See Exh. 335.) The Board
6 concluded that a permit of short duration is a floodplain use permit subject to § 48-3645,
7 and that the District should issue a permit of short duration when an applicant
8 demonstrates that its application is “approvable from a health and safety perspective.”
9 (*Id.* at 2-4.) Finally, the Floodplain Review Board concluded that the District erred in
10 failing to appropriately process ABC’s requests for a permit, and failed to provide a
11 sufficient record explaining its decision to deny ABC’s requests for a permit of short
12 duration. (*Id.* at 5.) It therefore remanded the decision back to the Chief Engineer to re-
13 issue a reasoned decision regarding ABC’s requests. (*Id.*) ABC, however, was granted
14 a five-year permit before the Board had a chance to review Mr. Wiley’s latest reasoning
15 for denying ABC’s requests for a temporary permit.

16 Because the District, during 2016 and 2017, failed to properly process ABC’s
17 requests for a permit of short duration and consistently offered either contradictory or
18 inadequate explanations for its decisions, the District was arbitrary and capricious and
19 abused its discretion in upholding fines from April 2016 onward.

20 **IV. The District is equitably estopped from seeking a fine based on its wrongful**
21 **conduct throughout ABC’s permit application process.**

22 The government may be estopped from acting when its “wrongful conduct
23 threatens to work a serious injustice and if the public interest would not be unduly
24 damaged.” *Carlson v. Ariz. Dep’t of Econ. Security*, 184 Ariz. 4, 6 (App. 1995)
25 (quoting *Tucson Elec. Power v. Ariz. Dep’t of Revenue*, 174 Ariz. 507, 513–18 (App.
26 1993) (estopping an agency based on its arbitrary refusal to perform obligations

27 ¹⁰ The Floodplain Review Board includes many of the same individuals who serve
28 on the Board of Hearing Review, but the two bodies are technically and legally distinct.

1 imposed by statute)); *see also Freightways, Inc. v. Arizona Corp. Comm'n*, 129 Ariz.
2 245, 245 (1981) (equitably estopping the agency from denying the validity of a “motor
3 vehicle certificate” where the agency knew of the defect in the filing of the application,
4 approved numerous transfers of the invalid certificate, and waited years before
5 challenging the certificate’s validity).

6 “The three elements of equitable estoppel are traditionally stated as: (1) the party
7 to be estopped commits acts inconsistent with a position it later adopts; (2) reliance by
8 the other party; and (3) injury to the latter resulting from the former’s repudiation of its
9 prior conduct.” *Valencia Energy Co. v. Ariz. Dep’t of Revenue*, 191 Ariz. 565, 576–77,
10 ¶ 35 (1998).

11 First, the District has repeatedly committed acts inconsistent with positions it
12 later adopts, including by offering ABC permits of short duration that it never actually
13 follows through with, asking ABC to submit applications that it then refuses to properly
14 process, and representing to ABC that no permit of short duration would be required
15 while the substantive review process was ongoing and then fining ABC for operating
16 without a permit.

17 ABC relied on the District’s representations that it would provide ABC with a
18 permit of short duration if it initiated the permit application process, as demonstrated by
19 ABC’s submission of an application by the District’s deadline and its continued mining
20 in the floodplain. ABC was then injured when the District failed to follow through with
21 its offer of a permit of short duration and instead initiated and secured fines against
22 ABC for operating without a permit.

23 Likewise, ABC relied on the District’s representations that ABC did not need to
24 continue pursuing a permit of short duration during the substantive review process, as
25 demonstrated by the fact that ABC did not request another permit of short duration until
26 April 2016—after it became obvious that the District had reversed course. And again
27 ABC was injured by the District’s decision to pursue and secure fines against ABC for
28 operating without the permit the District told ABC it did not need to pursue.

1 The District should therefore be estopped from seeking or imposing fines against
2 ABC for any period during or after 2015.

3 **V. The District's decision to impose fines on ABC for operating without a**
4 **permit violates ABC's equal protection and first amendment rights.**

5 Not only is the imposition of fines in this case arbitrary and capricious, an abuse
6 of discretion, and contrary to the evidence, it violates ABC's First Amendment and
7 equal protection rights.

8 **A. First Amendment Rights to Speak Freely and Seek Redress**

9 "It is clear that '[s]tate action designed to retaliate against and chill political
10 expression strikes at the heart of the First Amendment.'" *Soranno's Gasco, Inc. v.*
11 *Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989). If the exercise of constitutionally
12 protected rights was a "substantial" or "motivating" factor in the agency's decision to
13 retaliate, the burden shifts to the agency to establish that it would not have reached the
14 same decision in the absence of the protected conduct. *Id.* at 1314–15.

15 There is ample evidence that the District has pursued fines against ABC in
16 retaliation for ABC's exercise of its rights to redress and to speak freely. The decision-
17 making process in this case was unusual, to say the least. The Chief Engineer, contrary
18 to prior practice, took all decisions related to ABC to himself. When asked why, he
19 testified that it was because employees and their spouses had been attacked in court.
20 The Chief Engineer's testimony is compelling evidence that the he handled this case
21 differently because District employees were defendants in a lawsuit, or, in other words,
22 because ABC had exercised its right to seek redress in a court of law. Mr. Wiley's
23 intent is even more transparent from his Order in this case, in which he complains that
24 the District has had to spend "considerable resources in staff time and the payment of
25 legal fees" to address ABC's prior exercise of its legal rights. (Exh. 177 at 8.)

26 Furthermore, the District drafted ABC a permit of short duration in March 2015,
27 and then promptly buried it after finding, only days after the draft permit was circulated,
28 that ABC was opposing the District in front of the state legislature. The District has not

1 offered any explanation for the sudden and bizarre disappearance of the permit it
2 offered to and drafted for ABC. Rather, the memories of the District's witnesses appear
3 to have gone blank when it comes to the fact that they drafted then withheld a permit
4 that could have obviated the need for this years-long litigation. The permit disappeared
5 just after the District was notified that ABC was again opposing it in the legislature.
6 Even if ABC's lobbying efforts were not the sole reason for burying this draft permit,
7 they were without doubt a motivating factor in its decision to deny ABC the prepared
8 permit.

9 **B. Equal Protection of the Law**

10 The District's decisions to deny ABC's requests for permits of short duration are
11 without precedent, and the District has offered no reasonable or rational basis for those
12 decisions.

13 "The Equal Protection Clause of the Fourteenth Amendment commands that no
14 State shall 'deny to any person within its jurisdiction the equal protection of the laws,'
15 which is essentially a direction that all persons similarly situated should be treated
16 alike." *Lee v. City of Los Angeles*, 250 F. 3d 668, 686 (9th Cir. 2001) (quoting *City of*
17 *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)). "A successful equal
18 protection claim may be brought by a 'class of one,'" if the plaintiff can show that it
19 was "intentionally treated differently from others similarly situated and that there is no
20 rational basis for the difference in treatment." *Thornton v. City of St. Helens*, 425 F.3d
21 1158, 1167 (9th Cir. 2005) (quoting *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309
22 F.3d 662, 679 (9th Cir. 2002)).

23 The District has provided no rational basis—in fact no basis at all—for denying
24 ABC a permit of short duration during even though every other mine that had ever
25 requested a permit of short duration had received one. Even when the District began
26 offering explanations for its conduct in 2016, those explanations shed no light on the
27 District's behavior. The District claimed, for example, that ABC needed to come into
28 compliance with a prior plan of development to receive a permit of short duration, but

1 countless other mines whose permits had elapsed and who had similar compliance
2 issues—such as steep slopes and over-excavated areas—had received a permit, and
3 sometimes numerous permits, of short duration.

4 Because this action, and the fines impose through this action, was initiated in
5 whole or in part to penalize ABC for exercising its Frist Amendment rights and results
6 in irrational and inequitable treatment of ABC as compared to all other mining
7 operations in the county, the Board of Hearing Review’s decision is arbitrary and
8 capricious and contrary to law, and should be reversed in its entirety.

9 **VI. The District’s decision to impose fines for dates in the future without**
10 **hearing mitigating evidence pertinent to the reasonableness of those fines is**
11 **arbitrary and capricious and an abuse of discretion.**

12 Courts “[u]niformly . . . look[] with disfavor on ever-mounting penalties and
13 have narrowly construed the statutes which either require or permit them.” *Hale v.*
14 *Morgan*, 584 P.2d 512, 520-21 (Cal. 1978) (ruling a mandatory \$100 per day violation
15 unconstitutional under due process for lack of notice and collecting similar cases).
16 Without a fixed fine in place, ABC’s ability to appeal the propriety of that fine—to
17 challenge the alleged aggravators and assert mitigating and otherwise changed
18 circumstances—is worthless. *See Post v. City of Tacoma*, 217 P.3d 1179, 1185–86
19 (Wash. 2009) (“[T]he fundamental requirement of due process is the opportunity to be
20 heard at a meaningful time and in a meaningful manner” and “[a]lthough Post was
21 provided an opportunity to be heard on the initial findings, he had no similar
22 opportunity to bring potential errors to Tacoma’s attention with regard to any
23 subsequent findings or penalties.”).

24 This is clearly evident from the District’s position regarding post-January 2016
25 evidence. During the supplemental hearing before this Court, the District held
26 staunchly to the position that, to the extent the decision below imposed ongoing fines
27 from January 2015 to August 2017, ABC was not entitled to present any evidence
28 indicating the extent to which such fines were arbitrary or clearly excessive. If ABC
could not challenge those fines before this Court in this appeal, then where?

1 The facts of this case demonstrate the need to allow such evidence. Just after the
2 original evidentiary hearing before Hearing Officer Merkow, ABC retained Dr. David
3 Williams and his participation drastically changed the ongoing permit application
4 process with the District. Dr. Williams overhauled the engineering in ABC's
5 application, which immediately took care of nearly all the "corrections" about which the
6 District expressed concern, and the application process only went more smoothly after
7 that.

8 Meanwhile, the heart of the District's decision to pursue sanctions is the
9 allegation that ABC has not acted "diligently" or in "good faith." As discussed above,
10 this was not true for 2015, and it is patently not true from the time Dr. Williams became
11 involved and onward. Dr. Williams discussed the complexity of the mining plan and
12 confirmed that ABC acted diligently with respect to refining the mining plan to comply
13 with the District's ever-changing requirements.

14 The Court should therefore either decline to consider evidence after the date of
15 the January 4, 2016 evidentiary hearing and deny any fines after that date, or consider
16 the mitigating evidence and circumstances from post-January 4, 2016 to conclude, as
17 explained in detail below, that the ongoing fines imposed by the District were excessive,
18 arbitrary and capricious, and an abuse of discretion.

19 **VII. Even if the District could impose ongoing fines without hearing pertinent**
20 **evidence, the fines ceased when the District denied ABC's request for a**
21 **permit in April 2016.**

22 The final decision of the Board of Hearing Review states that fines will stop
23 when a permit is denied by the Chief Engineer. A permit of short duration is a
24 Floodplain Use Permit. (Exh. 335.) The Chief Engineer denied permits of short
25 duration in April and in July 2016. (Exhs. 191, 205.) Any fines imposed by the Board
26 of Hearing Review ceased in April 15, 2016, or July 7, 2016. No fines are authorized
27 beyond those denials.

1 The record for the original administrative hearing ended on the date of the
2 hearing, January 4, 2016. There was little testimony regarding ABC's ongoing
3 operations post-November 2015, and neither party submitted substantial mitigating or
4 aggravating evidence regarding that time period. While it is ABC's position, *see supra*
5 Part V, that the ongoing fines later imposed by Mr. Wiley and sustained by the
6 volunteer community members on the District's Board of Hearing Review are
7 impermissible penalties, even assuming such sanctions are permissible, any such fines
8 were not warranted between November 30, 2015 and August 2017.

9 After ABC responded to the District's initial Request for Corrections on
10 November 30, 2015, the ball was again in the District's court until it issued another
11 Request for Corrections on December 23, 2015. Nevertheless, throughout this period
12 ABC continued to work with its engineer Pedro Calza and sought out a new engineer,
13 Dr. David Williams, to prepare a more detailed response that it believed would finally
14 resolve all of the issues identified by the District.

15 Dr. Williams is a professional hydrologist who is certified in erosion and
16 sediment control. (Transcript Day 4 at 33:5-34:20.) He is well known in the area
17 throughout the country and has received numerous awards. (Exh. 405.) Dr. Williams
18 was even retained by the District in unrelated litigation and to teach in-house courses.
19 (Transcript Day 4 at 34:21-35:21.) Dr. Williams has previously worked productively
20 with the District's head engineer, Dr. Bing Zhao. (*See id.*)

21 Dr. Williams met with the District in March to ensure that he completely
22 understood all of the District's concerns, and it is undisputed in the record that he
23 worked diligently and in good faith to put together an application that he believed could
24 be approved by the District. (*Id.* at 40:6-41:12.) Any concerns the District had
25 regarding whether ABC was working in good faith to get a plan of development
26 approved and a permit issued should easily have been stayed by ABC's willingness to
27 hire such a well-known professional to do the work. But even assuming that merely
28

1 hiring Dr. Williams was not enough to calm the District's fears, the April submission
2 should surely have done so.

3 Indeed, from April 2016 through August 2017, Dr. Williams continuously met
4 and conferred with the District's engineers in his effort to design a mining plan that the
5 District would accept and approve. (*Id.* at 40:6-41:12.) Throughout that process, ABC
6 continuously requested that the District issue it a permit of short duration, and was
7 continuously ignored.


8 The ongoing fines imposed by the District during 2016 and 2017 were excessive,
9 arbitrary and capricious, and an abuse of discretion, and ABC respectfully requests that
10 the Court reverse those fines in full.

11 CONCLUSION

12 The District's arbitrary and irrational conduct toward ABC over the past two
13 years should not be condoned and should not be rewarded. ABC respectfully requests
14 that the conclude that imposing any fines on ABC for the period of January 2015 to
15 August 2017 "is contrary to law, is not supported by substantial evidence, is arbitrary
16 and capricious or is an abuse of discretion" and therefore reverse the decision of the
17 District's Board of Hearing Review.

18 OSBORN MALEDON, P.A.

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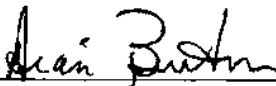
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ABC SAND AND ROCK COMPANY,
INC., an Arizona corporation,

Plaintiff,

vs.

FLOOD CONTROL DISTRICT OF
MARICOPA COUNTY, a political
subdivision,

Defendant.

No. LC2016-000324-001

Plaintiff/Appellant's Reply Brief

**(Assigned to the Hon. Kerstin
LeMaire)**

(Oral Argument Requested)

Pursuant to Rules 7 and 8 of the Rules of Procedure for Judicial Review of
Administrative Decisions ("JRAD"), Plaintiff/Appellant ABC Sand and Rock
Company, Inc., ("ABC") submits its Reply Brief.¹

¹ The Arizona Supreme Court abrogated the existing JRAD and substituted new
rules, effective January 1, 2018. *In the Matter of Rules of Procedure for Judicial
Review of Administrative Decisions*, No. R-17-0013 (Ariz. Aug. 31, 2017). This brief
follows the new rules.

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INTRODUCTION

The final decision of the Flood Control District (“District”)—the Board of Hearing Review’s Final Decision and Order (“Board” and “Decision”)—is contrary to law, not supported by substantial evidence, arbitrary and capricious, and/or an abuse of discretion and, therefore, should be reversed. A.R.S. § 12-910(E). The Decision runs counter to the evidence, fails to consider the circumstances, and is unreasonable and unjust. The record shows that, among other things, the District did not follow applicable statutes or regulations, affirmatively misled ABC, and retaliated against it.

In the alternative, the Court should remand the matter to the agency to take additional evidence, make mitigation findings, and render a new decision. *Id.* § 12-911(A)(7).

STATEMENT OF FACTS

The District’s Response Brief (“RB”) complains about ABC’s factual statement, even though it includes a 10-page statement of “controverting facts.” (RB at 2-11.) As a result, its assertion that ABC “violate[d] [JRAD] Rule 7(2)” is wrong. The current Rule 7(a)(3) abrogated Rule 7(2), and Rule 7(a)(3) requires only a statement of facts “that are relevant to the issues ... with appropriate references to the record.” ABC’s brief is consistent with the former and the new controlling Rule 7.

ARGUMENT

I. ABC Has Not Waived Its Right to Appeal.

The District argues that this Court should not hear ABC’s appeal. (RB at 13-14.) These arguments are an attempt by the District to overrule Judge Hegyi’s decision to supplement the record and, in any event, they are technical and meritless.

A. The Supplemental Record

ABC did not obtain discovery from the agency until April 2016, after it filed a civil rights action in federal court. ABC then issued discovery requests and took depositions. What ABC learned in the federal case was startling; it established intentional discrimination, disparate treatment, and retaliation by the District. But the

1 hearings before Hearing Officer Merkow and the Board had already occurred.
2 Accordingly, ABC moved to supplement the administrative record with this new
3 evidence. Subsequently, Judge Hegyi denied the District's repeated motions to dismiss
4 and granted the extended evidentiary hearing over which this Court presided.²
5 (11/3/2016 Minute Entry; 3/21/2017 Ruling; 3/22/2017 Minute Entry.)

6 The District argues that "[t]he admission of new evidence" before this Court
7 "does not expand the issues on appeal." (RB at 13 (citing *Hatch v. Arizona DOT*, 184
8 Ariz. 536, 540 (App. 1995)).) The issue, though, has always been the same: whether the
9 Decision is arbitrary, capricious, contrary to law, or supported by substantial evidence.

10 The District's reliance on *Hatch* is misplaced. *Hatch* has been long supplanted
11 by updated statutes and regulations on the scope of review of administrative decisions.
12 Section 12-910 expressly allows the Court to hold an evidentiary hearing, including
13 testimony, exhibits, and argument not offered during the administrative hearing, to
14 make a determination under § 12-910(E). A.R.S. § 12-910(A), (B) & (E). Section 12-
15 910 also expressly provides that the record on which the Court is to make the
16 determination under § 12-910(E) includes the record of the administrative proceeding
17 and the record of its evidentiary hearing. A.R.S. § 12-910(D) & (E).

18 This case is properly before this Court on a supplemental record. The Court can
19 consider the entire record in determining whether the Decision was arbitrary or
20 capricious or remand for a new hearing in light of the supplemental record.

21 **B. The District's Technical Arguments**

22 The District's other points are technical and without merit. It asserts that ABC's
23 Notice of Appeal "did not comply with" § 12-909(A) because it "did not reference any
24 specific holding or finding" in the Decision.³ (RB at 13.) This is contrary to the plain
25 language of the statute. Section 12-909(A) provides that a notice of appeal "shall

26 ² Judge Hegyi consolidated CV2016-010095 and LC2016-000324-001.
27 (9/1/2016 Minute Entry.)

28 ³ The Board rejected the same argument. (6/16/2016 Hrg. at 20:7-21; Ex. 203
Conclusions of Law ("COL") ¶ 2.)

1 contain a statement of the findings and decision *or part of* the findings and decision
2 sought to be reviewed.” A.R.S. § 12-909(A) (emphasis added). The text expressly
3 permits a party to appeal an entire administrative decision or part of one. ABC’s Notice
4 of Appeal stated that ABC was appealing the Board’s entire Decision. The issue before
5 the Court, therefore, is whether all or any part of the Board’s Decision contravenes §
6 12-910(E).

7 Next, the District contends that ABC’s “appeal is limited by law to the
8 *arguments* ABC presented in the administrative hearing before Judge Merkow.” (RB at
9 13 (citing cases) (emphasis added).) It reasons this must be the case because “[t]he
10 [Board] had no *evidence* but that submitted to Mr. Merkow.” (*Id.* at 14 (emphasis
11 added).) The District’s argument ignores Judge Hegyi’s ruling to supplement the record
12 and the three-part administrative appeal process in the agency.

13 Merkow’s decision is not final. It is reviewed by the Chief Engineer, and his
14 decision is reviewed by the Board. None of the District’s cited authority addresses an
15 administrative agency with such a tripartite decision-making apparatus and tiered
16 appeals. ABC had the right to challenge both Merkow’s recommendations *and* Wiley’s
17 changes before the Board. *E.g.*, FRMC § 707(F). Moreover, with an internal appeal,
18 the Board hears additional argument. (Resolution FCD 2016R004, Appendix A, ¶ F.)
19 In fact, the Board stated that the final hearing here included the parties’ “briefs and oral
20 argument before [it].” (Ex. 203 COL ¶ 1.) The Board here changed some of Wiley’s
21 recommendations and issued a new Decision. The District’s idiosyncratic position, if
22 accepted, would cordon off Wiley’s and the Board’s decisions from any reasonable or
23 effective challenge.

24 The District then maintains that ABC made “only one argument” to Merkow and
25 the Board as to “why it ought not to be fined.” (RB at 14.) The record contradicts this.
26 (*E.g.*, 1/4/2016 Hrg. at 9:25-15:10 & 187:15-190:24; 6/16/2016 Hrg. at 5:24-20:3 &
27 30:1-33:23.) Moreover, the District conflates ABC’s purpose with its arguments. In the
28 block quote that the District relies on, counsel for ABC informed the Board *why* ABC

1 appealed; the quote was not the full extent of ABC's contentions.⁴ (RB at 14 (quoting
2 6/16/2016 Hrg. at 6:3-15).)

3 The District also insists that ABC's appeal is "limited" to review of "the
4 [Board's] finding that no such agreement" concerning ABC's operation pending
5 permitting "was made." (RB at 14 (citing Ex. 203 FOF ¶¶ 45-46).) This ignores the
6 record. While the District cherry-picks two findings, the Board's Decision includes 50
7 findings of fact, eleven conclusions of law, and a three-page final order. (Ex. 203.)
8 Under § 12-910, the full final administrative decision is subject to review.

9 **II. As a Matter of Law, Because of Its Claim of Attorney-Client Privilege, the**
10 **District Cannot Justify Any Decision It Has Made Concerning ABC's**
11 **Permit Application Process, Undermining the Board's Decision.**

12 The District concedes that it took the position that the attorney-client privilege
13 protects all of its internal discussions and decision-making concerning ABC, but it
14 claims that this "ha[s] nothing to do with the case or the arguments on appeal." (RB at
15 16.) **It has everything to do with this matter.** The District's conduct denied both the
16 Court and ABC the opportunity to discover the actual foundation for its decisions and
17 whether it acted with an unlawful intent.

18 In his deposition, Wiley testified that the privilege shielded all District
19 discussions and decisions after January 15, 2015 (7/18/2016 Wiley Dep. at 124:10-21),
20 all District decisions not to issue a permit of short duration (*id.* at 186:17-20), and all
21 District decisions about ABC's engineering (*id.* at 206:3-208:7, 210:19-211:1 & 232:23-
22 233:12). This pattern continued in the hearing before this Court. The District invoked
23 privilege again to shield, among other things, its general treatment of and permitting
24 decisions for ABC. (*E.g.*, 8/28/2017 Hrg. at 73:6-74:6, 142:11-143:2 & 175:3-16;
25 8/29/2017 Hrg. at 97:6-98:6 & 130:3-131:20.)

26
27
28 ⁴ The Board expressly noted that ABC made numerous arguments. (Ex. 203
Findings of Fact ("FOF") ¶ 44.)

1 The District cannot use the privilege as a sword and a shield. It cannot say it
2 acted with noble intentions and then deny discovery as to its actual decision-making.
3 This pattern has created pronounced gaps in the record. Other than the letters written to
4 ABC, which were sent by or ghostwritten by District lawyers, the record is devoid of
5 any reasons or explanation for the District's decisions.

6 For example, there is no explanation—other than the District's counsel's post hoc
7 one (RB at 29-30)—why the District vanished or failed to act upon the March 10, 2015
8 short duration permit prepared by Tony Beuché, **immediately after the District was**
9 **informed that ABC was lobbying the legislature to reject a bill the District**
10 **supported.** (Exs. 363 & 364.) Given the scope of the decision-making information that
11 the District is keeping secret through privilege, it cannot rebut the reasonable inference
12 that it withdrew the permit as retaliation for lobbying against the District. By shielding
13 all decision-making, ABC did not have a full and fair opportunity to contest the
14 District's actions before Merkow or the Board. This undermines any foundation for the
15 Board's Decision, and it constitutes grounds for the Court to vacate the fines as arbitrary
16 and capricious and not supported by substantial evidence or to remand the matter.

17 **III. Under the Facts and Circumstances of this Case, The Board's Fines Are Not**
18 **Supported by Substantial Evidence, Are Arbitrary and Capricious, and/or**
19 **Constitute an Abuse of Discretion.**

20 **A. Fines for January 2015 to July 2015**

21 The Board fined ABC \$5,000 from January 28, 2015, the date of its decision on
22 remand, to July 30, 2015, a date by which it arbitrarily determined, without reference to
23 any regulation or applicable timeline, that ABC should have submitted certain technical
24 submissions. (Ex. 203 Final Order ¶ 2.) In defense of the fine, the District states that
25 the fine "could have been \$1.8 million," so "[t]he decision ... was not arbitrary or
26 capricious." (RB at 18.) Saying the fine can be arbitrarily higher is not a defense.

27 No one disputes Merkow's finding that, prior to January 2015, ABC reasonably
28 believed it had a permit to operate. Merkow did not assess any fines from January 2015

1 until July 30 due to, among other things, the District's contradictory and confusing
2 behavior during this period. (Ex. 174 at 2-4.) Even the Board recognized that the
3 District did not communicate effectively during this timeframe. (Ex. 203 FOF ¶¶ 11-25
4 & p. 9.)

5 Later, in Wiley's February 12, 2015 letter, the District agreed to "forebear any
6 enforcement action for operating without a permit" *and* to "issue a permit of short
7 duration during the application process if required," provided that ABC submit an
8 application and pay the associated fee by a certain deadline, which ABC did. (Ex. 140.)
9 Based on Wiley's letter, ABC had legitimate grounds to believe that the District would
10 not penalize it for ostensibly operating without a permit while the application process
11 was ongoing.

12 Obliquely referencing this letter, the Board states, "ABC operated under its
13 mistaken understanding of the District's offer to forbear enforcement," but it found that
14 the District's "enforcement posture" informed ABC that it could not continue to
15 operate. (Ex. 203 FOF ¶ 46; *see also id.* ¶ 48.) This is factually incorrect and
16 irreconcilable with the District's actions. Wiley offered a short duration permit! The
17 Board's Decision also fails to take into account the short duration permit that was
18 actually prepared in March 2015, which the District withheld without explanation and
19 for retribution. (Exs. 363 & 364; 8/28/2017 Hrg. at 91:9-92:1 & 92:2-96:16.)

20 Further requests from ABC for short duration permits in 2015, the District's
21 promises to issue a short duration permit, and the District's failure to process these
22 requests or even respond, are set out below in Section IV.A and B.

23 Similarly, the Decision fails to address the District's June 2015 written
24 agreement that a short duration permit was "not necessary," and that one "will not be
25 pursued" by ABC. (Ex. 154; 8/28/2017 Hrg. at 129:3-131:23 & 133:7-17.) At the June
26 15 meeting among ABC, key District employees, and top County officials, the District
27 and the County agreed that ABC was acting "diligently" and that "a temporary permit
28 [was] not necessary and [need] not be pursued." (*Id.*)

1 The District protests that “[t]he record is clear that there was no such agreement.”
2 (RB at 15 (citing Ex. 153).) In doing so, it conveniently ignores Deputy County
3 Manager Joy Rich’s email stating that Michelle De Blasi’s summary of the meeting,
4 including the reference to the agreement, was “accurate[.]” (Ex. 154; RB at 14-15;
5 8/28/2017 Hrg. at 122:2-9, 129:3-25 & 131:9-23.) The District further mischaracterizes
6 Ms. De Blasi’s deposition testimony. She stated that the parties agreed that a short
7 duration permit “wasn’t needed so that we could get through this process quickly,”
8 because it would “take staff time trying to work through a permit of short duration.”
9 (8/22/2017 De Blasi Dep. at 107:2-109:11.)

10 The issue of equitable estoppel arising from the written agreement that a
11 temporary permit is not necessary is set out below in in Section V. Nonetheless, given
12 the multiple assurances by the District that ABC could continue to operate without
13 penalty during the January through June 2015 timeframe, any fine during this period
14 should be reversed.

15 **B. Fines for July 2015 to December 2015**

16 The Board fined ABC \$73,000 from July 30, 2015 to December 23, 2015, the
17 date the District sent ABC another Request for Corrections.⁵ (Ex. 203 Final Order ¶ 2.)
18 The District tries to explain this fine by claiming that the Board, Wiley, and Merkow all
19 found that ABC “was not acting expeditiously” during this period. (RB at 20.) Therein
20 lies the problem. There is no statutory or administrative standard on how long a party
21 may or can take to respond to a request for corrections. “Acting expeditiously” is not a
22 legal standard, and it allows for an arbitrary and capricious subjective opinion of speed.

23 The Board found that ABC should have responded to the District’s June 30, 2015
24 Request for Corrections, which sought information on 37 technical matters (Ex. 155),
25 within 30 days or by July 30 (Ex. 203 FOF ¶ 47). There is no statutory or
26 administrative rule basis to impose *sua sponte* a 30-day limit retroactively, and the
27

28 ⁵ \$500 a day fines for 146 days.

1 Board did not even attempt to explain how it devised this time limitation. Indeed, its
2 Decision fails to address that the District's June 30 Request included a "Notice of
3 Permit Rights," which stated ABC had "one (1) year" from the date "of this notice" to
4 respond. (Ex. 155 at ABCSR00000664.) The District admits this. (RB at 19-21.)

5 At no time between June 30 and November 2, when the District issued a "Notice
6 of Violation," did anyone at the District provide ABC any other deadline. Moreover,
7 since the hearing before Merkow, ABC discovered that even the District itself agreed
8 that ABC could not reasonably have been expected to respond to its demands within
9 that short period. (Ex. 162 (anticipating ABC could respond to the District's first
10 Request for Corrections by October).)

11 Without any evidence or reasoning, the Board simply declared that ABC "took
12 an unreasonable amount of time to respond" and "did not timely respond to outstanding
13 deficiencies," even though it found that "the District did not provide specific response
14 dates for ABC to adhere to during the substantive review period." (*Id.*) To compound
15 its error, the Board placed the burden on ABC to show why, after the fact, it did not
16 meet this newfound thirty-day deadline. Although the Board found that the District "did
17 not provide concrete dates by which it expected responses to its statement of
18 deficiencies," it faulted ABC for "not seek[ing] to clarify such dates." (Ex. 203 FOF ¶
19 49; *see also id.* ¶ 49 (same).) This is a textbook example of arbitrary and capricious
20 agency action.

21 The Board's newly made-up "reasonable amount of time to respond" standard is
22 no standard at all. ABC did in fact work diligently to submit its application and to
23 answer the District's questions. (*E.g.*, OB at 13-14, 15, 22, 32, 33.) Sand and gravel
24 mines are technical operations in a complicated environment, and it takes significant
25 time and resources to develop a plan to operate such mines. (*See* 8/31/2017 Hrg. at
26 41:19-21 & 44:20-62:24.) There is no discussion of this in the Decision.

27 Lastly, while sanctioning ABC for its lack of diligence, the Board inexplicably
28 penalized ABC for the *District's* delay. The Board acknowledged that ABC responded

1 in full to the District's Request for Corrections by November 30, 2015 (Ex. 203 FOF ¶
2 32), but it fined ABC through December 23, during which time the District was
3 assessing ABC's application and sending yet another Request for Corrections (*id.* ¶ 33).
4 In other words, the Board fined ABC \$500 a day for 23 days, or for \$11,500, during
5 which the ball was in the District's court. This is another example of arbitrary and
6 capricious conduct.

7 **C. Fines for December 2015 to August 2017**

8 The Board fined ABC \$1,000 a day from December 23, 2015 going forward
9 "*until the District determines to issue or deny a Floodplain Use Permit*" to ABC. (Ex.
10 203 Final Order ¶ 2 (emphasis added).) Since the District issued ABC a permanent
11 permit on August 10, 2017, or 596 days later, this fine may amount up to \$596,000.
12 Although, as explained below in Section VIII, assuming the fine is lawful (which ABC
13 does not concede) it should end on April 15, 2016, when Wiley actually in writing
14 denied ABC a *floodplain use permit* of short duration after his order but before the
15 Board took up ABC's appeal (Ex. 191), or no later than July 7, 2016, six days after the
16 Board's Decision, when the District again denied ABC a *floodplain use permit* of short
17 duration (Ex. 205). The District offers no substantive justification for this part of the
18 Board's Decision. (RB at 21.)

19 ABC submitted its final application on April 8, 2016, for which the District
20 ultimately issued ABC a five-year permit on August 10, 2017—489 days later. (OB 22-
21 23; RB at 11, 21.) This fact, however, is nowhere in the Decision, because the Board
22 stopped addressing the facts as of December 2015. (*See* Ex. 203 FOF ¶¶ 33-34.)
23 Neither Wiley nor Merkow had the ability to assess whether there were any mitigating
24 circumstances for this period, and the Board did not either. The Board did not make
25 specific findings concerning the merits of ABC's April 2016 application or its conduct
26 after the December 2015, but it still fined ABC \$1,000 per day during this period.
27 Under the Board's Decision, the longer the District dragged its feet in approving ABC's
28 application, the more questions it asked, and the more information it sought, the greater

1 ABC's fine grew. Indeed, the District sent ABC back to the drawing board with respect
2 to the April 2016 application at least four times to address ever-changing requests. (*See*
3 8/31/2017 Hrg. at 41:19-21.) Denial or approval of a five-year permit was outside of
4 ABC's control; such authority rested with the District, which it refused to exercise.

5 The Board's Decision also indicates that the Flood Control District's antipathy
6 towards ABC drove this portion of its fines. The Decision adopted Wiley's final order
7 on this point (Ex. 203 Final Order ¶ 2), and Wiley's order adopted Merkow's
8 recommendations (Ex. 177 at 8-10). Wiley quoted Merkow's statement that ABC had a
9 "poor attitude" in 2015 and acted "audacious in its insubordinate responses," which
10 "justif[ied] the imposition of civil penalties." (Ex. 174 at 10; *see also* Ex. 177 at 9.)
11 Both the Board and Wiley evidently agreed with Merkow that ABC was a "bad actor,"
12 which necessitated a punitive fine. There is no statute or administrative rule that allows
13 fines for a "bad attitude" or "insubordination." Again, this is arbitrary and capricious.

14 **IV. Imposing Fines on ABC for Operating without a Permit Is Arbitrary,**
15 **Capricious, and Contrary to Law Because the District Refused to Properly**
16 **Process ABC's Applications.**

17 **A. ABC's February 2015 Permit Application**

18 The District states it had no obligation to process ABC's February 2015
19 application (Exs. 141 & 142) because it was "faulty" and included the "wrong fee."
20 (RB at 22-23).⁶ Even if it "wrongfully" rejected the application, the District states this
21 is no "excuse" for ABC to "keep operating." (*Id.*) Both arguments are wrong and
22 underscore the District's arbitrary and capricious conduct.

23 By law, the District was required to process ABC's February 2015 application,
24 but it did not. Its response simply declined to accept or process ABC's application,
25 violating multiple requirements of § 48-3645. (Ex. 143.) It rejected the application for
26 what it said was a wrong title: the District wanted a "new" plan of development, not an

27 ⁶ The District received ABC's February 2015 application (Ex. 142) in March
28 (RB at 18 n.8), so it refers to this as ABC's March application.

1 “amended” one, and required that ABC pay the correspondingly higher application fee.
2 ABC acquiesced and resubmitted the exact same plan, recast as a “new” rather than
3 “amended” application, on May 1, 2015. (Ex. 146.) The District processed the latter
4 application, even though there were no material differences between the applications.
5 (Ex. 155.) Indeed, the District admits that its different responses were based on the
6 form, not the substance, of the applications. It confesses, “When ABC ... refiled the
7 same plan with the correct application and the correct fee, the application was in fact
8 accepted.” (RB at 22; 8/28/2017 Hrg. at 79:10-81:17 & 82:3-13.)

9 There was obviously no material issue with ABC’s February 2015 application
10 that required its rejection. But the District suggests that ABC’s payment of the
11 allegedly incorrect fee alone supported the outright rejection: “The District is under no
12 requirement to accept an application without the correct payment.” (*Id.*) This ignores
13 the administrative process where the District can ask the applicant to correct and
14 supplement its application. There is no administrative rule to reject an application
15 outright. The District’s pretext here highlights its arbitrary and capricious conduct.

16 Despite all of this, the District continues, “even if the application was wrongfully
17 rejected[,] ... the [Board] cannot be said to have acted arbitrary in fining ABC.” (RB at
18 23.) This blithe remark encapsulates the District’s arbitrary, capricious, and contrary-
19 to-law conduct. The District wrongfully rejected ABC’s application. If the District had
20 processed ABC’s application, as required, and issued it the promised permit of short
21 duration, ABC would not have been “operating illegally.” The size of the fine does not
22 excuse the District’s unfounded behavior. This statement is further evidence that the
23 Board’s fine is arbitrary, capricious, and not supported by substantial evidence.

24 **B. ABC’s Requests for Permits of Short Duration**

25 A permit of short duration is generally used to bridge an applicant from the
26 expiration of a five-year permit to a new five-year permit. In the history of the District,
27 no applicant other than ABC has been denied such a permit. (*E.g.*, 8/30/2017 Hrg. at
28 172:23-173:13; 8/31/2017 Hrg. at 18:1-13.)

1 In 2015, ABC sought a permit of short duration on no less than eight occasions—
2 approximately one request for each new submittal the District requested. (Ex. 146
3 (5/1/2015 request (referencing Ex. 140), Ex. 151 (5/12/2015 renewed request), Ex. 154
4 (6/15/2015 meeting re request), Ex. 186 (4/11/2016 request), Ex. 187 (4/12/2016
5 request), Ex. 202 (7/1/2016 request); Ex. 206 (7/7/2016 request for reconsideration) &
6 Ex. 327 (8/20/2016 renewed request); 8/28/2017 Hrg. at 108:3-109:6 & 111:6-113:8.)

7 At a due process minimum, the District should have processed and granted
8 ABC's 2015 requests, which would have ended this entire proceeding. The District
9 does not dispute that it agreed, if ABC "filed an application" and paid "the fees" before
10 March 6, 2015, it would issue ABC a short duration permit. (Ex. 140, OB 23, RB 22-
11 23.) There is no dispute that ABC submitted an application and paid a fee before March
12 6. (Ex. 142 & 143 at ABCS00000286.) The District, however, asserts that "[t]he law"
13 does not require it "to *accept*" a "wrong application" with a "wrong fee." (RB at 22
14 (emphasis added).) This purposely misstates ABC's contention. Section 48-3645 is
15 clear that the District had an obligation to *process* the application. A.R.S. § 48-3645(D)
16 & (F). (See 8/28/2017 Hrg. at 76:21-77:11.) If ABC's application and fee were truly
17 off, then state law required the District to identify these specific deficiencies, not
18 summarily reject the application. *Id.* § 48-3645 (D)-(f).

19 With respect to ABC's 2015 requests, the District's rebuttal is that "ABC
20 withdrew the request [for a short duration permit] at the June 16, 2015 meeting" (RB at
21 25), but this is inaccurate and misstates what occurred. Ms. De Blasi summarized the
22 meeting in writing, and the District and County agreed with the summary. (Ex. 154.)
23 The District and County specifically agreed at the meeting that a short duration permit
24 was "not necessary," such that one "[need] not be pursued" by ABC. (*Id.*) ABC did not
25 withdraw the request; it believed that ABC and the District/County had a tacit
26 agreement that it could continue operations during the application process without being
27 penalized. To fine ABC for continuing to mine given the parties' mutual written
28 understanding is unreasonable, arbitrary, and capricious.

1 Concerning ABC's 2016 requests, the District makes two points. At first, the
2 District does not address any of ABC's requests for permits of short duration directly,
3 claiming, "All claims after [the hearing before Merkow] are irrelevant to this appeal,"
4 relying on *Hatch*. (RB at 25-27.) As explained above, though, the District's reliance on
5 *Hatch* is misplaced. It ignores the tripartite appeal process of the District. *Hatch* is
6 simply inapposite.

7 The District then argues that ABC's April 2016 request could not have been
8 processed or granted because "ABC did not file an application for a permit of short
9 duration" and "ABC did not submit a fee for a permit of short duration." (RB at 26.)
10 But, while Wiley testified that ABC did not submit an application (*e.g.*, 8/28/2017 Hrg.
11 at 118:14-20), Beuché testified that there was no application for a short duration permit!
12 (*E.g.*, 8/29/2017 Hrg. at 104:23-105:5.) The District itself explains just two pages
13 earlier in its brief: "there is no separate application for a permit of short duration to
14 process" and "[t]here is no additional fee." (*Id.* at 24.)

15 This double speak is the epitome of the District's arbitrary and capricious
16 conduct. The District constantly changes the target that ABC needed to reach in order
17 to obtain a permit. Regardless of ABC's efforts, the District was determined to prevent
18 it from operating.

19 **C. Short Duration Permit Requests Are Subject to A.R.S. § 48-3645.**

20 The District never responded or acted on ABC's requests for a permit of short
21 duration in 2015. In 2016, a year after ABC applied for a permit, the District finally
22 responded in writing. The first time, on April 15, 2016, Wiley denied a permit because
23 of his order. (Ex. 191.) The second time, on July 7—six days after the Board's
24 Decision—the County Attorney denied the permit. (Ex. 205.) The third time, on
25 October 31—almost four months later and after the Floodplain Review Board ("FRB")
26 found that the record did not disclose the reasons for these denials and required Wiley to
27 provide a written explanation for any denials (Ex. 335)—Wiley denied the permit,
28

1 reasoning “it seems unlikely that ABC would comply with the terms of any permit
2 issued” (Ex. 337 at 3).⁷

3 The District defends these three summary denials on the ground that it is “not
4 true” that § 48-3645 applies to short duration permits. (RB at 24.) This position is
5 patently contrary to law. Wiley himself testified that a short duration permit is a
6 floodplain use permit, which would make short duration permits subject to § 48-3645.
7 (8/28/2017 Hrg. at 170:24-171:1, 172:5-7 & 183:11-13.)

8 The FRB also held that short duration permits are floodplain use permits subject
9 to § 48-3645 (Ex. 335 at 9, COL ¶ 9), but the District claims—in a footnote—that this
10 conclusion is “incorrect.” (RB at 24 n.9.) The District posits, “the decision is without
11 effect,” because the District appealed it, “the matter was referred back to the FRB,” and
12 the matter “was dismissed before a final ruling as moot.” Yet the District provides no
13 legal authority that § 48-3645 does not apply, cites nothing in the record to support it,
14 and fails to explain how or why the FRB’s conclusion was allegedly vacated.

15 The County even admitted that short duration permits are floodplain use permits.
16 (Ex. 205 at 1 (“[A] permit of short duration is a floodplain use permit ...”).)

17 Even if the FRB’s conclusion or the County’s admission do not control, § 48-
18 3645 plainly encompasses short duration permits. Section 48-3645 applies to “any ...
19 regulation requiring a license,” unless excluded, and the statute only excludes licenses
20 that are either: (1) “[i]ssued within seven working days after receipt of the initial
21 application or a permit that expires within twenty-one working days after issuance” or
22 (2) “[n]ecessary for the construction or development of a residential lot ...” A.R.S. §
23 48-3645 (A) & (M). A permit of short duration is a floodplain use permit under the
24 District’s regulations. FRMC §§ 403 & 404. Further, neither statutory exclusion
25 applies. A short duration permit is not issued within seven working days, it does not
26

27 ⁷ ABC appealed the denial of permits of short duration to the FRB. The appeal
28 was dismissed as moot when the District finally granted ABC a five-year permit in
2017. The FRB never ruled on the validity of Wiley’s denials.

1 expire within twenty-one working days, and it does not concern residential lots. (*E.g.*,
2 12/1/2016 Beuché Dep. at 128:25-130:5; Ex. 205; RB at 24.)

3 The District also maintains that short duration permits cannot be subject to § 48-
4 3645 because “the time frames for a response (90 working days) would exceed the
5 period of the permits (four months).” (*Id.*) This assumes that such permits are in fact
6 limited to four months, but the District has created this limitation out of whole cloth. It
7 is not in the statute, floodplain regulations, or anywhere else. *E.g.*, FRMC §§ 205,
8 403(B)(3) & 404(B)(4). Not even Wiley testified to this. (8/28/2017 Hrg. at 53:7-13.)

9 Lastly, the District contends that it could not have issued ABC a short duration
10 permit because “every permit to operate in the floodplain must reference an approved
11 Plan of Development.” (RB at 24; *see also id.* at 25 (supporting same) (citing FRMC §§
12 403(B)(1)(e)(2) and 404(B)(2)).) This purported requirement does not comport with the
13 facts or the statutory of administrative law.

14 Factually, ABC did have an approved Plan of Development and had one for over
15 twenty years. Other sand and mine operators were allowed to get a short duration
16 permit while they sought to amend and substantially revise a prior Plan of Development.
17 Indeed, they were granted short duration permits even where their prior permit had
18 expired and they had operated some time without a permit.⁸ Once again, the District’s
19 purported rationale only underscores its arbitrary administrative action and begs the
20 question as to why ABC was treated differently than everyone else.

21 All that is needed for a short duration permit is an application. Even Wiley
22 testified that he needed only “a plan that’s *approvable*.” (8/28/2016 Tr. at 190:4-9

23 ⁸ Nothing in the administrative regulations states that the ongoing application
24 process must have started prior to the expiration of the prior permit. Additionally, the
25 regulations that the District relies on are way off base. Section 403(B)(1)(e)(2) provides
26 that an application for a Floodplain Use Permit shall include “[a] A mining plan that
27 shows the extent and depth of the area(s) to be excavated along with appropriate
28 benchmarks, elevations and phases.” Section 404(B)(2) provides that a permitted
operator “shall maintain a copy on site of the permit along with an approved Plan of
development bearing the approval of the Floodplain Administrator.” Neither supports
its position.

(emphasis added).) Sections 403(B)(3) & 404(B)(4) both provide that the Floodplain Administrator “*may* issue a permit of short duration for an applicant participation in an ongoing application process.” FRMC §§ 403(B)(3) & 404(B)(4) (emphasis added).

V. Equitable Estoppel Applies and Precludes Any Fine.

The District argues that ABC’s “estoppel argument fails to mention any error by the [Board] and, therefore, is not a valid basis for asking the Court to overturn the [Board] decision.” (RB at 29; *see also id.* at 27 (same).) The District is incorrect that equitable estoppel does not apply and does not preclude the fines.

Equitable estoppel applies to this case. Section 12-910 provides a broad scope of review of administrative actions and decisions. While judicial review in this context stems from a final administrative decision, a court “*may* affirm, reverse, modify or vacate and remand *the agency action*,” not merely the agency’s final decision. *Id.* § 12-910(E) (emphasis added). Indeed, § 12-901(E) specifically instructs courts that they “*shall affirm the agency action unless the court concludes that the agency’s action is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion.*” *Id.* (emphasis added). If the District is/was estopped from seeking fines, it follows that the Board’s Decision contravenes § 12-910(E). (*See* 8/28/2017 Hrg. at 126:24-129:2, 132:16-23 & 145:7-11 (Wiley testifying that, if the District had issued the March 2015 permit of short duration, “[ABC] would not be subject to the penalties”).

The facts cry out for the application of equitable estoppel. The District should be estopped from seeking or imposing fines against ABC for any period during or after 2015 because of its own contrary conduct that ABC relied upon. The District repeatedly committed acts inconsistent with positions it later adopted. The District offered ABC permits of short duration by letter and by representation to Ms. De Blasi that it never acted on. (*E.g.*, Exs. 140, 146 & 154.) The District demanded applications that it refused to process and represented and actually agreed that no permit of short

1 duration would be required of ABC for it to be allowed to continue operations during
2 the application process. ABC relied on the District's representations to its detriment.

3 **VI. The Imposition of Fines Violates ABC's First Amendment Rights to Speak**
4 **Freely and Seek Redress and Fourteenth Amendment Right to Equal**
5 **Protection.**

6 **A. First Amendment Rights to Speak Freely and Seek Redress**

7 In the history of the Flood Control District, ABC is the only sand and gravel
8 mine to have been denied a permit of short duration. Why? The hearing demonstrated
9 that the District retaliated against ABC for its actions to hold the Flood Control District
10 accountable.

11 The District contends that this argument "is not directed to the [Board.]" (RB at
12 29.) Again, § 12-910 provides a broad scope of review. In order to determine whether
13 a decision is contrary to law, not supported by substantial evidence, arbitrary and
14 capricious, and/or an abuse of discretion under § 12-910(E), a court may hold an
15 evidentiary hearing, including testimony, exhibits, and argument not offered during the
16 administrative hearing. A.R.S. § 12-910(A), (B) & (E); *see also* JRAD Rule 10. If the
17 court holds such an evidentiary hearing, the record developed during the hearing is to be
18 taken into account when making the determination under § 12-910(E). A.R.S. § 12-
19 910(D) & (E). Section 12-910(D) is clear, "The record in the superior court shall
20 consist of the record of the administrative proceeding, and the record of any evidentiary
21 hearing." After reviewing the administrative record *and* supplementing evidence, the
22 court "may affirm, reverse, modify or vacate and remand the agency action." *Id.* § 12-
23 910(E). Additionally, the court may "[m]odify, affirm or reverse the decision in whole
24 or in part." *Id.* § 12-911(A)(5). In the alternative, the court can remand the matter to
25 the agency to take additional evidence. *Id.* § 12-911(A)(7).

26 The District tries to spin Chief Engineer Wiley's unprecedented choice to make
27 all decisions about ABC himself as if he only "review[ed] all major decisions." (RB at
28 29.) Yet the District does not dispute that Wiley personally ran this matter inside the

1 District and that this is not standard operating procedure. (*Id.*; *see also* 8/28/2017 Hrg.
2 at 66:11-67:7 & 69:24-72:5; 8/29/2016 Hrg. at 59:16-61:3.) Wiley's conduct—unique
3 to ABC—raises a reasonable inference that the District pursued fines against ABC in
4 retaliation for ABC's exercise of its rights, which the District never rebuts. Indeed, the
5 District hides all its decision making in this case behind the attorney-client privilege.
6 The District cannot proffer any evidence that rebuts this inference.

7 The District states that the March 2015 short duration permit "was not issued"
8 and "could not have been" issued. (RB at 29-30.) This is pure conjecture and post hoc
9 speculation on the part of the District's counsel. The District does not and cannot cite
10 any portion of the record to support these assertions, explain why the permit was not
11 issued, or explain why the permit was ever prepared if it "could not have been legally
12 issued." (*See* Ex. 363.) This belated explanation should be rejected.

13 Lastly, the District maintains, "the bill [that] ABC was lobbying against was not
14 even the District's bill." (RB at 30.) This is not to say that the District was not in favor
15 of the bill. Even if it was not the District's bill, ABC's opposition was communicated to
16 the District and flagged to senior officials, including Wiley. (Ex. 364.) Thereafter, all
17 discussions of a short duration permit on the District's part stop abruptly, immediately
18 after it learned of ABC's opposition. This evidence raises a reasonable inference that
19 the District pursued fines against ABC in retaliation for ABC's exercise of its rights.

20 **B. Fourteenth Amendment Right to Equal Protection**

21 The District's answer to ABC's charge that the District violated ABC's right to
22 equal protection is non-existent. (RB at 30.) The District concedes that it treated ABC
23 unlike any other mine. (*Id.*; *see also* 8/28/2017 Hrg. at 162:3-7) Without any
24 explanation or authority, though, the District claims that ABC's plan of development
25 "was the only plan any operator had ever submitted that relied on not approved
26 hydrology." (RB at 30.)

27 The hydrology that ABC relied upon was certified by an engineer and the subject
28 of further review and report by a contractor for Maricopa County, retained to assess

1 whether the County should seek an amendment of the FEMA floodplain map.
2 Moreover, the District knew that ABC's application would contain the hydrology to
3 which it now objects, and but still offered Ms. De Blasi a short duration permit once the
4 application was refiled.

5 The District agreed with Ms. De Blasi in 2015 that the issue of hydrology would
6 be worked out in the review process for the permit, and the County and District, on this
7 hydrology, said a short duration permit was not necessary in June 2015. When the
8 contractor for Maricopa County concluded that the FEMA floodplain map could not be
9 changed because the cost of fortifying the empty mine spaces in the Agua Fria River
10 was prohibitively expensive, ABC switched hydrology. There is nothing about the
11 hydrology that explains why ABC was treated differently than every other mine.

12 **VII. The Board's Fines Stopped upon Denial of a Permit, and the Imposition of a**
13 **Future Fine without a Further Hearing is Contrary to Law, Arbitrary and**
14 **Capricious, and an Abuse of Discretion.**

15 **A. The Fines Stop Upon the Denial of a Permit.**

16 The Board fined ABC \$1,000 a day from December 23, 2015 going forward
17 "until the District determines to issue or deny a *Floodplain Use Permit*" to ABC, in its
18 July 1, 2016 Decision. (Ex. 203 Final Order ¶ 2 (emphasis added).) Of course, after
19 Wiley's order but before the Board took up ABC's appeal, Wiley denied ABC a permit
20 of short duration on April 15, 2016. (Ex. 191.) After the Board's decision, the District
21 again, denied ABC a permit of short duration on July 7. (Ex. 205.) As explained above
22 in Section IV.C, a permit of short duration is a floodplain use permit. Pursuant to the
23 plain language of the Board's Decision, the fines should end as of April 15 and, in any
24 event, must end as of July 7.

25 The District responds, "The Board was clearly referring to the application for a
26 five year permit then under review." (RB at 33.) Not so. This wholly disregards the
27 Decision's plain, written terms. At best, the District is arguing that the Decision is
28

1 ambiguous; but an ambiguous decision is itself capricious and arbitrary. It should be
2 construed against the District. At the very least, this matter should be remanded.

3 **B. Future Fines Cannot be Imposed without a Hearing.**

4 ABC argues that future fines cannot be assessed without an additional hearing as
5 a matter of due process. For example, these future fines were accruing at the same time
6 that ABC appealed the denial of a short duration permit to the FRB. The FRB issued a
7 ruling interpreting the short duration permit regulation contrary to the position taken by
8 the District, and remanded to the Chief Engineer for an explanation of why the short
9 duration permit was denied. (Ex. 335.) The FRB held that the record was insufficient
10 for it to ascertain why the Chief Engineer denied a permit.

11 This administrative proceeding was on going when the District finally granted
12 ABC a new five-year permit, and the appeal was administratively dismissed as moot.

13 Due process is dependent upon the facts and circumstances of each case. Here,
14 the District was the only entity that could stop fines by issuing a permit of short
15 duration. ABC contended that the District was wrongfully denying it a permit of short
16 duration. On these facts, the failure to provide a further hearing on fines for operating
17 without a permit, when there are on-going allegations that the District is violating the
18 law, is simply unconstitutional. It denies ABC any defense to future fines.

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **CONCLUSION**

2 The original and supplemental records provide sufficient evidence to reverse the
3 Flood Control District's Decision under § 12-910(E) or, in the alternative, to remand the
4 matter to the agency to take additional evidence, make mitigation findings, and render a
5 new decision under § 12-911(A)(7).

6 Dated this 29th day of January, 2018.

7 OSBORN MALEDON, P.A.

8
9 By 

10 Colin F. Campbell
11 Meghan H. Grabel
12 Colin M. Proksel
13 2929 North Central Avenue, 21st Floor
14 Phoenix, Arizona 85012-2793

15 Attorneys for ABC Sand & Rock Company,
16 Inc.

17 This document was filed with
18 the Clerk of the Superior Court
19 on 29th day of January 2018.

20 CONFORMED COPY hand-delivered
21 this same date to:

22 Hon. Kirsten LeMaire
23 Maricopa County Superior Court
24 East Court Building – 711
25 101 W. Jefferson
26 Phoenix, AZ 85003
27
28

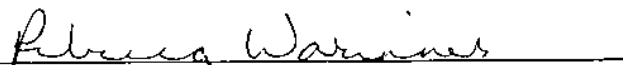
1 COPY of the foregoing emailed
2 and mailed via first class mail
3 this 29th day of January, 2018, to:

4 Stephen W. Tully
5 Randy J. Aoyama
6 Bradley L. Dunn
7 HINSHAW & CULBERTSON LLP
8 2375 East Camelback Road, Suite 750
9 Phoenix, Arizona 85016
10 stully@hinshawlaw.com
11 raoyama@hinshawlaw.com
12 bdunn@hinshawlaw.com
13 *Attorneys for Maricopa County, Flood Control District of Maricopa County,
14 William Wiley, Ed Raleigh, and Anthony Beuché*

15 Charles E. Trullinger
16 Maricopa County Attorney's Office, Civil Division
17 222 North Central Avenue, Suite 1100
18 Phoenix, Arizona 85004
19 trullinc@mcao.maricopa.gov
20 *Co-counsel for Maricopa County, Flood Control District of Maricopa County,
21 William Wiley, Ed Raleigh, and Anthony Beuché*

22 COURTESY COPY of the foregoing emailed
23 this 29th day of January, 2018, to:

24 Eric L. Hiser
25 JORDEN HISER & JOY, P.L.C.
26 5080 North 40th Street, Suite 245
27 Phoenix, Arizona 85018
28 ehiser@jhjlawyers.com
Attorneys for the District's Floodplain Review Board





RE: ABC v. FCD: Stipulation 
Stephen W. Tully to: Sean Berberian

07/20/2015 01:18 PM

Looks fine you can sign for me.

Stephen W. Tully
Partner
Hinshaw & Culbertson LLP
2375 E. Camelback Rd.
Suite 750
Phoenix, AZ 85016
Tel: 602-631-4400 | Fax: 602-631-4404
Direct 602-337-5524 | Mobile 602-820-1170
E-mail: STully@hinshawlaw.com

HINSHAW
& CULBERTSON LLP

Sean Berberian ---07/20/2015 01:07:56 PM---Steve, thanks, unfortunately, I'll be in Nogales, Arizona, so t...

From: Sean Berberian <sberberian@wbazlaw.com>
To: "STully@hinshawlaw.com" <STully@hinshawlaw.com>,
Date: 07/20/2015 01:07 PM
Subject: RE: ABC v. FCD: Stipulation

Steve, thanks, unfortunately, I'll be in Nogales, Arizona, so the weather won't be any better.

You can let your client know that we are working on the response to the District's comments. Attached are the draft stipulation and proposed order. I made the extension for exactly one month, which puts the date at August 24. Let me know if this is ok to sign.

Thanks,

Sean

Sean B. Berberian
White Berberian PLC
60 East Rio Salado Parkway, Suite 900
Tempe, AZ 85281

(480) 626-8713 direct

(480) 366-3933 general

(480) 718-8368 fax

www.wbazlaw.com

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FCD060562
APP164

contents to others.

From: STully@hinshawlaw.com [mailto:STully@hinshawlaw.com]
Sent: Monday, July 20, 2015 9:14 AM
To: Sean Berberian <sberberian@wbazlaw.com>
Subject: RE: ABC v. FCD: Stipulation

Sean,

Good luck with your hearings. I hope it is cool where you are going. The District will stipulate to extending the deadline to file the opening brief for another month until August 21, 2015. It is agreeable to extending the time with the expectation that it will be receiving in the next few weeks a response addressing the District's comments to ABC's plan. ABC should not expect that a subsequent extension will be granted unless it has a permit. ABC needs to recognize that it is currently operating without a permit and penalties for doing so are not being waived. Let me know if you want to discuss or just shoot me the stipulation. Thanks

Steve

Stephen W. Tully
Partner
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2375 E. Camelback Rd.
Suite 750
Phoenix, AZ 85016
Tel: 602-631-4400 | Fax: 602-631-4404
Direct 602-337-5524 | Mobile 602-820-1170
E-mail: STully@hinshawlaw.com

HINSHAW
& CULBERTSON LLP

From: Sean Berberian <sberberian@wbazlaw.com>
To: "STully@hinshawlaw.com" <STully@hinshawlaw.com>,
Date: 07/20/2015 08:50 AM
Subject: RE: ABC v. FCD: Stipulation

Steve,

Please let me know about the extension. I am going out of town tomorrow for hearings the rest of the week, so I'd like to get this done today, if at all possible.

Thanks,

Sean

Sean B. Berberian
White Berberian PLC
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Tempe, AZ 85281

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From: STully@hinshawlaw.com [mailto:STully@hinshawlaw.com]
Sent: Wednesday, July 15, 2015 6:47 PM
To: Sean Berberian <sberberian@wbzlaw.com>
Subject: RE: ABC v. FCD: Stipulation

I'll check with the client and let you know.

Stephen W. Tully
Partner
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2375 E. Camelback Rd.
Suite 750
Phoenix, AZ 85016
Tel: 602-631-4400 | Fax: 602-631-4404
Direct 602-337-5524 | Mobile 602-820-1170
E-mail: STully@hinshawlaw.com

HINSHAW
& CULBERTSON LLP

From: Sean Berberian <sberberian@wbzlaw.com>
To: "STully@hinshawlaw.com" <STully@hinshawlaw.com>.

Date: 07/15/2015 04:28 PM
Subject: RE: ABC v. FCD: Stipulation

Steve, as the discussions between ABC and the FCD/County have continued, it makes sense to extend out the appeal briefing schedule. Please let me know if you agree to another extension, possibly an indefinite one while the discussions continue. The current deadline is July 24.

Thanks,

Sean

Sean B. Berberian
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From: Sean Berberian
Sent: Friday, May 15, 2015 2:31 PM
To: STully@hinshawlaw.com
Subject: Stipulation

Steve,

Per our conversation, to address staying the permit appeal, I have drafted a stipulation for an extension of time for ABC's Opening Brief. The draft has a 60 day extension. We could also do an indefinite period of time. Let me know your thoughts.

Thanks,

Sean

Sean B. Berberian
White Berberian PLC
60 East Rio Salado Parkway, Suite 900
Tempe, AZ 85281

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RE: ABC v. FCD: Permit Appeal Extension

Stephen W. Tully to: Sean Berberian

08/24/2015 12:07 PM

Sean,

The Flood Control District is only willing to stipulate to the additional 30 days. If ABC gets something on file within the next three weeks as promised it will consider stipulating to a further extension.

Steve

Stephen W. Tully

Partner

Hinshaw & Culbertson LLP

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HINSHAW

& CULBERTSON LLP

Sean Berberian ---08/24/2015 10:28:02 AM---Steve, I didn't hear back from you, so I took the liberty of dra...

From: Sean Berberian <sberberian@wbazlaw.com>
To: "STully@hinshawlaw.com" <STully@hinshawlaw.com>,
Date: 08/24/2015 10:28 AM
Subject: RE: ABC v. FCD: Permit Appeal Extension

Steve,

I didn't hear back from you, so I took the liberty of drafting the stipulation and proposed order. See attached. We need to have the stip filed today. Please let me know if you are good proceeding this way and if I can sign on your behalf.

Thanks,

Sean

From: Sean Berberian

Sent: Friday, August 21, 2015 3:19 PM

To: STully@hinshawlaw.com

Subject: RE: ABC v. FCD: Permit Appeal Extension

Thanks, Steve. I've been told that it will take Pedro, ABC's engineer, at least 3 weeks to draft the new plan. After we submit that plan to the County, I'm sure there will be at least some minor issues to work

through. So 30 days will not be enough time, even under the best case scenario, and we will be back here again discussing another stipulation. My suggestion is that we stipulate to an indefinite extension of time to give the sides enough time to get the terms finalized. If a deal is not reached, the County is always protected because it can assert a fine for the time that passes, as it has stated in the past. Our goal is to get a deal done here. I think this makes sense to do that. Let me know if you agree to proceed this way.

Thanks,

Sean

Sean B. Berberian
White Berberian PLC
60 East Rio Salado Parkway, Suite 900
Tempe, AZ 85281

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(480) 366-3933 general

(480) 718-8368 fax

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From: STully@hinshawlaw.com [<mailto:STully@hinshawlaw.com>]
Sent: Friday, August 21, 2015 2:02 PM
To: Sean Berberian <sberberian@wbzlaw.com>
Subject: Re: ABC v. FCD: Permit Appeal Extension

Sean,

You are correct. I followed up with the County. The County will stipulate to an extension of Sept 25. Please shoot a draft over for our approval.

Steve

Stephen W. Tully
Partner
Hinshaw & Culbertson LLP
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Suite 750

Phoenix, AZ 85016
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HINSHAW

& CURRIE FOSTER LLP

From: Sean Berberian <sberberian@wbazlaw.com>
To: "STully@hinshawlaw.com" <STully@hinshawlaw.com>
Date: 08/21/2015 01:49 PM
Subject: ABC v. FCD: Permit Appeal Extension

Steve,

I tried to reach you earlier today. I understand that the County is agreeable to extend out the permit appeal briefing deadline to allow ABC time to prepare a new plan and for the parties to continue to negotiate. Please give me a call and I can circulate the draft stipulation.

Thanks,

Sean

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Tempe, AZ 85281

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Flood Control District of Maricopa County

www.fcd.maricopa.gov

William D. Wiley, P.E.
Chief Engineer and
General Manager
2801 West Durango Street
Phoenix, Arizona 85009
Phone: 602-506-1501
Fax: 602-506-4601

November 2, 2015

REC'D OSBORN MALEDON RA

NOV 04 2015

Mr. David Waltemath
President/CEO
A.B.C. Sand & Rock Company, Incorporated
1804 North 27th Avenue
Phoenix, Arizona 85009

Subject: NOTICE OF FLOOD CONTROL DISTRICT OF MARICOPA
COUNTY HEARING

RE: NOTICE OF VIOLATION – CEASE AND DESIST HEARING
Unpermitted Activity in Floodway and Floodplain
Assessor's Parcel # 501-63-004 and State Trust Land
Floodplain Inquiry No: FI 2015-041

Dear Mr. Waltemath:

This will hereby serve as notice that:

A Hearing on the above-listed violation has been granted and a date set of Tuesday, December 1, 2015 from 9:00 A.M. to 4:00 P.M. and continuing as necessary Wednesday, December 2, 2015 from 9:00 A.M. to 4:00 P.M. The Hearing will be held at the Flood Control District of Maricopa County, 2801 W. Durango St., Phoenix, AZ 85009.

The Hearing will be for the purpose of determining whether a violation of the Floodplain Statutes (A.R.S. 48-3601 et seq.) and the Floodplain Regulations for Maricopa County has occurred. The Hearing shall advance in accordance with the procedures established in Article Seven, Enforcement, of the Floodplain Regulations for Maricopa County.

Pursuant to regulation, the Hearing shall be open to the public. The proceedings shall be audio recorded. A record of the proceedings may be made by a court reporter at your expense if you so request. You and the District representative must appear before the Hearing Officer on the date, time and place designated for adjudication of the alleged violation. You may be represented by an attorney or other designated representative. The District will be represented by the county attorney. If you desire to be represented by counsel or a designated representative at the Hearing you must provide written notice

ABCSR00000871

APP174

Mr. David Waltemath
Page 2
November 2, 2015

of such representation to the Hearing Officer and opposing party a minimum of 24 hours before the scheduled date and time of the Hearing. Representation by counsel may not be permitted at the Hearing unless proof of notification is produced at the Hearing.

Sincerely,



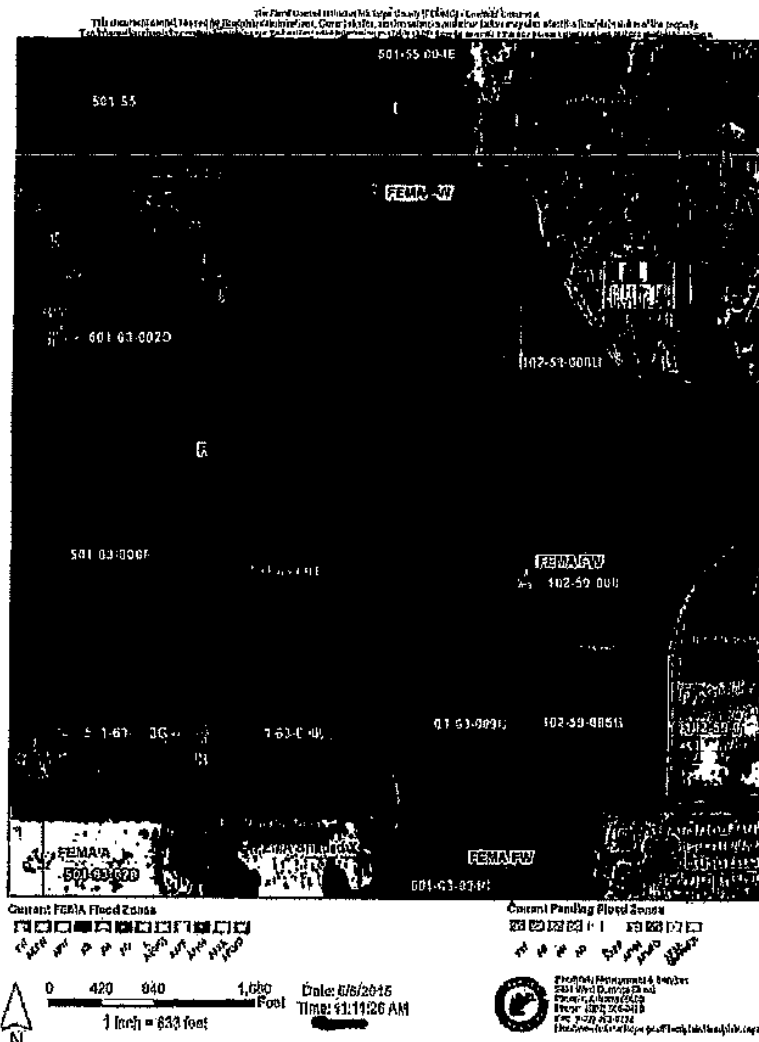
William D. Wiley, P.E.
Chief Engineer and General Manager

cc: Lisa A. Atkins, State Land Commissioner
Arizona State Land Department
1616 W. Adams Street, Phoenix, AZ 85007

Steve White, Statutory Agent
Rare Earth, LLC
1075 W. Todd Drive, Tempe, AZ 85283

Glenn R. Dietrich, CPA, Statutory Agent
A.B.C. Sand & Rock Company, Incorporated
Creed Dietrich & Robinson PLLC
1345 E. Chandler Blvd., #117, Phoenix, AZ 85048

Meghan H. Grabel
Osborn Maledon
2929 North Central Ave.
21st Floor
Phoenix, AZ 85012





Flood Control District of Maricopa County

REC'D OSBORN MALEDON RA

NOV 04 2015

LETTER OF TRANSMITTAL

TO: Meghan H. Grabel
Osborn Maledon
2929 North Central Avenue
21st Floor
Phoenix, AZ 85012

11/02/2015

SUBJECT: Notice of Hearing
Notice of Violation – Cease and Desist
Floodplain Inquiry No. FI 2015-041

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Remarks:

SIGNED:

Tony Beuché, P.E. Manager, Floodplain Use Permits for Sand and Gravel



Floodplain Regulations

for Maricopa County

Published by:
Flood Control District of Maricopa County
2801 West Durango Street, Phoenix, Arizona 85009, 602-506-1501

FCDMC 2011 Revision

ABCSR00000081

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REVISIONS

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ARTICLE ONE

GENERAL PROVISIONS

Section 101. Findings of Fact

It is the finding of the Board of Directors of the Flood Control District of Maricopa County that:

- A.** The flood hazard areas of Maricopa County are subject to periodic inundation that may result in loss of life and property, health and safety hazards, disruption of commerce and governmental services, extraordinary public expenditures for flood protection and relief, and impairment of the tax base, all of which adversely affect the public health, safety, and general welfare.
- B.** These flood losses are caused in part by the cumulative effect of obstructions in Special Flood Hazard Areas that increase flood heights and velocities, and when inadequately anchored, cause damage. Uses that are inadequately floodproofed, not elevated or otherwise protected from flood damage also contribute to the flood loss.
- C.** Development within a watercourse or areas designated as Special Flood Hazard Areas or areas with contributing watersheds that have flows greater than 50 cubic feet per second (cfs) during a 100-year flood event, require permitting through judicious floodplain management pursuant to the authority granted in A.R.S. §48-3609(B), so as to not cause obstruction, retardation, or diversion of flows within the area of jurisdiction.

Section 102. Statutory Authority

Arizona Revised Statutes Sections 48-3601 through 48-3650 direct each county Flood Control District Board of Directors to adopt and enforce floodplain regulations consistent with criteria adopted by the Director of Arizona Department of Water Resources. The floodplain regulations adopted by a district are intended to carry out the requirements of the national flood insurance program and any term not otherwise defined in this chapter shall have the meaning set forth in 44 Code of Federal Regulations parts 59 through 78, as effective on January 1, 2005.

A Floodplain Regulation for Maricopa County has been in force since February 25, 1974. Therefore, the Board of Directors of the Flood Control District of Maricopa County, Arizona adopts these Regulations, amending the December 20, 2006 adopted version, continuing the statutory authority vested in the District to regulate development through its Floodplain Administrator.

In accordance with A.R.S. Sections 48-3642 and 48-3644 the District shall publish, or prominently place on the website the ordinances, regulations and substantive policy statements, including a directory of documents, at the office of the District or District website as provided in A.R.S. §48-3647, and documentation of authorization by statute, rule, regulation, ordinance, executive order or delegation agreement.

Section 103. Statement of Purpose

It is the purpose of these Regulations to comply with the directive of A.R.S. §48-3609 and 44 C.F.R. Ch.1, et seq. (pertaining to the National Flood Insurance Program) to promote and protect the health, peace, safety, comfort, convenience, and general welfare of the residents within the jurisdictional area of Maricopa County, Arizona; to minimize public and private losses due to flood conditions in specific areas; and to enable Maricopa County and its residents to participate in the National Flood Insurance Program (NFIP), receive Federal Disaster Assistance, obtain flood insurance and reduce the cost of flood insurance.

It is the intent of the Flood Control District Board of Directors to:

1. Protect the life, health, and property of county residents;
2. Minimize expenditure of public money for costly flood control projects;
3. Minimize the need for rescue and relief efforts associated with flooding and generally undertaken at the expense of the general public;
4. Minimize prolonged business interruptions;
5. Minimize damage to public facilities and utilities such as water and gas mains, electric, telephone, fiber optics and sewer lines, streets and bridges located in Special Flood Hazard Areas;
6. Help maintain a stable tax base by regulating development of Special Flood Hazard Areas so as to minimize future flood blight areas;
7. Take all reasonable action so that potential buyers have notice that property is in a Special Flood Hazard Area;
8. Take reasonable action so that those who occupy the Special Flood Hazard Areas assume responsibility for their actions;
9. Minimize flood damages and reduce the height and violence of floods that are caused by obstructions restricting the capacity of floodways;
10. Prevent unwise encroachment, building and development within Special Flood Hazard Areas;
11. Reduce the financial burden imposed on the community, its governmental units and its residents when such land is flooded;
12. Protect the natural and beneficial function of the floodplains; and
13. Maintain eligibility for disaster relief.

Section 104. Title

These Regulations, adopted by Resolution FCD 2011R005, shall be known and cited as the Floodplain Regulations for Maricopa County and are hereinafter referred to as "Regulations."

Section 105. Applicability

These Regulations shall apply to all Special Flood Hazard Areas within the boundaries of Maricopa County except those incorporated cities and towns which have adopted a resolution in accordance with A.R.S. §48-3610. Land areas that are at high risk for flooding are called Special Flood Hazard Areas (SFHAs), or floodplains. These areas are indicated on Flood Insurance Rate Maps (FIRMs). Such areas include all lands located within delineated floodplains and watercourses; areas designated as Special Flood Hazard Areas; and areas with contributing watersheds that have flows greater than 50 cubic feet per second (cfs) during a 100-year flood event that are within the area of jurisdiction of the Flood Control District of Maricopa County.

Section 106. Rules

When not inconsistent with the context, words used in the present tense include the future tense, words in the singular include the plural; words in the plural include the singular. Words or phrases not specifically defined in these Regulations shall be interpreted so as to give them the meaning they have in common usage. The word “shall” is mandatory and the word “may” is permissive. No provision of these Regulations shall be construed to require written authorization for those exceptions set forth in A.R.S. §48-3613(B) nor shall the Board of Directors prohibit said exceptions; however, those exceptions must comply with A.R.S. §48-3613(C), which states, “Before any construction authorized by A.R.S. §48-3613(B) may begin, the person must submit plans for the construction to the Board for review and comment.”

Section 107. Construction and Interpretation

Nothing contained in these Regulations shall be construed to limit or repeal any powers granted to the Flood Control District of Maricopa County under state statute. These Regulations are not intended to repeal, abrogate, or impair any existing applicable requirements under federal, state, city, county, or other special district code, regulation, statute, or ordinance.

Section 108. Warning and Disclaimer of Liability

The degree of flood protection required by these Regulations is considered reasonable for regulatory purposes under 44 C.F.R. Ch. 1, et seq. and is based on scientific and engineering considerations. Compliance with these Regulations does not insure complete protection from flooding and is not to be construed as a warranty. Larger floods can and will occur on rare occasions. Flood height may be increased by man-made or natural causes, such as bridge openings restricted by debris, natural erosion, streambed meander, or man-made obstructions and diversions.

These Regulations are not intended to imply that land outside Special Flood Hazard Areas or uses permitted within such areas will be free from flooding or flood damage. These Regulations shall not create liability on the part of the Flood Control District of Maricopa County, and any officer or employee thereof, Maricopa County and any officer or employee thereof, the State of Arizona, or the Federal Emergency Management Agency for any flood damages that may result from reliance on these Regulations or any administrative decision lawfully made hereunder.

Section 109. Severability

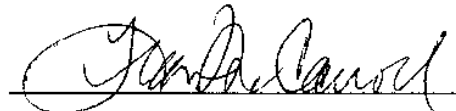
These Regulations and the various parts thereof are hereby declared to be severable. Should any section of these Regulations be declared by the courts to be unconstitutional or invalid, such decision shall not affect the validity of these Regulations as a whole, or any portion thereof, other than the section so declared to be unconstitutional or invalid.

Section 110. Effective Date

These Regulations as amended are adopted by the Board of Directors of the Flood Control District of Maricopa County, Arizona, this 30th day of Nov. 20 11



Chairman, Board of Directors



JAN 03 2012

Clerk of the Board

Date

ARTICLE TWO ADMINISTRATION

Section 201. Floodplain Administrator

A. Designation of the Floodplain Administrator

The Floodplain Administrator as designated by the Board of Directors shall be the Chief Engineer and General Manager of the District who shall administer and enforce these Regulations. The Floodplain Administrator may delegate signature authority to District staff for permitting purposes.

B. Duties and Responsibilities of the Floodplain Administrator

Duties of the Floodplain Administrator shall include, but not be limited to:

1. Permit Review

Review all development permits to determine that:

- a. The permit requirements of these Regulations, applicable statutes, and federal codes have been satisfied;
- b. Applicants have certified that all other required state and federal permits have been obtained [44 C.F.R. Ch. 50, 60.2(a)(1) and (2)];
- c. Structures are reasonably safe from flooding from the one percent (1%) chance flood event;
- d. The proposed development does not adversely affect the carrying capacity of areas where base flood elevations have been determined, but a floodway has not been designated. For purposes of these Regulations, "adversely affect" means that the cumulative effect of the proposed development, when combined with all other existing and anticipated development, will not increase the water surface elevation of the base flood more than one foot at any point [44 C.F.R. Ch. 1, 60.3(c)(10)].

2. Substantial Improvement and Substantial Damage Procedures

- a. Develop detailed procedures for identifying and administering requirements for substantial improvement and substantial damage, to include defining "Market Value."
- b. Assure procedures are coordinated with other departments and divisions and implemented by District staff.

3. Use of Other Base Flood Data

When base flood elevation data has not been provided in accordance with Section 303, the Floodplain Administrator shall obtain, review, and reasonably utilize any base flood elevation data available from a federal, state or other source, in order to administer Article Six – Development Standards. Any such information shall be consistent with the requirements of the Federal Emergency Management Agency and the Director of the Arizona Department of Water Resources.

4. Obtain and Maintain for Public Inspection

- a. The certified regulatory flood elevation required in Section 601;
- b. The floodproofing certification required in Sections 405 and 601(G);
- c. The flood vent certification required in Section 601;
- d. The elevation certification required for additional development standards, including subdivisions, in Section 601;
- e. The floodway encroachment certification required in Section 405;
- f. Records of all variance actions, including justification for their issuance, and report such variances issued as required by the State or the Federal Emergency Management Agency;
- g. Improvement calculations;
- h. Any other documents required by statutes which shall be open to public inspection at the office of the District or the District website.

5. Notification to Other Entities

- a. Whenever a watercourse is to be altered or relocated:
 - 1) Notify adjacent communities and the Arizona Department of Water Resources prior to such alteration or relocation of a watercourse, after assuring that the flood carrying capacity of the altered or relocated portion of said watercourse be maintained, and
 - 2) Submit evidence of such notification to the Federal Emergency Management Agency through appropriate notification means.
- b. Base flood elevation and rate of flow due to physical alterations:
 - 1) Base flood elevations may increase or decrease resulting from physical changes affecting flooding conditions. As soon as practicable, but not later than six months after the date such information becomes available, the Floodplain Administrator shall notify the Federal Emergency Management Agency of the changes by submitting technical or scientific data in accordance with Volume 44 Code of Federal Regulations Section 65.3. Such a submission is necessary so that upon confirmation of those physical changes affecting flooding conditions, risk premium rates and floodplain management requirements will be based upon current data.
 - 2) Within one hundred twenty (120) days after completion of construction of any flood control protective works which changes the rate of flow during the flood or the configuration of the floodplain upstream or downstream from or adjacent to the project, the person or agency responsible for installation of the project shall provide to the governing bodies of all jurisdictions affected by the project a new delineation of all floodplains affected by the project. The new delineation shall be done according to the criteria adopted by the Director of the Arizona Department of Water Resources.

c. Corporate Boundary Changes:

Notify the Federal Emergency Management Agency and the Arizona Department of Water Resources of acquisition by means of annexation, incorporation or otherwise, of additional areas of jurisdiction.

6. Map Determinations

Make interpretations, where needed, as to the exact location of the boundaries of the Special Flood Hazard Areas (e.g., where there appears to be a conflict between a mapped boundary and actual field conditions). The person contesting the location of the boundary shall be given a reasonable opportunity to appeal the interpretation as provided in Article Four.

7. Remedial Actions

Take actions on violations of this ordinance as required in Article Seven.

Section 202. Duties of Communities Dependent on the District

Communities in Maricopa County that have elected not to assume floodplain management responsibility as authorized in A.R.S. §48-3610 shall appoint a Community Floodplain Administrator who will be responsible for 1) coordinating with District staff in providing floodplain management responsibility, and 2) verifying that the Community's participation in the National Flood Insurance Program is maintained and remains in good standing through adoption and enforcement of these Regulations.

The Community's Floodplain Administrator shall also be responsible for the following:

1. Keeping and maintaining the most current Flood Insurance Studies and Flood Insurance Map(s) covering their community;
2. Keeping and maintaining at least three (3) copies of the most current Floodplain Development Regulations at the office of the city or town clerk;
3. Keeping and maintaining elevation certificates (or acceptable records of lowest floor elevations) for all structures within the floodplain. Such records shall be retrievable and maintained by the Community in perpetuity; and,
4. Repealing or modifying all existing local ordinances that conflict with these Regulations.

See Appendix B for the communities for which the Flood Control District performs Floodplain Management.

Section 203. Applicable Boards, Agencies, and Hearing Officer

- A. Board of Directors (Board)** – The Board of Directors of the Flood Control District of Maricopa County. The County Board of Supervisors shall serve as the Board of Directors. The Board shall exercise all powers and duties in carrying out its regulatory functions as authorized by A.R.S. §48-3603. The Board, by Resolution FCD 84-7, appoints the Chief Engineer and General Manager of the Flood Control District as the Floodplain Administrator.

The Board of Directors shall adopt rules of procedure consistent with the provisions of these Regulations and applicable statutes for the conduct of Floodplain Review Board business including establishment of a fee schedule to cover administrative costs incurred in the processing of Appeals, Floodplain Use Permits, Floodplain Variances, and plan reviews.

- B. Flood Control District of Maricopa County (District) –** The Flood Control District of Maricopa County was officially organized on August 3, 1959 pursuant to A.R.S. §48-3602 (current). The District performs floodplain management for unincorporated county and the communities as noted in Appendix B.
- C. Flood Control Advisory Board –** A Board of seven members appointed by the Board of Directors. Five members shall be resident taxpayers and qualified electors of the District, at least three of whom shall be residents of the cities in the District. At least one of the Board members who are residents of cities shall be a resident of the largest city in the District.

The city engineer of the largest city in the District and the chief engineer or manager of a major irrigation or agricultural improvement district, or their representatives, shall be ex officio members of the Advisory Board with all rights and privileges granted to other Board members.

- D. Floodplain Review Board (Board of Review) –** Established by the Board of Supervisors pursuant to the authority granted in A.R.S. §48-3612. The Flood Control Advisory Board is appointed by the Board of Directors as the Floodplain Review Board to sit in review and make decisions in accordance with A.R.S. §48-3612. The members of the Floodplain Review Board shall serve without compensation except that their reasonable and necessary expenses incurred on Board business may be reimbursed.

Duties:

- 1.** The Floodplain Review Board shall elect a chairperson and a vice chairperson from among its own members who shall have power to administer oaths and to take evidence.
- 2.** The Floodplain Review Board shall by resolution fix the time and place of its meetings. The meetings shall be open to the public. Minutes of its proceedings and records of its interpretations, appeals, Variances, and other official actions shall be kept and filed in the office of the Flood Control District as a public record.
- 3.** The Floodplain Review Board may prescribe, in connection with the grant of any Variance or appealed use permit, conditions determined necessary to carry out the provisions of these Regulations, state statutes, and any relevant federal codes, regulations, and any court interpretations thereof.

If the Floodplain Review Board has cause to believe, after approval of a Variance, that any stipulations or conditions may have been violated, it may set a hearing for the purpose of determining possible revocation of the Variance for such violation. The Floodplain Review Board may revoke the Variance for finding a violation of the stipulations or conditions, or it may grant a limited time within which to correct the violation in order to avoid revocation of the Variance.

- E. Board of Hearing Review** (see A.R.S. §48-3615.01(G)(1) and §48-3615.02) – The Board of Directors shall establish a Board of Hearing Review to review decisions of hearing officers that are issued pursuant to section 48-3615.01. The board of hearing review shall consist of one member from each board of directors' district or the board of directors may authorize the citizens' flood control advisory board or the board of review to designate a like number of its members to serve as the board of hearing review.
- F. Arizona Department of Water Resources (ADWR)** – The State agency that coordinates with participating NFIP communities to ensure compliance with Federal and State floodplain management regulations. The Floodplain Management Program is housed at ADWR and is responsible for assisting communities that participate in the NFIP, administers the Community Assistance Program, the Risk MAP (Mapping Assessment and Planning), sets State Standards for floodplain management, and works with local, state and federal entities during times of flood emergencies.
- G. Federal Emergency Management Agency (FEMA)** – The federal agency within the Department of Homeland Security that is tasked with responding to, planning for, recovering from, and mitigating against man-made and natural disasters. FEMA oversees the administration of the National Flood Insurance Program and the designation of areas as flood prone. FEMA oversees the development and publishing of Flood Insurance Rate Maps and Flood Insurance Studies.
- H. Hearing Officer** – The Hearing Officer shall be appointed by the Board of Directors and may be an employee of the District. The individual appointed by the Board shall hear and decide all civil proceedings established in these Regulations. Decisions of the Hearing Officer or by the Board of Hearing Review shall be available to any party to the hearing.

Section 204. Coordination

The Board and the Floodplain Administrator shall coordinate the provisions of these Regulations with all other interested and affected political subdivisions, federal and state agencies, as required by A.R.S. §48-3609 and §48-3610.

Section 205. Definitions

In these Regulations, unless the context requires otherwise, the following words shall be used as set forth in this Section:

Accessory Structure: A structure which is on the same parcel of property as a principal structure and the use of which is incidental to the use of the principal structure. Examples include: detached garage, storage shed, gazebos, open shade structures, picnic pavilions, boat houses, small pole barns, and similar buildings.

Accessory Structure, low-cost and small: A structure that is less than 120 square feet in size, non-inhabitable, used solely for the parking of no more than two (2) passenger cars or limited storage.

Accessory Use: A use that is incidental and subordinate to the principal use of the parcel of land on which it is located.

Active Alluvial Fan Flooding: A type of flood hazard that occurs only on alluvial fans, characterized by flow path uncertainty so great that this uncertainty cannot be set-aside in realistic assessments of flood risk or in the reliable mitigation of the hazard. An active alluvial fan flooding hazard is indicated by three related criteria: A) Flow path uncertainty below the hydrographic apex; B) Abrupt deposition and ensuing erosion of sediment as a stream or debris flow loses its competence to carry material eroded from a steeper, upstream source area; and C) An environment where the combination of sediment availability, slope, and topography creates a hazardous condition for which elevation on fill will not reliably mitigate the risk.

Administrative Floodway: The Special Flood Hazard Area designated on either the Flood Insurance Rate Maps (FIRM) or flood management maps as areas that are subject to local regulation requirements. These areas may include Active Alluvial Fan Flooding, Alluvial Fan High Hazard Area Flooding, Inactive Alluvial Fan Flooding, and conveyance corridors. These areas are designated as the corridors that must be reserved to maintain the continuity of flow and sediment for the one percent (1%) annual flood event without causing cumulative adverse impact to adjacent properties.

Adverse Impact: Flood hazards resulting from development which diverts, retards, or obstructs the flow of water in any watercourse, threatens public health, safety, or the general welfare pursuant to A.R.S. §48-3609(B)1; fails to protect the site from flood related erosion; and aggravate the existing flood related erosion hazards (C.F.R. Title 44 Part 60 Subpart A Section 60.5); and include the following:

- Any development that may create a loss of life, limb and well-being to any person,
- Any development that may cause a structure to fail, and/or not be able to be used for its intended use including loss of access for maintenance and/or repair,
- Any development that may cause erosion or aggravate existing flood-related erosion on adjacent or nearby property, or
- Until a regulatory floodway is designated, any cumulative effect of the proposed development, when combined with all other development, will not increase the water surface elevation of the base flood more than one (1) foot at any point as stated in 44 C.F.R. Ch. 1, 60.3 (c)(10); or
- Any development that may cause a rise in the Base Flood Elevation by more than one (1) foot.

Aggradation: The deposition of sediment in a watercourse or floodplain.

Alluvial Fan: A sedimentary deposit located at a topographic break such as the base of a mountain front, escarpment, or valley side, that is composed of streamflow and/or debris flow sediments and has the shape of a fan, either fully or partially extended.

Alluvial Fan Flooding: Flooding occurring on the surface of an alluvial fan that originates at the apex and is characterized by high velocity flows, active processes of erosion, sediment transport and deposition, and unpredictable flow paths.

Alluvial Fan High Hazard Area (AFHH): An area of alluvial fan flooding that is reserved to convey and receive sediment and floodwater without altering and thereby increasing the distribution of hazard across the fan to inactive areas and to areas downslope.

Alluvial Fan Uncertain Flow Distribution Area (AFUFD): A transitional area for sheet flooding and channelized flow located below the AFHFI area generally becoming more stable and less uncertain with distance from the AFHFI area.

Alluvial Fan Zone A (AFZA): An area of alluvial fan flooding characterized by flooding along stable flow paths and sheet flow or sheet flooding. These stable flow paths may still be subject to erosion hazards, channel bed and bank scour, and deposition.

Approximate Alluvial Fan Floodways (AAFF): Major conveyance corridors defined within AFUFD and AFZA areas for unimpeded through flow of floodwater and sediment.

Anticipated Development: Development which might occur consistent with permits, plans, ordinances, zoning, resolutions, or other actions taken by government entities.

Approximate Study: A graphic illustration of a delineation of the floodplain by the Floodplain Administrator made from the most reliable sources available where neither a floodplain nor a floodway has been determined by detailed methodology.

Apex: A point on an alluvial fan below which the flow of the major stream that formed the fan becomes unpredictable and alluvial fan flooding may occur.

Appeal: A request for a review of the Floodplain Administrator's interpretation of any provision of these Regulations; including denial of a permit, results of an inspection, or final decision and order of the Chief Engineer; or any determination made under these Regulations.

Area Drainage Master Study (ADMS): A study to develop hydrology for a watershed, to define watercourses, to identify potential flood problem areas, drainage problems and recommend solutions and standards for sound floodplain and stormwater management. The ADMS will identify alternative solutions to a given flooding or drainage problem.

Area Drainage Master Plan (ADMP): A plan that identifies the preferred alternatives of those identified in an ADMS. An ADMP provides minimum criteria and standards for flood control and drainage relating to land use and development.

Area of Shallow Flooding: An area with flood depths from one (1) to three (3) feet where a clearly defined channel does not exist, the path of flooding is indeterminate, and where ponding may be evident.

Backfill: The placement of fill material within a specified depression, hole or excavation pit below the surrounding adjacent ground level, as a means of improving flood water conveyance.

Basement: The lowest level or story of any area of a building that has its floor sub grade (below ground level) on all sides.

Base Flood or One-Hundred-Year Flood: A flood that has a one percent (1%) chance of being equaled or exceeded in any given one-year period based on the criteria established by ADWR.

Base Flood Elevation (BFE): The water surface elevation produced by a base flood or 100-year flood.

Breakaway Wall: A wall that is not part of the building and is intended through its design and construction to collapse under specific lateral loading forces without causing damage to the elevated portion of the building or the supporting foundation system.

Building: A structure affixed to the land having a roof supported by columns or walls built for housing, shelter or enclosure of persons, animals, or property of any kind.

Clearing/Grubbing: Removal of vegetation without disturbance of existing land surface contours.

Conveyance Corridor: A land area adjoining a body of water or adjacent to or located partially or wholly within a floodplain which due to the soil instability, is likely to suffer flood related erosion damage. Conveyance corridors are areas that may not be defined by traditional encroachment methods due to directional changes when trying to achieve the increase in base flood of one (1) foot or less.

Community: Any state, area or political subdivision thereof, or any Native American tribe or authorized tribal organization who is charged with the authority to implement and administer laws, ordinances and regulations for that community.

Compensation of Flood Volume Displacement: The replacement of the quantity of stormwater volume below the Base Flood Elevation that would be lost due to import of fill or by development by the proposed project.

Cumulative Substantial Damage: The total of all repairs to a repetitive loss structure shall not cumulatively increase the market value of the structure more than fifty percent (50%) of the market value during the life of the structure. This term does not, however, include either:

Any project for improvement of a structure to correct existing violations of state or local health, sanitary or safety code specifications which have been identified by the local code enforcement official and which are the minimum necessary to assure safe living conditions; or

Any repair of flood damage to "historic structure," provided the repair will not preclude the structure's continued designation as a "historic structure."

Cumulative Substantial Improvement: Improvements, modifications, or additions to existing buildings are counted cumulatively for at least five (5) years and reconstruction and repairs to damaged buildings are counted cumulatively for at least five (5) years. When the improvements, modifications, additions, reconstruction, or repairs reach the fifty percent (50%) substantial improvement threshold, the structure must be brought into compliance.

Crawl Space: A type of basement in which one cannot stand up; the height may be as little as a foot and the surface is often soil; it is a convenient access to pipes, substructures and a variety of other areas. A crawlspace cannot be used as living space; it may be used as storage.

Degradation: The erosion of sediment in a watercourse or floodplain.

Delineated Floodplain: A graphic illustration of the area susceptible to inundation by a 100-year flood based upon the results of an authorized study that is included on either the Flood Management Maps for Maricopa County or the Flood Insurance Rate Maps, or both.

Delineated Floodplain, Pending: A delineated floodplain identified through a Flood Insurance Study, Area Drainage Master Study or Plan, or other study that has been accepted by the Floodplain Administrator as best available data to use for regulatory purposes, but is not yet shown on the Flood Insurance Rate Maps (FIRM); or when FEMA has issued a Best Available Data (BAD) Letter indication that the delineation will not be shown on the FIRMs, but is to be used for development purposes. Pending floodplain delineations are displayed on the Flood Management Maps.

Development: Any man-made change to improved or unimproved real estate, including, but not limited to, buildings or other structures, mining, dredging, filling, grading, paving, excavation, drilling operations, and storage of materials and equipment located within the Special Flood Hazard Area.

Dwelling: A residential building intended for human habitation.

Enclosure: That portion of a building that is below the residential lowest floor and is above ground.

Encroachment: The advance or infringement of uses, plant growth, fill, excavation, buildings, permanent structures, or development into a floodplain which may impede or alter the flow capacity of a floodplain.

Erosion: The process of the gradual wearing away of landmass.

Erosion Hazard Zone: A land area located partially or wholly within a delineated floodplain which due to the soil instability, is likely to suffer flood related erosion damage.

Erosion Setback: The minimum horizontal distance between a structure and a channel bank necessary to protect the structure from flood related erosion damage.

Exempt Use: Any use within the delineated floodplain specifically exempted from these Regulations by applicable law.

Existing Manufactured Home Park or Subdivision: A manufactured home park or subdivision for which the construction of facilities for servicing the lots on which the manufactured homes are to be affixed (including, at a minimum, the installation of utilities, construction of streets and either final site grading, or the pouring of concrete slabs) was completed before the August 8, 1973 effective date of the floodplain management regulations adopted by the community.

Expansion to an Existing Manufactured Home Park or Subdivision: The preparation of additional sites by the construction of facilities for servicing the lots on which the manufactured homes are to be affixed (including the installation of utilities, the construction of streets and either final site grading or the pouring of concrete pads).

Fill: The placement of fill material at a specified location to bring the ground surface up to a desired elevation.

Fill Material: Natural sand, dirt, soil and rock. For the purposes of floodplain management, fill material may include concrete, cement, soil cement, brick or similar material as approved by the Floodplain Administrator on a case-by-case basis.

Flood or Flooding: A general and temporary condition of partial or complete inundation of normally dry land areas from: A) the overflow of flood waters; B) the unusual and rapid accumulation or runoff of surface waters from any source; and/or C) the collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels or suddenly caused by an unusually high water level in a natural body of water, accompanied by a severe storm or by an unanticipated force of nature, such as flash flood or an abnormal tidal surge, or by some similarly unusual and unforeseeable event which results in flooding as defined in this definition.

Flood Hazard Zone: Any land area located partially or wholly within a delineated floodplain susceptible to flood related damage as designated on the Floodplain Management Maps. Such flood hazard zones may include but are not limited to areas highly susceptible to erosion, stream meander sensitivity, moveable bed, scour, wave action, and subsidence.

Flood Insurance Rate Map (FIRM): An official map on which the Federal Insurance Administration has delineated both the 100-year flood Special Flood Hazard Areas and the risk premium zones applicable to a community.

Flood Insurance Study (FIS): The official report provided by the Federal Insurance Administration. The report includes flood profiles and Base Flood Elevations.

Flood Management Map: An official map, which may be either hard copy or in electronic format, for Maricopa County on which the Floodplain Administrator has delineated floodplains and other flood related flood hazard zones for the purpose of floodplain management.

Floodplain: The area adjoining the channel of a watercourse susceptible to inundation by a base flood including areas where drainage is or may be restricted by man-made structures that have been or may be covered partially or wholly by flood water from the one hundred year flood.

Floodplain Management: The operation of an overall program of corrective and preventive measures for reducing flood damage, including, but not limited to emergency preparedness plans, flood control works, and floodplain management regulations.

Floodplain Regulations: These Regulations and other codes, ordinances, and regulations adopted pursuant to the authority granted in A.R.S. §48-3603 through §48-3628 relating to the use of land and construction within a delineated floodplain and floodway, or other Special Flood Hazard Areas.

Floodplain Use Permit: A permit that must be obtained from the Floodplain Administrator prior to commencement or continuance of any development subject to these Regulations within the area of jurisdiction.

Floodproofing: Any combination of structural and non-structural additions, changes or adjustments to structures that reduce or eliminate flood damage to real estate or improved property, water and sanitary facilities, structures and their contents.

Floodway: The channel of a river or other watercourse and the adjacent land areas necessary in order to discharge the 100-year flood without cumulatively increasing the water surface elevation more than one (1) foot.

Floodway Fringe: The areas of a delineated floodplain adjacent to the floodway where encroachment may be permitted.

Functionally Dependent Use: A use which cannot perform its intended purpose unless it is located or carried out in close proximity to water. The term includes only docking facilities, port facilities that are necessary for the loading and unloading of cargo or passengers, and ship building and ship repair facilities, and does not include long-term storage or related manufacturing facilities.

Grading: Disturbance of existing land contours.

Hazardous Waste: Garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility, or other discarded materials, including solid, liquid, semisolid or contained gaseous material, resulting from industrial, commercial, mining, and agricultural

operations or from community activities that because of its quantity, concentration, or physical, chemical, or infectious characteristics, may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating irreversible illness, or pose a substantial present or potential hazard to human health or the environment if improperly treated, stored, transported, disposed of or otherwise managed, or any waste identified as hazardous pursuant to A.R.S. §49-922.

Hazardous waste does not include solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under 402 of the Federal Water Pollution Control Act (P.L. 92-500; 86 STAT. 816) as amended, or source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954 (68 STAT. 919), as amended.

Highest Adjacent Finished Grade: The highest finished ground elevation after construction next to the walls of a structure.

Highest Adjacent Natural Grade: The highest natural elevation of the ground surface prior to construction next to the proposed walls of a structure.

Historic Structure (44 CFR 59.1): Any structure that is:

Listed individually in the National Register of Historic Places, a listing maintained by the Department of the Interior, or preliminarily determined by the Secretary of the Interior (Secretary) as meeting the requirements for individual listing on the National Register;

Certified or preliminarily determined by the Secretary as contributing to the historical significance of a registered historic district or a district preliminarily determined by the Secretary to qualify as a registered historic district;

Individually listed on a state inventory of historic places with historic preservation places in states with historic preservation programs which have been approved by the Secretary; or

Individually listed on a local inventory of historic places in communities with historic preservation programs that have been certified either by: A) an approved state program as determined by the Secretary; or B) directly by the Secretary in states without approved programs.

Inactive Alluvial Fan: An alluvial fan where floodwater typically is within incised channels and adjacent stable land.

Landfill: See "Solid Waste Landfill."

Levee: A man-made structure, usually an earthen embankment, designed and constructed in accordance with sound engineering practices to contain, control or divert the flow of water so as to provide protection from temporary flooding.

Levee System: A flood protection system that consists of a levee, or levees, and associated structures, such as closure and drainage devices, which are constructed and operated in accordance with sound engineering practices.

Lowest Floor: The lowest floor of the lowest enclosed area (including basement). An unfinished or flood resistant enclosure, usable solely for parking of vehicles, building access or storage in an area other than a basement area is not considered a building's lowest floor provided that such enclosure is not built so as to render the structure in violation of the applicable non-elevation design requirements of these Regulations.

Market Value: Market Value is determined by estimating the cost to replace the structure in new condition and adjusting that cost figure by the amount of depreciation that has accrued since the structure was constructed. The cost of replacement of the structure shall be based on a square foot cost factor determined by reference to a building cost estimating guide recognized by the building construction industry. The amount of depreciation shall be determined by taking into account the physical deterioration of the structure and functional obsolescence as approved by the Floodplain Administrator, but shall not include economic or other forms of external obsolescence.

Use of replacement costs or accrued depreciation factors different from those contained in recognized building cost estimating guides may be considered only if such factors are included in a report prepared by an independent professional appraiser and supported by a written explanation of the differences.

Mean Sea Level: For purposes of the National Flood Insurance Program, the National Geodetic Vertical Datum (NGVD) of 1929, North American Vertical Datum of 1988 (NAVD) or other datum, to which base flood elevations shown on a community's Flood Insurance Rate Maps are referenced.

Mobile/Manufactured Home: A structure transportable in one or more sections that is built on a permanent chassis and is designed for use with or without a permanent foundation when connected to the required utilities. For floodplain management purposes, the term "Mobile/Manufactured Home" also includes park trailers, travel trailers, and other similar vehicles placed on a site for greater than 180 consecutive days. For flood insurance purposes, the term "Mobile/Manufactured Home" does not include park trailers, travel trailers, and other similar vehicles.

Natural and Beneficial Functions of Floodplains: Includes, but is not limited to the following: natural flood and sediment storage and conveyance, water quality maintenance, groundwater recharge, biological productivity, fish and wildlife habitat, harvest of natural and agricultural products, recreation opportunities, and areas for scientific study and outdoor education.

New Construction: For the purposes of determining insurance rates, structures for which the "start of construction" commenced on or after the effective date of an initial FIRM or after December 31, 1974, whichever is later, and includes any subsequent improvements to such structures. For floodplain management purposes, "new construction" means structures for which the "start of construction" commenced on or after the effective date of a floodplain management regulation adopted by a community and includes any subsequent improvements to such structures.

New Manufactured Home Park or Subdivision: A manufactured home park or subdivision for which the construction of facilities for servicing the lots on which the manufactured homes are to be affixed (including, at a minimum, the installation of utilities, the construction of streets and either final site grading or the pouring of concrete pads) is completed on or after the effective date of floodplain management regulations adopted by the community.

Nonconforming Use: The use of any land, building or permanent structure lawfully existing either on the effective date of the adopted floodplain delineation in which the land, building or permanent structure is located, or August 3, 1984, the effective date of A.R.S. §48-3601 et. seq., whichever is the earlier date.

One-Hundred Year Flood: The flood having a one percent (1%) chance of being equaled or exceeded in any given year. (See Base Flood definition)

Obstruction: Anything in, along, across or projecting into any watercourse that may alter, impede, retard or change the direction and/or velocity of the flow of water, or due to its location, its propensity to snare or collect debris carried by the flow of water, or its likelihood of being carried downstream, including but not limited to, any dam, wall, wharf, embankment, levee, dike, pile, abutment, protection, excavation, channelization, bridge, conduit, culvert, building, wire, fence, rock, gravel, refuse, fill, structure, vegetation or other material.

Person: An individual or his agent, firm, partnership, association, corporation, municipality, or agent of the aforementioned groups, or this State or its agencies or political subdivisions.

Piedmont Assessment Manual: The document developed by the District to aid in the identification and delineation of active and inactive alluvial fan flood hazard areas.

Policies and Standards: The document developed by the District (Drainage Policies and Standards for Maricopa County) to provide technical guidance for application of the Floodplain Regulations and Drainage Regulations for Maricopa County.

Recreation Vehicle: Any vehicle or portable unit designed for living, sleeping, housekeeping or office purposes that is: A) not more than forty (40) feet in length or eight (8) feet in width; B) transportable on its own chassis; C) maintained in a readily transportable condition at all times; and D) designed primarily not for use as a permanent dwelling but as temporary living quarters for recreational, camping, travel, or seasonal use. This definition includes motorized and non-motorized vehicles, travel trailers, camping trailers, but does not include mobile/manufactured homes or buildings as defined by these Regulations.

Regulatory Flood Elevation (RFE): The elevation which is determined by the criteria established in the applicable section of Article Six of these Regulations and is typically a measured amount above the Base Flood Elevation, floodway or flood depth.

Sand and Gravel Mining: Any development that involves the extraction of sand and gravel or other materials from a floodplain.

Shallow Flooding: Area of flooding with average depths of one (1) to three (3) feet.

Solid Waste: Any garbage, trash, rubbish, refuse, sludge from a waste treatment plant, water supply treatment plant or pollution control facility and other discarded material, including solid, liquid, semisolid or contained gaseous material but not including domestic sewage or hazardous waste.

Solid Waste Landfill: Either a public or private facility at which solid waste is placed on or in land for the purpose of long-range storage or disposal. Solid waste landfill does not include a land application unit, surface impoundment, injection well, compost pile or agricultural on-site disposal areas covered under A.R.S. §49-766.

Special Flood Hazard Area: Land in a floodplain subject to a one-percent (1%) or greater chance of flooding in any given year. These areas are designated as Zones A, AO, AE, AH, AR, A99, or Alluvial Fan Zones on the FIRM or Floodplain Management Maps and other areas determined by the criteria adopted by the Director of the Arizona Department of Water Resources. (44 C.F.R. Ch. 1, 59.1 – Definitions)

Start of Construction: Includes substantial improvement, and means the date the building permit was issued, provided the actual start of construction, repair, reconstruction, rehabilitation, addition, placement or other improvement was within 180 days of the permit date. The actual start means either the first placement of permanent construction of a structure on a site, such as the pouring of slab or footings, the installation of piles, the construction of columns, or any work beyond the stage of excavation, or the placement of a manufactured home on a foundation.

Permanent construction does not include land preparation, such as clearing, grading and filling, nor does it include the installation of streets and/or walkways, nor does it include excavation for a basement, footings, piers, or foundations or the erection of temporary forms, nor does it include the installation on the property of accessory buildings, such as garages or sheds not occupied as dwelling units, or not part of the main structure.

For a substantial improvement, the actual start of construction means the first alteration of any wall, ceiling, floor, or other structural part of a building, whether or not that alteration affects the external dimensions of the building.

State Standards: Documents defining standards for floodplain management as adopted by the Director of the Arizona Department of Water Resources pursuant to A.R.S. §48-3605(A).

Structure: Anything affixed to the ground or attached to something located on the ground, including, but not limited to fences, walls, berms, levees, fill, gas or liquid storage tanks, buildings and mobile/manufactured homes as defined by these Regulations, or other features that have the potential to obstruct, divert or retard flood flows.

Substantial Damage: Damage of any origin sustained by a structure whereby the cost of restoring the structure to its before damaged condition would equal or exceed fifty percent (50%) of the market value of the structure before the damage occurred, as determined by a duly licensed appraiser.

Substantial Improvement: Any repair, reconstruction, rehabilitation, addition or other improvement of a structure, the estimated cost of which as determined by a licensed contractor equals or exceeds fifty percent (50%) of the fair market value or the appraised value, whichever may be higher, of the building or structure either: A) before the improvement or rehabilitation is started, or B) if the building or structure has been damaged by any origin and is being restored, before the damage occurred. In the case of structures that have been damaged, the value of the rehabilitation or restoration must include the fair market cost of all material and labor required to return the structure to its pre-damaged condition, regardless of the actual work performed.

"Substantial Improvement" is considered to occur when the first alteration of any wall, ceiling, floor or other structural part of the building or structure commences, whether or not that alteration affects the external dimensions of the building or structure. The term does not include any project for improvement of a building or structure which has been identified by the local building official to correct violations of existing state and local health, sanitary or safety code requirements; nor does it include any alteration of a building or structure listed on the National Register of Historic Places or State Inventory of Historical Places.

Variance: A grant of relief from the requirements of these Regulations that do not result in danger or damage to persons or property in floodplains in the area of jurisdiction and that permits construction or other uses of property in a manner that would otherwise be prohibited or restricted by these Regulations.

Violation: The failure of a structure or other development to be fully compliant with the community's floodplain management regulations. A structure or other development without the elevation certificate, other certifications or other evidence of compliance required in these Regulations is presumed to be in violation until such time as that documentation is provided.

Watercourse: A lake, river, creek, stream, wash, arroyo, channel or other topographic feature on or over which waters flow at least periodically. Watercourse includes specifically designated areas in which substantial flood damage may occur.

Watercourse Master Plan (WCMP): A hydraulic plan for a Watercourse that examines the cumulative impacts of existing development and future encroachment in the floodplain and future development in the watershed on potential flood damages and/or erosion hazards, and establishes technical criteria for subsequent development so as to minimize potential flood damages for all flood events up to and including the 100-year flood.

Zone A: An area with an approximate delineation of a floodplain. Floodway boundaries and Base Flood Elevations have not been determined.

Zone AE: An area with a detailed delineation of a floodplain and in which Base Flood Elevations have been determined. Floodway may be part of the delineation.

Zone AH: An area with flood depths of one (1) to three (3) feet (usually areas of ponding); Base Flood Elevations have been determined.

Zone AO: An area with Flood depths of one (1) to three (3) feet (usually sheet flow on sloping terrain); average flood depths have been determined. For areas of alluvial fan flooding, velocities may have also been determined.

Zone AR: Special Flood Hazard Area formerly protected from the one percent (1%) annual chance flood by a flood control system that was subsequently decertified. Zone AR indicates that the former flood control system is being restored to provide protection from the one percent (1%) annual chance or greater flood.

Zone A99: Area to be protected from one percent (1%) annual chance flood by a Federal flood protection system under construction; no Base Flood Elevations determined.

Zone D: Areas in which flood hazards are undetermined, but possible.

Zone X (shaded): Areas of 500-year flood; areas of 100-year flood with average depths of less than one (1) foot or with drainage areas less than one (1) square mile; and areas protected by levees from the 100-year flood.

Zone X (unshaded): Areas to be determined outside the 500-year floodplain.

Section 206. Definitions Pertinent to Inspection and Enforcement

In this Section, unless the context otherwise requires:

Administrative Hearing: A proceeding wherein evidence is taken for the purpose of determining an issue of fact and reaching a decision on the basis of that evidence. This proceeding takes place outside the judicial process and before a Hearing Officer who has the authority to conduct such hearings.

Administrative Search Warrant: An order in writing issued in the name of the State of Arizona, signed by a magistrate, directed to a peace officer, commanding him to accompany an appropriate official to search and inspect property in the interest of the public health, safety or welfare as part of an inspection program authorized by law.

Alleged Violator: Any person as herein defined who allegedly violates any flood control statute, regulation, ordinance, rule or terms and stipulations of a floodplain permit.

Cease and Desist Order: An order from the Floodplain Administrator prohibiting the person or entity to which it is directed from undertaking or continuing a particular activity or course of conduct.

On-Site Representative: A person who is authorized by the regulated person to accompany the District inspector or regulator on the premises.

Other Designated Representative: A person over eighteen years of age, other than an attorney, authorized in writing by the owner or alleged violator to represent them in a public hearing before the Hearing Officer. The written authorization shall be in a form sufficient to satisfy the Hearing Officer that the person has in fact been authorized to act in the owner's or alleged violator's behalf, and that they understand and agree to be bound by actions taken by the designated representative in proceedings before the Hearing Officer.

Peace Officers: Sheriffs of counties, constables, marshals, policemen of cities and towns, commissioned personnel of the Department of Public Safety, or others included in A.R.S. §1-215.28.

Remediation: Returning a site that has been disturbed to an acceptable condition of flow conveyance, erosion control, and environmental compliance by actions of the property owner or their representative.

ARTICLE THREE

FLOOD HAZARD BOUNDARIES

Section 301. Area of Jurisdiction

- A.** For floodplain management purposes and enforcement of these Regulations, area of jurisdiction means the incorporated and unincorporated areas of Maricopa County, including public lands, excluding those incorporated areas of cities or towns that have elected to assume floodplain management powers and duties pursuant to A.R.S. §48-3610.
- B.** Area of jurisdiction for floodplain management under these Regulations includes the following:
 - 1.** Watercourses or areas designated as Special Flood Hazard Areas as authorized in A.R.S. §48-3609(A);
 - 2.** Areas with contributing watersheds with flows greater than 50 cubic feet per second (cfs) in the unincorporated areas of the county;

Section 302. Flood Hazards Not Delineated

- A.** In areas without delineated flood hazard zones where development is imminent or ongoing, the Floodplain Administrator may require developers of land to delineate floodplains to be administered under these Regulations.
 - 1.** For any development, the developer shall delineate the 100-year floodplains and erosion setbacks per Arizona State Standards or other adopted technical standards developed by the District to avoid adverse impacts. Such delineations shall be consistent with criteria established by the Director, Arizona Department of Water Resources, and may be forwarded to the Federal Emergency Management Agency for adoption.
 - 2.** Per 44 CFR Ch.I et seq., if the State of Arizona has not adopted floodplain regulations, any Development on state land shall comply with local regulations.
 - 3.** Other sources include, but are not limited to: A) a developer of floodplain property, B) State or County agency, C) any agency which must delineate a floodplain as a result of completion of a flood control structure, or D) the Federal Emergency Management Agency.
 - 4.** Such delineations shall be submitted to the Floodplain Administrator to be reviewed for technical adequacy. The Floodplain Administrator may forward such delineations to the Arizona Department of Water Resources and to the Federal Emergency Management Agency with a recommendation for approval or denial.
 - 5.** All delineations approved by the Federal Emergency Management Agency are hereby adopted as referenced and shall be included on the Flood Management Maps for Maricopa County.
- B.** The Floodplain Administrator may forward to the Federal Emergency Management Agency other delineations obtained from other sources, provided they are determined to be consistent with criteria established by the Director of the Arizona Department of Water Resources.

Section 303. Basis for Establishing Special Flood Hazard Areas

The Special Flood Hazard Areas identified by the Federal Insurance Administration (FIA) of the Federal Emergency Management Agency (FEMA) in scientific and engineering report entitled "The Flood Insurance Study for Maricopa County, dated July 2, 1979," with accompanying Flood Insurance Rate Maps (FIRMs) and flood boundary and Floodway maps (FBIFMs), dated July 2, 1979, and all subsequent amendments and/or revisions, including Digital Flood Insurance Rate Maps, are hereby adopted by reference and declared to be a part of these Regulations. This Flood Insurance Study (FIS) and attendant mapping is the area of applicability of these Regulations and may be supplemented by studies for other areas that allow implementation of these Regulations and are recommended to the Board of Directors by the Floodplain Administrator. The Board, within its area of jurisdiction shall delineate or may require developers of land to delineate, as authorized by A.R.S. §48-3609, for areas where development is ongoing or imminent, and thereafter as development becomes imminent, floodplains consistent with the criteria developed by FEMA and the Director of the Arizona Department of Water Resources. The FIS, FIRMs and FBIFMs are on file at the Flood Control District of Maricopa County, 2801 West Durango Street, Phoenix, Arizona, 85009.

Section 304. Other Flood Hazard Boundaries

Whenever the Floodplain Administrator determines through a flood hazard study, Watercourse Master Plan, or other flood related study authorized by the Board that a flood related hazard exists due to such factors as high velocity flows, erosion, sediment transport, deposition, unstable soil conditions, unstable flow path, or land subsidence, the Floodplain Administrator shall designate such hazard areas on the Flood Management Maps for Maricopa County. The Floodplain Administrator shall establish technical criteria and enforce rules and regulations for subsequent development that meet criteria adopted by the Director of Arizona Department of Water Resources or as necessary to participate in the Community Rating System and National Flood Insurance Programs. When appropriate these District studies authorized by the Board may be forwarded to the Federal Emergency Management Agency.

Section 305. Watercourse Master Plans

- A. Authorization:** The District, whenever it has completed a Watercourse Master Plan, may submit the plan, including uniform rules for that river or drainage system pursuant to A.R.S. §48-3609.01 to the Board for adoption. If adopted by the Board, the Floodplain Administrator shall enforce the Watercourse Master Plan under these Regulations.
- B. Public Notification:** During the preparation of a Watercourse Master Plan, the owners of record of real property within and immediately contiguous to the watercourse or watercourses included in the planning shall be publicly notified by the Board or its agents so that the owners may have input to the planning process. In addition, the aggregate mining operations recommendation committees organized pursuant to A.R.S. §11-830(D), if any, shall be notified.
- C. Recharge Techniques:** All Watercourse Master Plans shall consider recharge techniques including but not limited to: swales, dry wells, sand tanks and small dams.

- D. Minimum Standards:** Requirements for a Watercourse Master Plan shall meet the minimum requirements under the National Flood Insurance Program or the criteria adopted by the Director of The Arizona Department of Water Resources. In case of conflict the most stringent requirements shall prevail.

Section 306. Publication of Flood Hazard Boundaries

All flood hazard designations as authorized by these Regulations including but not limited to Erosion Control (Hazard) Zones, Watercourse Master Plans, moveable bed watercourses and other special flood related designations and, including all Zones A, AE, AO, AH, AR, A99, and Alluvial Fan Zones on the Flood Insurance Rate Maps for Maricopa County, Arizona, shall be shown on the official Flood Management Maps for Maricopa County.

For floodplain management purposes, areas that are under current flood hazard study shall be designated by the Floodplain Administrator as pending delineations on the Flood Management Maps for Maricopa County as the best technical data available awaiting final approval of the study by the Federal Emergency Management Agency.

Section 307. Public Notice

Whenever a flood hazard identification study has been authorized by the Board, the District shall publish a notice concerning the intent and scope of the study and notify affected adjacent political jurisdictions. The District shall also mail information concerning the study to affected property owners or hold a public meeting for the affected property owners.

Section 308. Determination in Case of Dispute

If the boundary of any floodplain with a Zone A delineation, floodway, floodway fringe, area of shallow flooding, including ponding areas, alluvial fans, or other flood hazard boundaries is in dispute, the Floodplain Administrator shall determine the boundary using the best technical data available. In cases where a revision of the floodway becomes necessary, the required public notice and public hearing process shall be followed and the necessary information shall be submitted to the Federal Emergency Management Agency.

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ARTICLE FOUR

FLOODPLAIN USE PERMIT, APPEALS, AND VARIANCES

Section 401. Floodplain Use Permit Required

- A.** A person shall not engage in any development which will divert, retard, or obstruct the flow of water in any watercourse and threaten public health or safety or the general welfare without securing written authorization from the Board or its designee. Where the watercourse is a delineated floodplain, no development shall take place in the floodplain without written authorization from the Board. Written authorization from the Board is established herein as the Floodplain Use Permit signed by the Floodplain Administrator. If the watercourse is not delineated, delineation may be required pursuant to Article Three, and once delineated, a Floodplain Use Permit shall be required prior to development.
- B.** Applications shall be submitted in accordance with the current District requirements or if applicable community formats and include the information as set forth in this Article.
- C.** The applicant shall submit any information that the Floodplain Administrator considers necessary to ensure that the development specified in the application complies with relevant statutes, rules, regulations, ordinances, executive orders or delegation agreements. The applicant may also be required to provide certification that all requirements of the Floodplain Use Permit have been met [44 C.F.R. Ch. 1, 60.3(a)(2)].
- D.** Renewal of a Floodplain Use Permit for Extraction of Sand and Gravel or Other Materials: The permittee may submit an application for the renewal of a Floodplain Use Permit. The application must be submitted prior to the expiration date of the permit with sufficient time to allow for the review and approval of the permit. Failure to submit an application for the renewal of the permit before the expiration date shall cause the permit to expire and operations within the floodplain to cease and require that a permittee obtain a new permit.
- E.** Voluntary Limited Suspension of a Floodplain Use Permit for Extraction of Sand and Gravel or Other Materials: The permittee may request a suspension of a Floodplain Use Permit for the extraction of sand and gravel or other materials by submitting a written request to the Floodplain Administrator that contains the following information:
 - 1.** The facility location and permit number for which a suspension is being requested.
 - 2.** The effective date and time frame of the suspension,
 - 3.** A statement of the reason or reasons for the suspension, and
 - 4.** Current facility contact information to be maintained with the Floodplain Administrator.

If the permittee is in compliance with the current permit, the Floodplain Administrator shall issue a suspension of the existing permit for a period not-to-exceed five (5) years during a single suspension period or not-to-exceed a total of five (5) years during multiple suspension periods. The expiration date for any permit suspended under this Section shall be extended by the total time period(s) of the suspension(s).

While a Floodplain Use Permit for the extraction of sand and gravel or other materials is suspended, the permittee is required to maintain existing erosion controls; and to make repairs to the property necessitated by flood events as required by permit or agency directive. All mining, processing of material, material handling, grading, or any other activities not expressly authorized by the Floodplain Administrator within the floodplain shall cease during the suspension period(s). The suspension of the Floodplain Use Permit for the extraction of sand and gravel or other materials does not limit the permittee's right to maintain or remove equipment or impact any other operations that take place entirely outside of the floodplain.

While a Floodplain Use Permit for the extraction of sand and gravel or other materials within the floodplain is suspended, the Floodplain Administrator may inspect the permitted property to ensure compliance with this Section.

The permit may be reactivated by the permittee by submitting a written notification to the Floodplain Administrator fifteen (15) days prior to the resumption of operations to allow the Floodplain Administrator time to inspect the site to verify compliance with the permit. At the end of the suspension period or upon reactivation of the permit, the Floodplain Administrator will issue a new permit with a revised renewal date reflecting the extension of the time associated with suspension period.

Section 402. Permit Fees

The Board has adopted a fee schedule pursuant to A.R.S. §48-3603(F) for review of permit applications and variances from or interpretations of these Regulations. No permit shall be processed, and no permit shall be considered to be issued, until all applicable fees have been paid pursuant to these Regulations. The Fee Schedule is adopted by Resolution to be a part of these Regulations as Appendix A.

Section 403. Application Requirements

- A.** Applications for a Floodplain Use Permit, except for extraction of sand and gravel or other material, shall include:
1. A completed application form in accordance with the current District requirements or if applicable community formats signed by the property owner or their designated agent, contractor or consultant.
 2. A signed and notarized Property Owner Authorization form if the owner wishes to grant an agent, contractor or consultant authority to make decisions on their behalf;
 3. A signed Warning and Disclaimer of Liability form;
 4. Plans drawn to scale showing the nature, location, dimensions and elevation of the property, existing or proposed structures, fill, storage of materials, floodplains, and drainage facilities.
 5. Proposed elevation in relation to mean sea level of the lowest floor (including basement) of all existing and proposed structures. In Zone AO the elevation of existing highest adjacent natural grade and proposed elevation of lowest floor of all structures;

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6. Proposed elevation in relation to mean sea level to which any non-residential structure will be floodproofed;
 7. Base Flood Elevation and Regulatory Flood Elevation data for subdivision proposals or other development greater than fifty (50) lots or five (5) acres;
 8. Description of the extent to which any watercourse will be altered or relocated as a result of proposed development; and
 9. All information required as set forth in Article Six – Development Standards.

B. Extraction of Sand and Gravel or Other Materials

1. Applications for a Floodplain Use Permit for the extraction of sand and gravel or other materials shall include the following:
 - a. A completed Floodplain Use Permit application form;
 - b. A signed and notarized authorization if the applicant wishes to grant an agent, contractor or consultant authority to make decisions on their behalf;
 - c. A signed acknowledgement from the property owner that a Floodplain Use Permit is being sought and, if applicable, designation of an operator authorized to mine the property;
 - d. A signed Warning and Disclaimer of Liability form;
 - e. A plan of development for the extraction of sand and gravel or other materials, which shall contain the following:
 - 1) Administrative information that includes parcel data, site map(s), and appropriate contact information;
 - 2) A mining plan that shows the extent and depth of the area(s) to be excavated along with appropriate benchmarks, elevations and phases;
 - 3) A report of the engineering practices and design(s) that demonstrate there will be no adverse impacts to structures or surrounding properties from all flows up to and including the 100-year flood;
 - 4) A description of all other uses associated with the mining operation, such as but not limited to, processing of material, batch plants, concrete plants, storage areas, access roads; and
 - 5) A floodplain closure plan which causes the land to be, when the approved use is terminated, in such a condition as to maintain stability of the floodplain, to prevent flood related erosion or to not aggravate existing flood related erosion and to prevent adverse impacts to the structures or the property by appropriate means to protect from all flows up to and including the 100-year flood. The plan may require financial assurances for performance of closure as may be authorized by statute.
2. A renewal of an existing approved Floodplain Use Permit for the extraction of sand and gravel or other materials shall be issued with only an administrative completeness review provided that the development has been done in accordance with the approved plan of

development, the approved plan of development has not been modified, no flood related changes in river morphology have occurred and there is no imminent or apparent danger to structures, life or property.

The following must be submitted for the renewal application:

- a. An application for renewal,
 - b. The applicable fee,
 - c. A signed Warning and Disclaimer of Liability form,
 - d. Five copies of the previously approved plan of development,
 - e. A letter signed by the property owner or an authorized representative of record that the mining operation is in compliance with all the conditions of the original permit, and
 - f. A signed and sealed letter from a registered professional engineer that floodplain conditions are substantially unchanged since the original permit was approved.
3. For extraction of sand and gravel or other materials the Floodplain Administrator may issue a permit of short duration for an applicant participation in an ongoing application process.

Section 404. Permit Conditions

- A.** Issuance of a Floodplain Use Permit, except for extraction of sand and gravel or other material, shall include the following conditions:
- 1. The Floodplain Administrator shall advise the applicant the issuance of a Floodplain Use Permit does not negate requirements to obtain all necessary permits from those governmental agencies from which approval is required by Federal or State law and the applicant may be required to show copies of those required permits.
 - 2. The applicant may be required to execute deed restrictions or easements running with the land or to post performance bonds, assurances or other security to guarantee the performance of the conditions and restrictions imposed.
 - 3. The Floodplain Use Permit is subject to review, suspension, and revocation for 1) any substantial deviation from the approved plan, or 2) for any violation of these Regulations, or 3) for any stipulation or other terms and agreements made a part of the Floodplain Use Permit not complied with.
 - 4. The Floodplain Administrator may place a time limit and any other conditions or restrictions as part of the Floodplain Use Permit consistent with the authority of the Administrator as set forth in these Regulations.
 - 5. The Floodplain Use Permit will automatically expire if start of construction has not commenced within one (1) year of permit issuance unless an extension has been requested in writing and a written extension is issued by the Floodplain Administrator.
 - 6. Approval of any map revision request (CLOMR) requiring Community Acknowledgement or Community Overview and Concurrence by FEMA may be declared null and void as determined by the Floodplain Administrator if there is a lapse of time of five (5) years or conditions have changed for the proposed development.

B. Extraction of Sand and Gravel or Other Materials

Issuance of a Floodplain Use Permit for extraction of sand and gravel or other material shall include the following conditions:

1. The Plan of development is subject to post-flood review and possible modification if necessary due to flood related changes in river morphology.
2. The operator of an active sand and gravel extraction operation permitted under these Regulations shall maintain a copy on site of the permit along with an approved Plan of development bearing the approval of the Floodplain Administrator. Failure to maintain a copy on site of the approved Floodplain Use Permit and Plan of development shall be a violation of these Regulations, subject to revocation of the Floodplain Use Permit pursuant to this Section and a fine pursuant to Section 708 of these Regulations.
3. A Floodplain Use Permit for the extraction of sand and gravel or other materials shall not exceed a five (5) year duration unless suspended pursuant to Section 404(B)7 and may be issued for a lesser duration of time as determined by the Floodplain Administrator.
4. The Floodplain Administrator may issue a permit of short duration for an applicant participating in an ongoing application process.
5. Any request for a major or minor change to an approved Floodplain Use Permit for the extraction of sand and gravel or other materials including an approved Plan of development shall require an application to amend the permit.
6. The Floodplain Administrator shall advise the applicant that the issuance of a floodplain use permit does not negate any requirements to obtain all permits from those governmental agencies from which approval is required by Federal or State law.

C. Permit Inspections are required as part of a Floodplain Use Permit and will be conducted in accordance with all statutory requirements.

1. All permitted work shall be inspected in accordance with the specific requirements of the permit stipulations in addition to any in-progress or follow up inspections as may be deemed necessary by the applicant and District inspection staff during the course of construction.
2. Sites permitted for the extraction of sand and gravel or other materials shall be inspected every six (6) months to verify that the plan of development is followed and no violations of these Regulations, applicable laws, or permit conditions exist.
3. Re-inspection of sites permitted for the extraction of sand and gravel or other materials shall be conducted within thirty (30) days after the date set forth in the notice of violation to verify the correction of an alleged violation, or for cease and desist order, within ten (10) days after the notice of violation is served.

D. Permit Timeframes

1. Timeframes for Floodplain Use Permit application completeness and substantive review shall be in accordance with A.R.S. §48-3645.

2. The applicant must submit all items required for the review and approval of a Floodplain Use Permit. If the Floodplain Administrator requests relevant items missing from the application that are necessary for the review and approval of a Floodplain Use Permit the applicant shall submit all requested items for review of the permit application to proceed.
3. The Floodplain Use Permit application shall automatically expire at one (1) year of the notice of request for additional information if no response has been received from an applicant.

Submittal after the year shall be treated as a new application and subject to all submittal requirements and fees. If the applicant is unable to meet this timeframe a request for extension shall be requested in writing and a written extension may be authorized by the Floodplain Administrator.

- E. The rights and responsibilities under a Floodplain Use Permit for any development including extraction of sand and gravel or other materials are non-delegable and cannot be transferred without the written authorization of the Floodplain Administrator.

Section 405. Elevation and Floodproofing Certificates

- A. After obtaining a Floodplain Use Permit and prior to Final Inspection, a complete, correct, and current FEMA Elevation Certificate form prepared by an Arizona Registered Professional Engineer or Land Surveyor shall be submitted to the Floodplain Administrator prior to occupancy or use of any building within a Special Flood Hazard Area designated on the Flood Management Maps, except those uses exempted by applicable law. The required elevation certificate within a Zone AO may be completed by District staff as approved by the Floodplain Administrator.
- B. A complete, correct, and current FEMA Floodproofing Certificate form prepared by an Arizona Registered Civil Engineer shall be submitted for any development that has not been elevated up to the Regulatory Flood Elevation as approved by the Floodplain Administrator.
- C. Encroachment Certification: Any development in a floodway must be reviewed to determine if the development will increase flood heights. An engineering analysis must be conducted before a permit may be issued. A record of the results of this analysis shall be part of the permit file, which may be in the form of a No-rise Certification for Floodways. This No-rise Certification must be supported by technical data and signed by a registered professional engineer. The supporting technical data should be based on the standard step-backwater computer model used to develop the 100 year floodway shown on the Flood Insurance Rate Map (FIRM) or Flood Boundary and Floodway Map (FBFM).
- D. The Floodplain Administrator shall maintain a record of all Elevation and Floodproofing Certificates and may record such certification with the office of the Maricopa County Recorder in a manner so that it appears in the chain of title of the affected parcel of land.

Section 406. Allowed Uses

In accordance with A.R.S. §48-3609(H), unless expressly provided, nothing in these Regulations shall affect the uses of property described below.

1. Existing legal uses of property or the right to continuation of such legal uses. However, if a legal nonconforming use of land, or a building or structure is discontinued for twelve consecutive months or destroyed to the extent of fifty percent (50%) of its market value, as determined by a competent appraiser, any further use shall comply with these Regulations.
2. Reasonable repair or alteration of property for the purposes for which the property was legally used on August 3, 1984, or on the date any regulations affecting such property take effect, except that any alteration, addition, rehabilitation or repair to a legal nonconforming building or structure regardless of the cost of the work performed as determined by a licensed contractor which would result in increasing its flood damage potential by fifty percent (50%) or more of the value of such building or structure prior to alteration, addition, rehabilitation or repair, as determined by a competent appraiser shall be either floodproofed or elevated to or above the Regulatory Flood Elevation. On February 25, 1974, the Maricopa County Board of Directors and the Board of Supervisors adopted the 1974 Floodplain Regulations for unincorporated areas of Maricopa County with certain amendments recommended by the Planning and Zoning Director and the sand and gravel industry's suggested revisions to be effective on that day. This is the date used for purposes of establishing existing legal nonconforming use on all properties. The Floodplain Regulations have been subsequently revised and amended in response to changes in the State Statutes and Code of Federal Regulations pertaining to the National Flood Insurance Program.
3. Reasonable repair of structures constructed with the written authorization required by A.R.S. §48-3613.
4. Facilities constructed or installed pursuant to a certificate of environmental compatibility issued pursuant to Title 40, Chapter 2, Article 6.2 of the Arizona Revised Statutes.

Section 407. Exceptions: Review of Plans

In accordance with A.R.S. §48-3613(B), written authorization is not required for nor shall the Board prohibit the following development in a watercourse. Before any construction may begin, the person must submit plans for construction to the Board for review and comment.

Exceptions to these Regulations are as set out in A.R.S. §48-3613(B) & (C) and noted below.

1. Construction of bridges, culverts, dikes and other structures necessary to the construction of public highways, roads, and streets intersecting or crossing a watercourse.
2. Construction of dams for the conservation of flood waters as permitted by Title 45, Chapter 6 of the Arizona Revised Statutes and construction of storage dams for watering livestock or wildlife and structures on the banks of a watercourse to prevent erosion of or damage to adjoining land if the structure will not divert, retard or obstruct the natural channel of the watercourse.
3. Construction of tailing dams and waste disposal areas used in connection with mining and metallurgical operations. This paragraph does not exempt those sand and gravel operations that may divert, retard or obstruct the flow of waters in a watercourse from complying with and acquiring authorization pursuant to these Regulations.

4. Other construction upon determination by the Board that written authorization is unnecessary.
5. Any flood control district, county, city, town or other political subdivision from exercising powers granted to it under A.R.S. Title 48, Chapter 21, Article 1.
6. Construction of streams, waterways, lakes and other auxiliary facilities in conjunction with development of public parks and recreation facilities by a public agency or political subdivision.
7. Construction and erection of poles, towers, foundations, support structures, guy wires, and other facilities related to power transmission as constructed by any utility whether a public service corporation or a political subdivision.

Section 408. Personal Liability

The exceptions contained in Section 407 do not relieve any person from liability if that person's actions cause flood damage to any other person or property.

Section 409. Appeals

- A. Appeals may be taken to the Floodplain Review Board pursuant to A.R.S. §48-3612(B) and A.R.S. §48-3642 by any person who feels that there is error or doubt in the interpretation of these Regulations, which includes denial of permits and final decisions of inspections, or that due to unusual circumstances attaching to his property an unnecessary hardship is being inflicted on him. The appeal shall state whether it is a plea for an interpretation or a variance and the grounds for the appeal.
- B. Appeals of any decision of the Floodplain Administrator to the Floodplain Review Board shall be filed with the Floodplain Administrator within thirty (30) calendar days of the receipt of notice of the decision to be appealed, or sixty (60) calendar days from the date of the decision whichever is earlier. The notice of appeal shall be in writing on a form provided by the Floodplain Administrator and specify the grounds for appeal.
- C. During the pendency of an appeal all existing floodplain delineations shall remain in effect. All other matters regarding the proceeding shall be stayed during its pendency unless the Administrator certifies to the Floodplain Review Board that by reason of facts surrounding the application the stay would, in his or her opinion, cause imminent peril to life or property.
- D. The Floodplain Review Board shall fix a time for hearing the appeal and give notice to the parties in interest and to the public as set forth herein. The Floodplain Review Board shall hear and decide the appeal within a reasonable time.
- E. Property shall be posted pursuant to procedures adopted by the Floodplain Review Board.
- F. Any person aggrieved by a decision of the Floodplain Review Board may, within thirty (30) days of such decision, appeal to the Board of Directors by filing a written notice of appeal with the Clerk of the Board on a form provided by the Floodplain Administrator. Said notice shall specify the grounds of the appeal. The Board of Directors shall conduct the appeal under such rules of procedure, as they shall adopt.

- G.** Any person aggrieved by a decision of the Board of Directors may file a special action in Superior Court of the State of Arizona to determine if an abuse of discretion by the Board of Directors, the Floodplain Review Board or the Floodplain Administrator may have occurred.
- H.** Failure to appeal the Floodplain Administrator's order pursuant to a variance to the Floodplain Review Board within the time period set forth in these Regulations, shall render the order of the Floodplain Administrator final and enforceable.

Section 410. Floodplain Variance

- A.** Generally, Variances may be issued for new construction and substantial improvements to be erected on a lot of one-half acre or less in size contiguous to and surrounded by lots with existing structures constructed below the base flood elevation, provided the procedures of Articles One and Six of these Regulations have been fully considered. As the lot size increases beyond one-half acre, the technical justification required for issuing variances increases.
 - 1.** Variances may be issued for the repair, rehabilitation, or restoration of structures listed in the National Register of Historic Places or the State Inventory of Historic Places, upon a determination that the proposed repair or rehabilitation will not preclude the structures' continued designation as a historic structure and the variance is the minimum necessary to preserve the historic character and design of the structure.
 - 2.** Variances shall only be issued upon showing that the use cannot perform its intended purpose unless it is located or carried out in close proximity to water. This includes only facilities defined in Section 205 of this ordinance in the definition of "Functionally Dependent Use."
- B.** Conditions for the issuance of a Variance:
 - 1.** A Variance for relief from these Regulations may be issued by the Floodplain Administrator, Floodplain Review Board, or affirmed by the Board of Directors when development does not result in danger or damage to persons or property in floodplains and all of the following criteria are met:
 - a.** That no increase in the Base Flood Elevation would result and that no increase in flood levels within any designated floodway during the base flood discharge would result;
 - b.** That special circumstances, such as size, shape, topography, location or surroundings of the property, would cause the strict application of the Regulations to deprive the property of privileges enjoyed by similar property in the jurisdictional floodplain;
 - c.** That the Variance does not constitute a grant of special privileges inconsistent with the limitations on similar property in the jurisdictional floodplain;
 - d.** That the Variance requested is the minimum necessary, considering the flood hazard, to afford relief;
 - e.** That there is a showing of good and sufficient cause;
 - f.** That a determination that failure to grant the Variance would result in exceptional hardship to the applicant;

zone, a notice of such determination may be recorded with the office of the Maricopa County Recorder in a manner so that it appears in the chain of title of the affected parcel of land. The Floodplain Administrator may also record the Floodplain Use Permit.

C. Recordation of Floodplain Violations

The Floodplain Administrator may cause to have recorded any notice of violation or non-compliance issued pursuant to Section 702.

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ARTICLE FIVE

ALLOWABLE DEVELOPMENT

Section 501. Zone AE Floodway

(Reference Article Six, Section 602 for applicable Development Standards.)

A. A Floodplain Use Permit may be granted for any of the following allowed Development within Zone AE Floodway:

1. Accessory residential uses including, but not limited to, lawns, gardens, parking areas, and play areas.
2. Agricultural uses including, but not limited to, general farming, pasture, grazing, outdoor plant nurseries, horticulture, truck farming, sod farming, and wild crop harvesting.
3. Drive-in theaters, roadside stands, signs, and billboards.
4. Fencing that is open or breakaway to allow for conveyance.
5. Industrial-commercial development including, but not limited to, loading areas, airport landing strips, and parking areas.
6. Marinas, boat rentals, docks, piers and wharves.
7. Operations for extraction of sand and gravel and other materials.
8. Private and public recreational development including, but not limited to, golf courses, tennis courts, driving ranges, archery ranges, picnic grounds, parks, wildlife and nature preserves, game farms, shooting preserves, target ranges, trap and skeet ranges, hunting and fishing areas, hiking and horseback riding trails.
9. Privately owned and maintained dikes and culverts.
10. Railroads, privately owned and maintained streets, bridges, utility transmission lines, and pipelines.
11. Cell tower projects, if no increase in the Base Flood Elevation would result and no increase in flood levels within the designated floodway during the base flood discharge would result.
12. Stockyards, corrals, and shade structures.

B. Prohibited or Conditioned Uses

1. The storage or processing of materials that are, in time of flooding, buoyant, flammable, explosive or could be injurious to human, animal or plant life is prohibited.
2. Storage of other material or equipment may be allowed if not subject to major damage by floods and if firmly anchored to prevent flotation, or if readily removable from the area within the time available after flood warning.

Section 502. Zone AE

(Reference Article Six, Sections 601 and 603 for applicable Development Standards.)

Within Zone AE, a Floodplain Use Permit may be granted for any of the following:

1. Any development permitted in Section 501.
2. Structures and buildings, including dwellings and mobile/manufactured homes, additions, improvements, recreational vehicles, and other residential development.
3. New and replacement water supply systems, water treatment and sewage collection and disposal systems provided that they are designed to prevent or minimize floodwater contamination during the base flood.
4. New and replacement sanitary sewage systems, provided that they are designed to minimize or eliminate infiltration of flood waters into the systems and discharges from the systems into flood waters, unless otherwise allowed by a permit in conformance with the Federal Water Pollution Control Act.
5. Septic systems and solid waste landfills, whether public or privately owned, provided that they are located in such a way as to avoid impairment to them or contamination from them during flooding and provided that no part of a solid waste landfill is within one-half mile of a 100-year floodplain that has 100-year year flows in excess of twenty-five thousand (25,000) cubic feet per second as determined by the Federal Emergency Management Agency.
6. Any other development which will not be subject to substantial flood damage and will not cause a hazard to life or property or to the public. These may include uses that can be readily removed from delineated floodplain areas during times of flooding.

Section 503. Zone A Non-Alluvial, Zone A Ponding, and Zone A Shallow Flooding

(Reference Article Six, Sections 601, 604, 605, or 606 for corresponding applicable Development Standards.)

Any development permitted in Sections 501 and 502 that will not increase the threat of flooding to surrounding property, and any other development not specifically named in Sections 501 or 502 provided the applicant submits an analysis of the Zone A Floodplain consistent with Article Six. Such analysis shall be subject to review and approval by the Floodplain Administrator prior to issuance of a Floodplain Use Permit and may be forwarded to the Federal Emergency Management Agency as described in Article Three, Section 303.

Section 504. Zone AH Ponding

(Reference Article Six, Sections 601 and 607 for applicable Development Standards.)

Any development permitted in Sections 501 and 502 that will not increase the threat of flooding to surrounding property, and any other development not specifically named in Sections 501 or 502 provided the applicant submits an analysis of the Zone AH Floodplain consistent with Article Six.

Such analysis shall be subject to review and approval by the Floodplain Administrator prior to issuance of a Floodplain Use Permit and may be forwarded to the Federal Emergency Management Agency in the manner described in Article Three, Section 303.

Section 505. Zone AO Ponding Area, Zone AO Shallow Flooding, Zone AO Alluvial Fan

(Reference Article Six, Sections 601, 608, 609, or 610 for corresponding applicable Development Standards.)

Any development permitted in Sections 501 and 502 that will not increase the threat of flooding to surrounding property, and any other development not specifically named in Sections 501 or 502 provided the applicant submits an analysis of the Zone AO Floodplain consistent with Article Six. Such analysis shall be subject to review and approval by the Floodplain Administrator prior to issuance of a Floodplain Use Permit and may be forwarded to the Federal Emergency Management Agency in the manner described in Article Three, Section 303.

Section 506. Zone A Alluvial Fan Administrative Floodway

(These include Zone A Alluvial Fan High Hazard Area Administrative Floodway, Zone A Alluvial Fan Uncertain Flow Distribution Area Administrative Floodway, and Zone A Approximate Alluvial Fan Administrative Floodway)

(Reference Article Six, Sections 602, 611, 612 or 613 for corresponding applicable Development Standards.)

- A.** Within Zone A Alluvial Fan Administrative Floodway a Floodplain Use Permit may be granted for any of the following:
1. Accessory residential uses including, but not limited to, lawns, gardens, parking areas and play areas.
 2. Agricultural uses including, but not limited to, general farming, pasture, grazing, outdoor plant nurseries, horticulture, truck farming, sod farming, and wild crop harvesting.
 3. Drive-in theaters, roadside stands, signs, and billboards.
 4. Fencing that is open or breakaway to allow for conveyance.
 5. Industrial-commercial development including, but not limited to, loading areas, airport landing strips, and parking areas.
 6. Marinas, boat rentals, docks, piers, and wharves.
 7. Operations for extraction of sand and gravel and other materials.
 8. Private and public recreational uses including, but not limited to, golf courses, tennis courts, driving ranges, archery ranges, picnic grounds, parks, wildlife and nature preserves, game farms, shooting preserves, target ranges, trap and skeet ranges, hunting and fishing areas, hiking and horseback riding trails.
 9. Privately owned and maintained dikes and culverts.

10. Railroads, privately owned and maintained streets, bridges, utility transmission lines and pipelines.
11. Cell tower projects, if no increase in the Base Flood Elevation would result and no increase in flood levels within the designated floodway during the base flood discharge would result.
12. Stockyards, corrals, and shade structures.

B. Prohibited or Conditioned Uses

1. The storage or processing of materials that are, in time of flooding, buoyant, flammable, explosive or could be injurious to human, animal or plant life is prohibited.
2. Storage of other material or equipment may be allowed if not subject to major damage by floods and if firmly anchored to prevent flotation, or if readily removable from the area within the time available after flood warning.

Section 507. Zone A Alluvial Fan

(Reference Article Six, Sections 601 and 614 for applicable Development Standards.)

Any development permitted in Sections 501 and 502 that will not increase the threat of flooding to surrounding property. Any other development not specifically named in Sections 501 or 502 provided the applicant submits an analysis of the Zone A floodplain consistent with Article Six. Such analysis shall be subject to review and approval by the Floodplain Administrator prior to issuance of a Floodplain Use Permit and may be forwarded to the Federal Emergency Management Agency in the manner described in Article Three, Section 303.

Section 508. Other Flood Hazard Zones

(Reference Article Six, Sections 601 and 615 for applicable Development Standards.)

This article regulates development located in Flood Hazard Zones designated by the Floodplain Administrator not specifically regulated elsewhere in these Regulations including but not limited to erosion hazard zones, Watercourse Master Plans, Area Drainage Master Plans, moveable bed watercourses, and other special flood related designations determined based upon authorized studies. Additional criteria include:

1. New development and substantial improvement to existing development shall require a Floodplain Use Permit and are subject to the provisions of Article Four. Issuance of a Floodplain Use Permit does not exempt the holder of the Floodplain Use Permit from any additional requirements necessary to obtain flood insurance.
2. Development for which a Floodplain Use Permit may be granted are: development permitted elsewhere in these Regulations provided the applicant submits technical information which demonstrates that neither the development nor the specific flood hazard will be adversely affected by such development.

ARTICLE SIX

DEVELOPMENT STANDARDS

Section 601. General Development Standards

(Applicable to all Allowable Development as identified in Article Five, except Sections 501 and 506)

When a Floodplain Use Permit is required pursuant to Section 401, these Development Standards shall apply in all Special Flood Hazard Areas except Zone AE Floodway and Alluvial Fan Administrative Floodway. See additional requirements for specific Flood Hazard Zones in Sections 602 through 618. All standards should be read and applied pertinent to development proposed.

A. General

1. Residential homes with a basement are not permitted within the 100-year floodplain.
2. New construction or substantial improvement to any existing structure shall be constructed with methods that minimize flood damage with materials and utilities resistant to flood damage.
3. Dwellings other than mobile/manufactured homes shall have the lowest floor elevated and all utilities, including ductwork, shall be floodproofed up to or above the Regulatory Flood Elevation. See Section 601(G)2.
4. All new construction and substantial improvements shall be anchored to prevent flotation, collapse, or lateral movement of the structure resulting from hydrodynamic and hydrostatic loads, including the effects of buoyancy.
5. In order to control erosion and preserve the natural and beneficial functions of the floodplain, removal of vegetation shall be the minimum necessary for the development.
6. Adequate drainage paths around structures on slopes to guide floodwaters around and away from proposed structures are required.
7. For buildings elevated greater than five (5) feet, enclosures, including breakaway walls, below the Base Flood Elevation are prohibited. Screening and open latticework is not considered an enclosure. Applicant must sign a non-conversion agreement, agreeing not to enclose the area for habitable use.
8. All new construction and substantial improvements that fully enclose areas below the lowest floor that are usable solely for parking of vehicles, building access or storage in an area other than a basement, and are subject to flooding, shall be designed to automatically equalize hydrostatic flood forces on exterior walls by allowing for the entry and exit of floodwaters. The applicant shall provide a Flood Proofing Certificate by an Arizona Registered Professional Engineer certifying that the flood proofing requirements have been met, or the design shall meet the provisions of Section 601(A)9.
9. Buildings other than dwellings or any type of residence may have the lowest floor below the Regulatory Flood Elevation provided that all of the following conditions are met:
 - a. They shall be watertight with walls substantially impermeable to the passage of water; and

- b.** Structural components and utilities, including ductwork shall have the capacity of resisting the effects associated with a base flood; and
- c.** Designs for meeting these criteria shall be certified on a Flood Proofing Certificate by an Arizona Registered Professional Engineer or the design must meet or exceed the following minimum criteria:

A minimum of two (2) openings, on at least two (2) sides, having a total net area of not less than one (1) square inch for every square foot of enclosed area subject to flooding shall be provided. The bottom of all openings shall be no higher than one (1) foot above finished grade. Openings may be equipped with screens, louvers, valves, or other coverings or devices provided they allow the automatic entry and exit of floodwaters.

- 10.** Storage containers (i.e., shipping containers) designed to be watertight with walls substantially impermeable to the passage of water and the capacity of resisting the effects associated with a base flood shall not be required to have openings as required in Section 601(A)9. Anchoring may be required.
- 11.** When the improvements, modifications, additions, reconstruction or repairs reach the fifty percent (50%) substantial improvement threshold, then the entire structure must be brought into compliance. The value of the improvements, modifications, reconstruction, repair or additions is counted cumulatively for five (5) years to determine whether the substantial improvement threshold has been met.
- 12.** For all new construction and substantial improvements, the building material below the Regulatory Flood Elevation shall be of flood resistant material. Flood-resistant materials include any building product capable of withstanding direct and prolonged contact with floodwaters without sustaining significant damage. Prolonged contact means at least 72 hours, and significant damage is any damage requiring more than low-cost cosmetic repair (such as painting). Additional information can be found in FEMA Technical Bulletins. Materials include, but are not limited to the following:
 - a.** Concrete, concrete block, or glazed brick;
 - b.** Clay, concrete, or ceramic tile;
 - c.** Galvanized or stainless steel nails;
 - d.** Indoor-outdoor carpeting with synthetic backing (not fastened down);
 - e.** Vinyl, terrazzo, rubber, or vinyl floor covering with waterproof adhesives;
 - f.** Metal doors and window frames;
 - g.** Polyester-epoxy paint;
 - h.** Stone, slate, or cast stone;
 - i.** Mastic, silicone, or polyurethane formed in place flooring. Styrofoam insulation;
 - j.** Water resistant glue;
 - k.** Pressure treated (.40 CCA minimum) or naturally decay-resistant lumber, marine grade plywood.

13. All recreation vehicles in accordance with 44 CFR 60.3(C)(14) placed on site will either:
 - a. Be on-site for fewer than 180 consecutive days, and be fully licensed and ready for highway use. A recreation vehicle is ready for highway use if it is on wheels or jacking system, is attached to the site only by quick disconnect type utilities and security devices, and has no permanently attached additions; or
 - b. Meet the permit requirements of Article Four of these Regulations and the elevation and anchoring requirements for manufactured homes in Section 601.

B. Mobile/Manufactured Homes

1. Mobile/manufactured homes including permanently placed recreation vehicles and modular buildings shall be elevated so that the bottom of the structural frame is at or above the Regulatory Flood Elevation and is anchored to prevent flotation, collapse or movement. Methods of anchoring may include, but not be limited to, use of over the top or frame ties to ground or foundation anchors. Specific requirements shall be as follows:
 - a. Over the top or frame ties shall be provided at each of the four corners of the mobile/manufactured home, with additional ties on each side at intermediate locations;
 - b. Mobile/manufactured homes more than fifty (50) feet long require one (1) additional tie per side;
 - c. All components of the anchoring system shall be capable of carrying a force of 4,800 pounds;
 - d. Adequate surface drainage and access for a hauler are provided;
 - e. If the mobile/manufactured home is elevated on piers, setbacks shall be sufficient to permit steps; pier foundations shall be placed in stable soil no more than ten (10) feet apart, and reinforcement is provided for piers more than six (6) feet above ground level. A scour analysis may be required when elevating on piers;
 - f. Any additions to the mobile/manufactured home shall be similarly anchored; and
 - g. Attached appliances and all utilities, including ductwork, shall be either elevated or floodproofed up to the Regulatory Flood Elevation.

The above requirements do not apply to units in storage, and may be waived by the Floodplain Administrator on a case by case basis for units placed for less than 180 consecutive days that are properly licensed and ready for highway use, or are on jacks or wheels with quick disconnect of utilities and have no permanently attached additions.
2. For all mobile/manufactured home parks and mobile/manufactured home subdivisions, an evacuation plan indicating alternate vehicular access and escape routes shall be filed with the Maricopa County Department of Emergency Management.
3. A mobile home located in a floodplain prior to August 3, 1985 may be replaced by another mobile home if:
 - a. The mobile home to be replaced was not damaged by a flood to more than fifty per cent of its value before the flood.

4. Fill material for purposes other than solid waste landfills shall not include solid waste, wood, or other buoyant materials nor hazardous, toxic or deleterious material and shall be protected as needed against scour and erosion by riprap or other protective measures as approved by the Floodplain Administrator.

E. Garages and Low Cost Accessory Structures

1. Attached Garages
 - a. A garage attached to a residential structure, constructed with the garage floor slab below the regulatory flood elevation, must be designed to allow for the automatic entry and exit of floodwaters. Areas of the garage below the Regulatory Flood Elevation must be constructed with flood resistant materials.
 - b. A garage attached to a nonresidential structure must meet the above requirements or be dry floodproofed as required in Section 601(A)9.
 - c. Applicable Standards in Section 601(A) and (B) shall apply to attached garages.
2. Detached Garages and Accessory Structures
 - a. An accessory structure used solely for parking (2-car detached garages or smaller) or limited storage (small, low-cost sheds) may be constructed such that its floor is below the regulatory flood elevation, provided the structure is designed and constructed in accordance with the following requirements:
 - 1) Use of the accessory structure must be limited to parking or limited storage;
 - 2) The portions of the accessory structure located below the Regulatory Flood Elevation must be built using flood-resistant materials as identified in 601(A)12;
 - 3) The accessory structure must be adequately anchored to prevent flotation, collapse and lateral movement;
 - 4) Any mechanical and utility equipment in the accessory structure must be elevated or floodproofed to or above the Regulatory Flood Elevation;
 - 5) The accessory structure must comply with floodplain encroachment provisions in these Regulations; and
 - 6) The accessory structure must be designed to allow for the automatic entry and exit of floodwaters in accordance with Section 601(A)9.
 - b. Detached garages and accessory structures not meeting the above standards must be constructed in accordance with all applicable standards in these Regulations.

F. Landfills / Extraction of Sand and Gravel and Other Materials

1. Permitted landfills shall be protected against scour, erosion and contamination by and contamination of the 100-year flood event.
2. Extraction of sand and gravel and other materials operations shall meet the requirements of this Article where applicable.

G. Other Requirements

1. Issuance of a Floodplain Use Permit does not exempt the holder of the Floodplain Use Permit from any additional requirements necessary to obtain flood insurance.
2. The applicant shall provide an Elevation and/or Flood Proofing Certificate prepared by an Arizona Registered Professional Engineer or Land Surveyor to the Floodplain Administrator certifying that the elevation or flood proofing requirement has been met when required. A separate certificate of the appropriate type shall be furnished for each building.
3. The storage or processing of materials that are, in time of flooding, buoyant, flammable, explosive, or could be injurious to human, animal or plant life is prohibited.
4. Storage of other material or equipment may be allowed if approved by the Floodplain Administrator if it will not be subject to major damage by floods and if firmly anchored to prevent flotation, or if readily removable from the area within the time available after flood warning.

Section 602. AE Floodway

(Applicable to Article Five, Section 501 Allowable Development)

A. General Requirements

Standards in addition to Section 601 for development in AE Floodway are:

1. Any development in a floodway must be reviewed to determine if the project will increase flood heights. An engineering analysis must be conducted before a permit can be issued. A record of the results of this analysis shall be part of the permit file, which can be in the form of a No-rise Certification as required by Section 405(C).
2. Regulatory Flood Elevation is one (1) foot above the floodway elevation or one (1) foot above the Base Flood Elevation, whichever is higher.
3. Septic systems, whether public or privately owned, shall not be located wholly or partially within a floodway.
4. In accordance with A.R.S. §49-772(A)(2) solid waste landfills or any part of such facility, whether public or privately owned, shall not be located wholly or partially within a floodway or within one-half mile of a one-hundred year floodplain that has one hundred year flows in excess of twenty-five thousand (25,000) cubic feet per second, as determined by the Federal Emergency Management Agency. A.R.S. §49-772(C) applies to non-FEMA Floodplains.
5. Any fill material proposed in the floodway must be shown by the applicant to have no detrimental effect. The amount of fill material shall not be greater than is necessary to achieve the purpose for which it is intended as demonstrated by a plan submitted by the applicant indicating the uses to which the filled land will be put, the final dimensions, and the extent of the proposed fill material.

Such fill material shall not include junk, trash, tires, garbage, wood or other buoyant materials, or hazardous, toxic or deleterious materials, and shall be protected against scour and erosion.

6. Structures and development permitted within the floodway shall not include buildings and shall have a low flood damage potential, shall be located so as to minimize obstruction to flood flows with any utilities floodproofed, and shall not be designed or utilized for human habitation.
7. The processing or the outside storage of materials and equipment may be permitted if flooding would cause minimal damage to the material or equipment and such material or equipment is either non-buoyant or firmly anchored or located so as to prevent flotation or is maintained in a readily transportable condition so as to be readily removed from the area within the time available after flood warning.
8. In order to control erosion and preserve the natural and beneficial functions of the floodplain, removal of vegetation shall be the minimum necessary for development.

B. Mining/Extraction of Sand and Gravel and Other Materials in AE Floodway

1. The applicant shall show that excavations will not have a cumulative adverse impact and not be of such depth, width, length, or location as to divert, retard, or obstruct flood water and present a hazard to life, property, or the watercourse in which they are located, and that they will comply with any applicable Watercourse Master Plan adopted by the Board of Directors.
2. Excavations shall not be permitted so close to any floodway crossings, utility structures or facilities as to cause or have the potential to cause an adverse impact on such crossings, utilities or similar facilities.
3. No stockpiling of tailings, overburden or sand and gravel which may obstruct, divert, retard or disrupt the continuity of the natural flow of water shall be permitted, unless otherwise required by state or federal regulations and approved by the Floodplain Administrator.
4. In order to control erosion and preserve the natural and beneficial functions of the floodplain, removal of vegetation shall be the minimum necessary for the development, and in accordance with the approved plan of development.
5. Erosion setbacks and erosion hazard zones within the 100-year floodplain shall meet the State of Arizona State Standards or minimum technical standards determined by the Floodplain Administrator to prevent adverse impacts to structures or property.

Section 603. Zone AE

(Applicable to Article Five, Section 502 Allowable Development)

Development shall meet Section 601 General Development Standards. Additional Standards in Zone AE are:

1. The Regulatory Flood Elevation is two (2) feet above the Base Flood Elevation if no floodway has been delineated. If a floodway has been delineated then the Regulatory Flood Elevation is one (1) foot above the floodway elevation or one (1) foot above the Base Flood Elevation, whichever is higher.
2. For Elevation Certificate purposes, the adjacent grade in an AE Zone is finished grade.

3. A Floodplain Use Permit for the extraction of sand and gravel or other materials within Zone AE shall be granted under the same conditions as Section 602. The following additional conditions are:
 - a. Dikes or levees are permitted provided it can be shown by the applicant that such dikes or levees will not adversely affect structures, road or utility crossings, easements, or right-of-way or other public or private property, and will not cause erosion or diversion of flood flows onto property outside the delineated floodplain, and will not create a danger to life or property.
 - b. The stockpiling and processing of material may be permitted by the Floodplain Administrator.

Section 604. Zone A (non-alluvial)

(Applicable to Article Five, Section 503 Allowable Development)

Development shall meet Section 601 General Development Standards. Additional Standards for Zone A are:

1. The Regulatory Flood Elevation is two (2) feet above the community determined Base Flood Elevation. The Elevation Certificate specifies that when a BFE cannot be determined and an RFE based on flood depth is used then the structure must comply with these Regulations.
2. For Elevation Certificates, the adjacent grade is natural grade, unless a datum Base Flood Elevation is determined, then the adjacent grade is finished grade.
3. Extraction of sand and gravel and other materials operations shall meet the Development Standards of Section 602 or Section 603, whichever is applicable. The applicant for a sand and gravel permit in Zone A shall delineate the floodway portion of the floodplain.

Section 605. Zone A Ponding

(Applicable to Article Five, Section 503 Allowable Development)

Development shall meet Section 601 General Development Standards. Additional requirements for Zone A Ponding Area are:

1. The Regulatory Flood Elevation is one (1) foot above the height of the effective outfall or the height of the feature causing the ponding.
2. For Elevation Certificate purposes, the adjacent grade is finished grade.
3. Any volume displacement shall be equally compensated for from within the same ponding area.
4. The effective lateral conveyance shall be preserved.
5. Extraction of sand and gravel and other materials operations shall meet the Development Standards of this Section if applicable.

Section 606. Zone A Shallow Flooding

(Applicable to Article Five, Section 503 Allowable Development)

Development shall meet Section 601 General Development Standards. Additional standards for Zone A Area of Shallow Flooding are:

1. The Regulatory Flood Elevation is two (2) feet above the community determined Base Flood Elevation.
2. For Elevation Certificate purposes, adjacent grade is natural grade.
3. Extraction of sand and gravel and other materials operations shall meet the Development Standards of this Section if applicable.

Section 607. Zone AH Ponding

(Applicable to Article Five, Section 504 Allowable Development)

Development shall meet Section 601 General Development Standards. Additional Development Standards for Zone AH Ponding are:

1. The Regulatory Flood Elevation is one (1) foot above the Base Flood Elevation.
2. For Elevation Certificate purposes, the adjacent grade is finished grade.
3. Any volume displacement shall be equally compensated for from within the same Ponding Area.
4. The effective lateral conveyance shall be preserved.
5. Extraction of sand and gravel and other materials operations shall meet the Development Standards of this Section if applicable.

Section 608. Zone AO Ponding Area

(Applicable to Article Five, Section 505 Allowable Development)

Development shall meet Section 601 General Development Standards. Additional Development Standards for Zone AO are:

1. The Regulatory Flood Elevation is one (1) foot above the flood depth.
2. For Elevation Certificate purposes, the adjacent grade is natural grade.
3. Any volume displacement shall be equally compensated for from within the same Ponding Area.
4. The effective lateral conveyance shall be preserved.
5. Extraction of sand and gravel and other materials operations shall meet the Development Standards of this Section if applicable.

Section 609. Zone AO Shallow Flooding

(Applicable to Article Five, Section 505 Allowable Development)

Development shall meet Section 601 General Development Standards. Additional Development Standards for Zone AO are:

1. The Regulatory Flood Elevation is one (1) foot above the flood depth.
2. For Elevation Certificate purposes, the adjacent grade is natural grade.
3. Extraction of sand and gravel and other materials operations shall meet the Development Standards of this Section if applicable.

Section 610. Zone AO Alluvial Fan

(Applicable to Article Five, Section 505 Allowable Development)

Development shall meet Section 601 General Development Standards. Additional Development Standards for Zone AO are:

1. The Regulatory Flood Elevation is one (1) foot above the flood depth.
2. For Elevation Certificate purposes, the adjacent grade is natural grade.
3. Extraction of sand and gravel and other materials operations shall meet the Development Standards of this Section if applicable.

Section 611. Zone A Alluvial Fan High Hazard Area Administrative Floodway

(Applicable to Article Five, Section 506 Allowable Development)

Development within an Alluvial Fan High Hazard Area, as determined using the Piedmont Assessment Manual shall be regulated in a manner similar to a Floodway as described in Article Six, Sections 602 of these Regulations. Additional Development Standards for Zone A Alluvial Fan High Hazard Area Administrative Floodway are:

Only major engineering measures as outlined in the Piedmont Manual may be used to mitigate the alluvial fan flood hazard in these areas.

Extraction of sand and gravel and other materials operations shall meet the Development Standards of this Section if applicable.

Section 612. Zone A Alluvial Fan Uncertain Flow Distribution Area Administrative Floodway

(Applicable to Article Five, Section 506 Allowable Development)

Development within an Alluvial Fan Uncertain Flow Distribution Area as determined using the Piedmont Assessment Manual shall be regulated in a manner similar to a floodway as described in Article Six, Sections 602 of these Regulations. Additional Development Standards for Zone A Alluvial Fan Uncertain Flow distribution Administrative Floodway are:

Only major engineering measures as outlined in the Piedmont Manual may be used to mitigate the alluvial fan flood hazard in these areas.

Extraction of sand and gravel and other materials operations shall meet the Development Standards of this Section if applicable.

Section 613. Zone A Approximate Alluvial Fan Floodway Administrative Floodway

(Applicable to Article Five, Section 506 Allowable Development)

Development within an Alluvial Fan Floodway as determined using the Piedmont Assessment Manual shall be regulated in a manner similar to a floodway as described in Article Six, Sections 602 of these Regulations. Additional Development Standards for Zone A Approximate Alluvial Fan Floodway Administrative Floodway are:

Only major engineering measures as outlined in the Piedmont Manual may be used to mitigate the Alluvial Fan flood hazard in these areas.

Extraction of sand and gravel and other materials operations shall meet the Development Standards of this Section if applicable.

Section 614. Zone A Alluvial Fan

(Applicable to Article Five, Section 507 Allowable Development)

Development within an Alluvial Fan Zone A as determined using the Piedmont Assessment Manual Development may require an engineered plan.

Development shall meet Section 601 Development Standards. Additional Standards for Zone A Alluvial Fan are:

1. The Regulatory Flood Elevation is two (2) feet above Base Flood Elevation.
2. For Elevation Certificate purposes, the adjacent grade is natural grade unless a datum Base Flood Elevation is determined; then the adjacent grade is finished grade.
3. When development plans propose structures located in the proximity of a wash or with an area of significant sheet flow depth, the applicant shall submit a plan of development prepared by an Arizona Registered Engineer. The plan shall include engineering analysis to mitigate all hazards associated with alluvial fan flooding including inundation, ground erosion, scour around structures, aggradation and degradation. The plan shall also include building pad and lowest floor elevations. The plan shall be consistent with ADWR State Standards.
4. Development requirements in these areas shall include:
 - a. Detailed site topography;
 - b. Identification of lowest floor elevations in relation to flood elevation/depth;
 - c. Identification of all washes through the site including ingress and egress locations;

- d. Identification of provisions to maintain all natural and improved drainage or flood conveyance systems with minimal disruption of the water/sediment system;
 - e. Fill pads that may be impacted by runoff shall be protected against scour and erosion.
- 5. Extraction of sand and gravel and other materials operations shall meet the Development Standards of this Section if applicable.

Section 615. Development Standards within Other Flood Hazard Areas

(Applicable to Article Five, Section 508 Allowable Development)

- 1. Standards adopted for development contained in a Watercourse Master Plan, Area Drainage Master Plan or other hydrologically or hydraulically oriented master plan shall be consistent with sound floodplain management practices and these Regulations.
- 2. The applicant for any proposed development may be required to provide against encroachment into or protection from the delineated flood hazard.
- 3. The placement of fill material or extraction of materials may require the Floodplain Administrator's approval of plans prepared by an Arizona Registered Professional Engineer.
- 4. The standards, provisions, criteria and requirements for development in Flood Hazard Zones imposed by an authorized master plan shall meet or exceed the requirements of these Regulations.
- 5. In areas where floodways have not been defined using traditional equal conveyance encroachment methods, the Floodplain Administrator may require that the Regulatory Flood Elevation be two (2) feet above the Base Flood Elevation.
- 6. Extraction of sand and gravel and other materials operations shall meet the Development Standards of this Section if applicable.

ARTICLE SEVEN

ENFORCEMENT

Section 701. Authority

This Section authorizes and specifies the enforcement procedures and establishes the penalties and remedies available for violations to enforce the provisions of these Regulations and to implement the violation, enforcement, and penalty provisions authorized pursuant to A.R.S. §§48-3603(D), 48-3609, 48-3613, 48-3614, 48-3615, 48-3615.01, 48-3622, 48-3626.

Section 702. Violation

A. The following acts constitutes a violation of these Regulations:

1. Engaging in any development or to divert, retard or obstruct the flow of waters in a watercourse if it creates a hazard to life or property without securing a Floodplain Use Permit from the Board of the Flood Control District. Where the watercourse is a delineated floodplain it is unlawful to engage in any development affecting the flow of waters without securing a Floodplain Use Permit from the Board of the Flood Control District.
2. Violating any other statutes, regulations, ordinances or rules governing floodplains including: A) the Floodplain Regulations for Maricopa County, B) the Drainage Policies and Standards for Maricopa County, Arizona, and C) any other rules or ordinances adopted pursuant to authority granted to the Flood Control District under state statute.
3. Engaging in any development that is not in compliance with an active Floodplain Use Permit.
4. Damaging or interfering with a facility that is owned, operated or otherwise under the jurisdiction of the Flood Control District without written authorization from the Board of the Flood Control District.
5. It is a civil offense for any person to violate any regulations, ordinances, or rules of the Flood Control District punishable in accordance with A.R.S. §48-3615(C).

B. Violators of any provision of these Regulations shall be notified by the Floodplain Administrator, or his designee, who shall state the nature of the violation and order corrective action.

C. Failure to comply with ordered corrective action may result in submission of a declaration for denial of flood insurance for otherwise insurable structures to the Administrator of the Federal Insurance Administration pursuant to Section 1316 of the National Flood Insurance Act of 1968, as amended (codified at 42 U.S.C §4023).

Section 703. Enforcement

A. Pursuant to regulations, ordinances, rules and technical standards as adopted from time to time by the Board of the Flood Control District, the Floodplain Administrator shall:

1. Conduct inspections to determine if violations of its regulations, ordinances, rules or permit conditions exist.
 - a. The Floodplain Administrator and its agents may have reasonable access for inspection pursuant to written authorization under A.R.S. §48-3609(K) or the terms of a Floodplain Use Permit. If no written authorization has been issued, the Floodplain Administrator may inspect during regular business hours, or in the case of emergency, at any time.
 - b. If the Floodplain Administrator and its agents are denied reasonable access for inspection, the Chief Engineer of the District may apply for an administrative search warrant to be served by a certified peace officer.
 2. If a violation of the District regulations, ordinances, rules, or permit conditions (referenced as stipulations as part of the permit) is found, the Floodplain Administrator will serve upon the property owner or permit holder a Notice of Violation.
- B. Pursuant to A.R.S. §48-3615.01, if the violation is not resolved by the deadline in the Notice of Violation, the Floodplain Administrator may set the matter for an administrative hearing before a Hearing Officer and serve notice of the hearing date, time, and place to the property owner or permit holder. The Floodplain Administrator may seek to enforce these Regulations in a court with applicable jurisdiction.

Section 704. Service of Notice of Violation

- A. If a District representative determines that a violation is occurring on the privately owned real property under the jurisdiction of the District, that representative shall serve, or cause to be served, a Notice of Violation to the real property owner and separately on the alleged violator. If a District representative determines that a District facility has been damaged or is being interfered with, that representative shall serve, or cause to be served, a Notice of Violation to the alleged violator. For the purposes of this section, service shall be deemed complete upon:
1. Personal service to the recipient; or
 2. Receipt of the return receipt when mailing a Notice of Violation to the recipient, postage pre-paid, by certified mail, return receipt requested; or
 3. Expiration of ten (10) business days after the date of posting the Notice of Violation on the property.
- B. Where the recipient is the owner of the real property, the address for notice shall be the address from the most recently issued equalized assessment roll for the property or as otherwise appears in the current records of the county. Where the recipient is a corporate or other entity, the address for the notice shall be the address of the statutory agent, or if none, the address from the most recent records of the Corporation Commission or Secretary of State. Service by posting of the Notice of Violation may only be used where the owner, operator, or alleged violator cannot be located after reasonable efforts by the Floodplain Administrator.

Section 705. Response to the Notice of Violation

Upon receipt of a Notice of Violation a person may:

1. Admit the allegations by appearing on the date and time indicated in the Notice of Violation to enter such admission;
2. Admit the allegations by mailing or delivering to the Floodplain Administrator the form accompanying the Notice of Violation indicating in writing the admission to the allegations. This admission shall include an agreement to acquire any permits as necessary, an agreement to remedy the violation in the manner requested by the Floodplain Administrator, or an agreement to remedy the damage or interference in accordance with terms determined by the Floodplain Administrator;
3. Deny the allegations by appearing at the date and time indicated in the Notice of Violation to enter such denial. This shall be deemed to be a request for a hearing unless the Floodplain Administrator has since withdrawn the Notice of Violation; or
4. Deny the allegations by mailing or delivering to the Floodplain Administrator a form accompanying the Notice of Violation indicating in writing and signed by the owner or alleged violator a request for a hearing.
5. If after ten (10) business from the date and time indicated in the Notice of Violation no response is received or appearance made by anyone on behalf of the owner or alleged violator then the District will construe the non-response as a request for a hearing and set a date pursuant to Section 706.

Section 706. Hearing Request

1. A request for a hearing shall be forwarded to a Hearing Officer who shall be appointed by the Flood Control District Board of Directors.
2. The Hearing Officer, or his designee, shall set a date, time and place for a hearing. The Hearing Officer, or his designee, shall cause notice of the hearing to be served on the owner or alleged violator and the Floodplain Administrator in accordance with this Section.
3. Notice of the hearing and a copy of the Notice of Violation shall be served on the owner or alleged violator by personal service at least ten (10) business days before the hearing, or alternatively, if the Hearing Officer is unable to personally serve the notice, the notice may be served by depositing the notice of hearing and a copy of the Notice of Violation in the post office, postage prepaid, addressed to the individual or entity to be served by any form of mail requiring a signed and returned receipt at least thirty (30) days before the hearing.
 - a. Personal service shall be completed by delivering a copy of the hearing notice and the notice of violation as follows:
 1. To that individual personally; or
 2. By leaving copies thereof at that individual's dwelling or usual place of abode with some person of suitable age and discretion then residing therein.

- b. If the real property owner or alleged violator are corporate or other entities, service shall be completed by delivering a copy of the hearing notice and Notice of Violation to the entity's statutory agent or, if none, to a partner, an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service or process at the entity's most recent address as reflected in the records of the Corporation Commission or Secretary of State.

Section 707. Hearing Procedures

Any hearing held pursuant to this section shall be open to the public. Proceedings shall be audio recorded. A record of the proceedings may be made by a court reporter at the owner or alleged violator's expense if they so request.

A. Parties

1. The owner or alleged violator and the District representative must appear before the Hearing Officer on the date, time and place designated for adjudication of the alleged violation.
2. An owner or alleged violator may be represented by an attorney or other designated representative. The District may be represented by the county attorney or by other counsel for the District or may be represented by District staff if the alleged violator is appearing without counsel.
3. If a party desires to be represented by counsel or a designated representative at the hearing, that party must provide written notice of such representation to the Hearing Officer and opposing party a minimum of 24 hours before the scheduled date and time of the hearing. Representation by counsel may not be permitted at the hearing unless proof of notification is produced at the hearing.

B. Discovery

1. Pre-hearing discovery shall not be permitted (i.e., no depositions, interrogatories, etc., will be allowed prior to the actual public hearing).
2. Immediately prior to the public hearing, both parties shall produce for inspection by the opposing party any prepared exhibits and written, taped or recorded statements of any witness which may be offered at the public hearing. Failure to comply with this rule may result, at the Hearing Officer's discretion, in the sanction of granting a recess or continuance to permit such inspection or denying admission of the evidence not so exchanged.

C. Rules of Procedure

1. The Arizona Rules of Evidence shall not apply. Admission of evidence is subject to the discretion and decision of the Hearing Officer. Admissible evidence shall be relevant and material. This is not to be construed as abrogating any statutory provision relating to privileged communications.
2. If the alleged violator does not appear at the date and time specified in the notice of hearing, the Hearing Officer may continue the case in the interest of justice, or may find the alleged violator in default, thereby finding the existence of all relevant facts set forth in the notice of violation, find for the District and submit his findings, determination and recommendation to the Chief Engineer within thirty (30) calendar days of the hearing.

3. If the District representative does not appear at the date and time specified in the notice of hearing, the Hearing Officer may continue the case in the interest of justice, or may find the District in default, thereby admitting that no violation exists, and submit his findings, determination and recommendation to the Chief Engineer within thirty (30) calendar days of the hearing.
4. Decisions of the Hearing Officer, the Chief Engineer or the Board of Hearing Review shall be available to any party to the hearing.

D. Conduct of the Hearing

1. The Hearing Officer shall call the case and briefly describe the procedures to be followed. The Hearing Officer may question any or all witnesses or parties to the action. No person may be examined at a hearing except by the Hearing Officer, the defendant or his attorney or designated representative, and the District representative or the county attorney or by other counsel for the District.
2. The Hearing Officer shall administer oaths and all testimony shall be given under oath or affirmation.
3. All witnesses for the District's case-in-chief, other than the owner or alleged violator, shall be required to testify prior to the owner or alleged violator being required to testify or to produce evidence. However, a witness not called in the District's case-in-chief may be called in rebuttal to testify to an issue raised by the owner or alleged violator.
4. The parties shall stipulate to all facts not in dispute.
5. The order of proceedings shall be as follows:
 - a. Testimony of District's witnesses
 - b. Testimony of owner or alleged violator's witnesses
 - c. Testimony of District's rebuttal witnesses, if any
 - d. Testimony of owner or alleged violator's rebuttal witnesses, if any
 - e. Argument of parties or their counsel or designated representatives
6. At the discretion of the Hearing Officer, cross-examination shall be limited to matters relevant to witnesses' testimony or direct examination.

E. Decision and Order

1. The Hearing Officer shall submit written findings and recommendations for the appropriate measures to be taken to abate or ameliorate any harm or damage arising from the violation and the imposition of any civil penalties to the Chief Engineer and the owner or alleged violator within thirty (30) calendar days after the date of the hearing.
2. The Chief Engineer shall issue a final decision and order. The final decision shall be in the form of findings of fact and conclusions why those facts constitute violations of statutes, regulations, ordinances or rules. The final order shall be in the form of measures required to abate or ameliorate any harm or damage resulting from the violation, requirements for permits and the imposition of civil penalties. The final decision and order shall be served on the parties to this action, in accordance with Sections 706.3.a and 706.3.b and is effective upon service.

F. Right to Appeal

1. Either party to a final decision and order of the Chief Engineer may request a review of the final decision and order by the Board of Hearing Review. A request for review shall be delivered to the Clerk of the Board of Directors within fifteen (15) calendar days after the effective date of the final decision and order.
2. The final decision of the Board of Hearing Review is subject to judicial review pursuant to A.R.S. Title 12, Article 6. Any decision not appealed in a timely fashion becomes the final enforceable order of the Floodplain Administrator.

Section 708. Penalties

- A. It is a Class 2 Misdemeanor to engage in any Development or to divert, retard or obstruct the flow of waters in a watercourse without first securing the written authorization of the District. A violator may be subject to jail and fines.
- B. The penalty for the civil offense of violation of Flood Control District regulations, ordinances or rules is a fine not in excess of that which is chargeable for a Class 2 Misdemeanor. Each day the violation continues constitutes a separate offense.
- C. All development located or maintained within any Special Flood Hazard Area since August 8, 1973, in violation of flood control statutes or regulations without authorization from the Floodplain Administrator is a public nuisance per se and may be abated, prevented or restrained by action of this political subdivision.
- D. Nothing in this section precludes any private right of action by any person damaged by another's unauthorized diversion, retardation or obstruction of a watercourse. Further the District is not precluded by anything in these Regulations from pursuing injunctive and other remedies as provided by law.

Section 709. Abatement

- A. If the violation has not been resolved to the satisfaction of the Chief Engineer after all steps have been exhausted of Article Seven of these Regulations the following may be done to abate the unresolved violation:
 1. Within thirty (30) calendar days of confirmation of an unresolved violation of these Regulations, the Chief Engineer may either authorize the abatement of the violation at District cost or apply to the Superior Court or any court with appropriate jurisdiction for a temporary restraining order or preliminary or permanent injunction. Any complaint filed shall include all information available to the Chief Engineer which is pertinent to said violation and request the following relief:
 - a. For an order allowing the Chief Engineer to take any necessary action to effect the abatement of such violation and to recoup any costs and expenses of taking such action from the owner. The order may, among other things, direct the owner of the property upon which the violation exists to provide whatever additional information and access may be required for the Chief Engineer's action to abate the violation and to provide such information and access within a reasonable time; or

- b.** For an order that the owner abate said violation within a reasonable time.
 - 2.** If applicable, in accordance with the provisions of Section 410 of these Regulations at the next regularly scheduled public meeting of the Floodplain Review Board the Board may issue a Variance.
 - 3.** The Chief Engineer acting as the Floodplain Administrator may submit to the Federal Emergency Management Agency a declaration for denial of insurance, stating that the property is in violation of a cited state or local law, regulation or ordinance, pursuant to Section 1316 of the National Flood Insurance Act of 1968 as amended.
- B.** The Hearing Officer may include a recommendation for the appropriate measures to be taken to abate or ameliorate any harm or damage arising from a violation. The Chief Engineer, who serves as the Floodplain Administrator, may include in his final decision an order that measures be taken to abate or ameliorate any harm or damage arising from a violation.

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APPENDICES

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APPENDIX A - FEE SCHEDULE

Floodplain Regulations for Maricopa County, Arizona

Effective November 30, 2011

Adopted by Resolution FCD 2011R007

The following administrative fees shall be charged for the processing of Appeals, Floodplain Use Permits, Floodplain Variances, plan review and map changes with no provision for refund, unless an error occurred or other state statutes apply:

<u>FLOODPLAIN USE PERMITS</u>	FEES *	
	Community	Unincorporated County
Complexity 1 – Minor, non-complex residential property development	\$250	\$350
Complexity 2 – Single family residential, mobile/manufactured building, commercial/industrial development	\$465	\$600
Complexity 3 – Residential subdivision, commercial/industrial center, other complex residential or commercial development	\$635	\$800
Clearance Review – Incidental Use	\$100	\$100
Clearance Review – No Development Activity in Floodplain	\$50	\$50
Clearance Review – Perimeter Floodplain and Exemptions	\$0	\$0
Permit Amendment or Modification	\$150	\$200
Post Construction Fee – Associated with Floodplain Inquiry Case	\$150 plus Complexity 1, 2, or 3	
<u>FLOODPLAIN USE PERMIT – EXTRACTION OF SAND AND GRAVEL</u>	FEE**	
Permit Application	\$ 12,800	
Non-compliance Engineering Review	\$ 1,600	
Permit Renewal (5 year)	\$ 6,400	
Major Amendment	\$ 7,440	
Minor Amendment	\$ 3,700	
Administrative Amendment	\$50	
<u>VARIANCE</u> (Floodplain Administrator, Floodplain Review Board, or Board of Directors)	FEE	
Residential/Commercial/Industrial (posting required)	\$ 2,600	
Continuance of Hearing – Applicants request	\$ 50	
New Posting Required	\$ 170	
<u>FLOODPLAIN DELINEATION REVIEW</u>	FEE	
CLOMR/LOMR (MT1)	\$ 880	
CLOMR/LOMR (MT2)	\$ 3,000	
Review of Floodplain Study	\$ 1,500	
<u>APPEALS</u>	FEE	
Appeals, Interpretations	\$250	

Note: Fees shall not be charged by the Floodplain Administrator to any government entities (federal, state, county, or municipal) for services provided by the District.

* Fees for unincorporated county include inspections. Inspections by District staff are not performed for communities unless requested by the community, and in those cases the applicant would be charged the unincorporated county fee.

** Fees include all required inspections throughout the life of the Floodplain Use Permit.

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APPENDIX B – Communities Dependent on the District

Listed below are the dates of the original firms, FIRMS, FBEM and FIS studies for the communities for which the Flood Control District of Maricopa County performs floodplain management:

COMMUNITY	ORIGINAL FIS & MAP DATES
Maricopa County Unincorporated Areas	July 2, 1979
Town of Buckeye	February 15, 1980
Town of Carefree	July 2, 1979
Town of Cave Creek	September 29, 1989
City of Chandler	July 16, 1980
City of El Mirage	December 1, 1978
Town of Gila Bend	December 4, 1979
Town of Guadalupe	April 15, 1988
City of Litchfield Park	September 29, 1989
City of Mesa	May 15, 1980
Town of Queen Creek	September 4, 1991
City of Surprise	January 15, 1978
City of Tolleson	January 16, 1980
Town of Youngtown	November 15, 1978

REVISIONS

Revisions to these Regulations will be required from time to time due to ongoing regulatory and technical changes, revisions or additions to state statutes, and other federal and state requirements. Such revisions will take place in accordance with the procedures outlined in state statutes.

A Floodplain Regulation for Maricopa County has been in force since February 25, 1974. The version that these Regulations supersede are the Floodplain Regulations for Maricopa County, Arizona that were adopted on August 4, 1986; and subsequently amended

March 23, 1987;

April 6, 1988;

September 18, 1989;

September 3, 1991;

December 15, 1993;

November 1, 2000;

December 20, 2006; and

Latest date, November 30, 2011



Flood Control District of Maricopa County

PURPOSE:

Pursuant to A.R.S. §48-3645, the District establishes overall licensing time frames during which the District will either grant or deny each type of license (permit) that it issues. The overall time frame for each type of license states separately the District's time frame for the administrative completeness review time frame and the substantive review time frame.

The District must take into account the partnerships with the communities that have elected not to assume their own floodplain management and participation in the Maricopa County One Stop Shop when establishing overall time frames. These time frames may be subject to modification in accordance with state statutes. Time frames include the District's review time and not the time the applicant takes responding to notice of deficiencies for either administrative or substantive review.

The following time frames are provided for development located within special flood hazard areas in the Flood Control District's area of jurisdiction in Maricopa County:

Time Frames

<u>FLOODPLAIN USE PERMITS</u>	Admin/Substantive/Overall Time (Working Days)
Complexity 1 – Minor, non-complex residential property development	30/60/90
Complexity 2 – Single family residential, mobile/manufactured building, commercial/industrial development	30/60/90
Complexity 3 – Residential subdivision, commercial/industrial center, other complex residential or commercial development	30/60/90
Clearance Review – Incidental Use	30/60/90
Clearance Review – No Development Activity in Floodplain	30/60/90
Clearance Review – Perimeter Floodplain and Exemptions	30/60/90
Permit Amendment	30/60/90
<u>FLOODPLAIN USE PERMIT – EXTRACTION OF SAND AND GRAVEL</u>	
Permit Application	30/60/90
Non-compliance Engineering Review	N/A
Permit Renewal (5 year)	30/0/30 *
Major Amendment	30/60/90
Minor Amendment	30/60/90
Administrative Amendment	N/A
<u>VARIANCE</u> (Floodplain Administrator, Floodplain Review Board, or Board of Directors)	
Residential/Commercial/Industrial (posting required)	30/60/90
<u>FLOODPLAIN DELINEATION REVIEW</u>	
CLOMR/LOMR (MT1)	20/10/30
CLOMR/LOMR (MT2)	30/60/90

*Provided that development has been done in accordance with the approved plan of development.



Flood Control District of Maricopa County

www.fcd.maricopa.gov

William D. Wiley, P.E.
Chief Engineer and
General Manager
2801 West Durango Street
Phoenix, Arizona 85009
Phone: 602-506-1501
Fax: 602-506-4601

February 12, 2015

Mr. David Waltemath, President/CEO
ABC Sand and Rock Company, Incorporated
1804 N 27th Avenue
PHOENIX, AZ 85009

Re: Mining Operation in the Agua Fria Floodplain

Dear Mr. Waltemath:

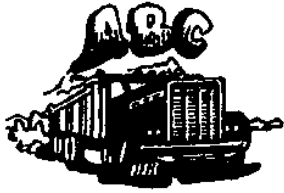
Now that the Board of Hearing Review has issued its Final Decision and Order on Remand on January 28, 2015, it is important that the Flood Control District follow up on the remaining order of business. Per item 1 of the Final Order, ABC Sand and Rock is required to pursue a Floodplain Use Permit and pay appropriate fees. If the application is filed and the fees are paid by March 6, 2015, we will forebear any enforcement action for operating without a permit, and per Floodplain Regulations Section 403.B.3, will issue a permit of short duration during the application process if required.

Sincerely,

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

William D. Wiley, P.E.
Chief Engineer and General Manager

cc: Sean B. Berberian, Esq.



A.B.C.
SAND & ROCK

"Quality Washed Products"

5401 NORTH 119th AVE.
GLENDALE, ARIZONA 85307

623-935-1677

RECEIVED

MAR - 2 2015

FLOOD CONTROL DISTRICT

February 27, 2015

Mr. Bill Wiley
Flood Control District of Maricopa County
2801 W. Durango St.
Phoenix, AZ 85009

Re: FA 95-048A

Mr. Wiley:

In response to your letter of February 12, 2015, A.B.C. Sand & Rock Co., Inc. (ABC) submits its proposed amended plan of development for the above-referenced permit for Plant One. ABC also submits the filing fee of \$7440. Note that ABC previously submitted a renewal fee of \$6400 twice in 2011. Thus, ABC has paid a total of \$20,240 in permit fees for Plant One since 2011.

ABC disagrees with the Board of Hearing Review's ruling that its permit was not renewed in 2011. ABC maintained, and continues to maintain, that its permit was renewed in 2011. Yet, after operating our family business here for over forty years now, I don't believe the past must necessarily cast the future in identical cement. Therefore, count me among those that remain hopeful your new administration will usher in a refreshing change at the FCDMC.

Please understand under the circumstances I must ask that any questions regarding the proposed permit amendment, including questions or requests for meetings with ABC's engineer Pedro Calza, must be directed to ABC's attorney, Jeri Kishiyama in writing at 207 West Northview Avenue, Phoenix, AZ 85021.

Sincerely,

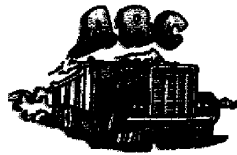
David J. Waltemath

Enclosures

cc: Jeri Kishiyama, Esq.
Sean Berberian, Esq.
Steve White, Esq.
Tim LaSota, Esq.
Pedro Calza, P.E.
Glenn Dietrich
Jack LaSota

ABCSR00001018

APP252



A.B.C.
SAND & ROCK

"Quality Washed Products"

5401 NORTH 119th AVE.
GLENDALE, ARIZONA 85307

623-935-1677

July 1, 2014

Mr. Pedro Calza, P.E.
52 W. 8th Place
Mesa, AZ 85201

RE: Scope of Work

Dear Mr. Calza;

ABC Sand & Rock Company, Inc. (ABC), hereby requests that Pedro Calza, P.E. amend FA #95-048A located at 5401 N. 119th Ave., Sec. 13, T 2N, 1W, including the property, (otherwise known as BLM property) in Maricopa County, Arizona, described as the SW ¼ of the SE ¼ of Sec. 13, T 2N, Range 1W and the NW ¼ of the NE ¼ of Sec. 24, T 2N, Range 1W.

ABC requests that you use the HEC-1, HEC-RAS, and HEC-6 of the Fuller Study dated March 18, 2014 in analyzing the aforementioned properties for the permit amendment. In conducting the analysis, ABC requests that you use 25 ft. setbacks on the mining site, with the expectation that some of the property may need more than a 25 ft. setback. Please analyze the mining scour depth and advise ABC of your progress regarding analysis of the scour depth. Finally, ABC also requests that the reclamation plan consist of 3:1 sloping.

ABC requests that the mining plan include phases so that if the plant operations building needs to be relocated, it has enough time to do so.

If you have any questions, please don't hesitate to call.

Sincerely,

David Waltemath
ABC Sand & Rock C., Inc.

DJW/gmf

HINSHAW

Stephen W. Tully
sttully@hinshaw.com
Direct Dial: (602) 337-5524

ATTORNEYS AT LAW

1001 North Central Expressway, Suite 2000
Phoenix, Arizona 85004
Telephone: (602) 337-5500

1001 North Central Expressway, Suite 2000
Phoenix, Arizona 85004
Web: www.hinshaw.com

March 13, 2015

Sean B. Berberian, Esq.
WHITE BERBERIAN, PLC
60 E. Rio Salado Parkway, Suite 900
Tempe, Arizona 85281

Jeri Kishiyama, Esq.
207 W. Northview Ave.
Phoenix, Arizona 85021

Re: ABC SAND AND ROCK COMPANY, INC.

Dear Counsel:

This letter is sent on behalf of the Flood Control District of Maricopa County in response to the letter of Mr. Waltemath dated February 27, 2015. With his letter, Mr. Waltemath submitted an amended plan of development and a check for the filing fee applicable to an amended plan. Unfortunately, A.B.C. Sand & Rock Company cannot file an amended plan as it has no permit to operate and thus no current plan to amend.

While the Flood Control District understands that Mr. Waltemath has appealed the January 28, 2015 order from the Board of Hearing Review, that order is still legally binding. Pursuant to the Board's order, A.B.C. Sand & Rock Company, Inc. has no permit to operate. See Findings of Fact ¶¶4&13, Conclusions of Law ¶6, and Final Order ¶1. Accordingly, the District cannot legally accept the application to amend the plan from the expired permit and is returning the filing fee submitted with that application (enclosed in the letter to Ms. Kishiyama).

The Flood Control District of Maricopa County wants to make sure there is no confusion. A.B.C. Sand & Rock Company, Inc. cannot mine or conduct related operations on any of the property subject to the lapsed permit. A.R.S. § 48-3615(A). If it mines with the hope that a court will find that it has a permit, A.B.C. is doing so at its own risk. If it is mining currently, it is in violation of law and subject to fines, up to \$10,000 per day. A.R.S. § 48-3615(B) & A.R.S. § 13-803(A)(2). If A.B.C. wants to resume mining, it will need to file a new application and pay the appropriate fee.

Building on the Barger Tradition

1001 North Central Expressway, Suite 2000, Phoenix, Arizona 85004 | Telephone: (602) 337-5500 | Fax: (602) 337-5501

ABCSR00000281

APP254

March 13, 2015

Page 2

In that regard, I have attached a new application for ABC to complete. In order to obtain a new Floodplain Use Permit for Sand and Gravel Mining within a floodplain in unincorporated Maricopa County or a community with floodplains managed by the District, A.B.C. must submit the following items directly to the District as required by Section 403.B, and Section 402 of the Floodplain Regulations for Maricopa County (Regulations):

1. A completed Floodplain Use Permit application form,
2. A signed and notarized authorization if the applicant wishes to grant an agent, contractor or consultant authority to make decisions on their behalf,
3. A signed acknowledgement from the property owner that a Floodplain Use Permit is being sought and, if applicable, designation of an operator authorized to mine the property,
4. Signed Warning and Disclaimer of Liability form,
5. A Plan of Development (see Section 403.B.1.c of the Regulations), and
6. A check for the appropriate fee. In this case that is \$12,800.

A Floodplain Use Permit for Sand and Gravel Mining allows mining, processing, grading, stockpiling and other operations associated with sand and gravel mining operations within Maricopa County floodplains but only allows mining within the floodway. In order to obtain a permit, the applicant must submit an application that clearly meets the requirements of the Floodplain Regulations for Maricopa County.

Also, to prevent wasted effort, the Flood Control District of Maricopa County has looked at the submitted proposal to amend the old mining plan. It is not a credible submission as it does not adequately address the impact to surrounding properties and structures, does not address the impact of flows from the east from New River, is based on 6 year old topography at the site, and states that the engineering analysis was conducted using hydrology and hydraulic models from the Fuller study dated March 18, 2014. That study did not use the FEMA effective models for the floodplain.

If A.B.C. has any questions regarding the process it can call, Anthony Beuche. His phone number is 602-506-2329. Understand that Mr. Beuche will not be able to discuss any matter concerning the current litigation. Please contact me with any legal questions.

Sincerely,

HINSHAW & CULBERTSON LLP



Stephen W. Tully

SWT/tdh

23387085v1 0959243

ABCSR00000282

APP255



Flood Control District of Maricopa County

Permit No. _____

Received Stamp

For District use only

FLOODPLAIN USE PERMIT APPLICATION**Application Information**☐ Residential ☐ Commercial ☐ Sand & Gravel ☐ CLOMR/LOMR

Name: _____

Mailing Address: _____ City: _____ State: _____ ZIP: _____

Phone Number: _____ Alternate Phone Number: _____

E-Mail: _____

Property Owner ☐ YES ☐ NO

If no the following is required:

A signed and notarized Property Owner Authorization form if the owner wishes to grant an agent, contractor, or consultant authority to make decisions on this application

OR

A signed acknowledgement from the property owner that a Floodplain Use Permit is being sought and, if applicable, designation of an operator authorized to mine the property. (for permits for extraction of sand and gravel or other materials)

Property Information

Property Address: _____ City: _____ State: _____ ZIP: _____

Assessor Parcel Number(s): _____

(if multiple APNs please include in the Purpose of Application description)

Cross Streets: _____ Section: _____ Township: _____ Range: _____ 1/4 Section: _____

Basement: ☐ Yes ☐ No As-Built ☐

Purpose of Application:

APPLICANT SIGNATURE _____ DATE _____

FCDMC Rev. 7/1/2013

2801 West Durango Street, Phoenix, Arizona 85009 Phone: 602-506-1501 main / 602-506-2419 Floodplain Management Fax: 602-372-6232

ABCSR00000283

APP256



Flood Control District of Maricopa County

WARNING AND DISCLAIMER OF LIABILITY

A Floodplain Regulation for Maricopa County has been in force since February 25, 1974. The current version of the Floodplain Regulation for Maricopa County, Arizona was adopted on August 4, 1986, and amended March 23, 1987, April 6, 1988, September 18, 1989, September 3, 1991, December 15, 1993, November 1, 2000, December 20, 2006, November 30, 2011, and April 9, 2014. The intent of the Regulations is to prevent the dangerous and expensive misuse of floodplains in Maricopa County.

A Floodplain as defined in the Regulations is the areas adjoining the channel of a watercourse susceptible to inundation by a base flood including areas where drainage is or may be restricted by man-made structures that have been or may be covered partially or wholly by flood water from the 100-year flood.

Depending on the location of your property it could possibly be inundated by greater frequency flood events (those occurring more often). A flood greater in magnitude than the 100-year flood could also occur.

The review your development has undergone is solely for the purpose of determining if your application conforms with the written requirements of the Floodplain Regulation for Maricopa County. It is not to be taken as a warranty. Compliance with this Regulation does not insure complete protection from flooding. The Floodplain Regulation meets established standards for floodplain management, but neither this review nor the Regulation take into account such flood related problems as natural erosion, streambed meander or man-made obstructions and diversions all of which may have an adverse affect in the event of a flood. You are advised to consult your own engineer or other expert regarding these considerations.

In consideration for the issuance of the requested permit the applicant, owner, agent, engineer and their successors agree to hold the District harmless from any onsite or offsite damages of any kind arising from the development of the subject property in accordance with their submittals as outlined in the attached permit

I have read and understand the above WARNING AND DISCLAIMER OF LIABILITY.

Permit Number	Owner or Agent	Date
---------------	----------------	------



Flood Control District of Maricopa County

PURPOSE:

Pursuant to A.R.S. §48-3645, the District establishes overall licensing time frames during which the District will either grant or deny each type of license (permit) that it issues. The overall time frame for each type of license states separately the District's time frame for the administrative completeness review time frame and the substantive review time frame.

The District must take into account the partnerships with the communities that have elected not to assume their own floodplain management and participation in the Maricopa County One Stop Shop when establishing overall time frames. These time frames may be subject to modification in accordance with state statutes. Time frames include the District's review time and not the time the applicant takes responding to notice of deficiencies for either administrative or substantive review.

The following time frames are provided for development located within special flood hazard areas in the Flood Control District's area of jurisdiction in Maricopa County:

Time Frames

FLOODPLAIN USE PERMITS	Admin/Substantive/Overall Time (Working Days)
Complexity 1 – Minor, non-complex residential property development	30/60/90
Complexity 2 – Single family residential, mobile/manufactured building, commercial/industrial development	30/60/90
Complexity 3 – Residential subdivision, commercial/industrial center, other complex residential or commercial development	30/60/90
Clearance Review – Incidental Use	30/60/90
Clearance Review – No Development Activity in Floodplain	30/60/90
Clearance Review – Perimeter Floodplain and Exemptions	30/60/90
Permit Amendment	30/60/90
FLOODPLAIN USE PERMIT – EXTRACTION OF SAND AND GRAVEL	
Permit Application	30/60/90
Non-compliance Engineering Review	N/A
Permit Renewal (5 year)	30/0/30 *
Major Amendment	30/60/90
Minor Amendment	30/60/90
Administrative Amendment	N/A
VARIANCE (Floodplain Administrator, Floodplain Review Board, or Board of Directors)	
Residential/Commercial/Industrial (posting required)	30/60/90
FLOODPLAIN DELINEATION REVIEW	
CLOMR/LOMR (MT1)	20/10/30
CLOMR/LOMR (MT2)	30/60/90

*Provided that development has been done in accordance with the approved plan of development.

A.B.C. Sand & Rock
5401 N 119th Avenue
Glendale, AZ 85307
623-935-1677

COBIZ BANK
Arizona Business Bank
Tempe, Arizona 85282
91-914/1221

31583

2/27/2015

PAY TO THE
ORDER OF

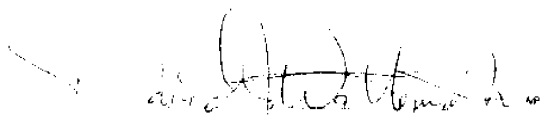
Flood Control District

\$ 7,440.00

Seven Thousand Four Hundred Forty and 00/100***** DOLLARS

Flood Control District
of Maricopa County
2801 W. Durango Street
Phoenix, AZ 85009

FA 95-048A



⑈031583⑈ ⑆122105540⑆ 3183515⑈

HINSHAW

& CULBERTSON LLP

Stephen W. Tully
stully@hinshawlaw.com
Direct Dial: (602) 337-5524

ATTORNEYS AT LAW

2375 East Camelback Road
Suite 750
Phoenix, AZ 85016

602-631-4400
602-631-4404 (fax)
www.hinshawlaw.com

April 15, 2015

Via Email and US Mail

Sean B. Berberian, Esq.
WHITE BERBERIAN, PLC
60 E. Rio Salado Parkway, Suite 900
Tempe, Arizona 85281

Jeri Kishiyama, Esq.
207 W. Northview Ave.
Phoenix, Arizona 85021

Re: ABC SAND AND ROCK COMPANY, INC.

Dear Counsel:

This letter is sent to follow up on the letter I sent on behalf of the Flood Control District of Maricopa County dated March 13, 2015. I understand each of you received that letter on March 30th or 31st. I know that Sean suggested that the District would be receiving a response to its March 13th letter. We look forward to receiving that response. In the meantime, ABC still needs to stop its mining activity in the flood plain.

The Flood Control District has reason to believe ABC Sand and Rock Company, Inc. is continuing to mine in the floodplain. As I am sure you can understand, the Flood Control District cannot look the other way while these violations of state law and the District's regulations occur. Accordingly, if by Friday May 1, 2015 ABC has not submitted the necessary paperwork and paid the fees required to obtain a permit or otherwise obtained some relief from the court, the Flood Control District will be forced to commence a new enforcement action. And to be clear, the Flood Control District is looking for a good faith submittal and evidence of vigorous follow up to get the permit issued.

The Flood Control District of Maricopa County, of course, hopes that it will not need to bring an enforcement action and that ABC will file the necessary documents and pay the necessary fees to obtain a permit and then work diligently toward obtaining a permit. If ABC needs any assistance in that regard, please have it contact Anthony Beuche at 602-506-2329. Please contact me if you want to discuss any legal matters or concerns.

Building on the Barger Tradition

Arizona California Florida Illinois Indiana Massachusetts Minnesota Missouri New York Rhode Island Wisconsin ^{23392179v1 0959243} & London


ABCSR00000287

APP260

April 15, 2015
Page 2

Sincerely,

HINSHAW & CULBERTSON LLP

A handwritten signature in black ink, appearing to read 'S. Tully', with a long horizontal flourish extending to the right.

Stephen W. Tully

SWT/tdh

23392179v1 0959243

ABCSR00000288

APP261

GAMMAGE & BURNHAM, PLC

ATTORNEYS AT LAW
TWO NORTH CENTRAL AVENUE
FIFTEENTH FLOOR
PHOENIX, ARIZONA 85004-4470

TELEPHONE (602) 256-0566
FACSIMILE (602) 256-4475

WRITERS DIRECT LINE

May 1, 2015

Michelle A. De Blasi
mdeblasi@gblaw.com

(602) 256-4419

RECEIVED

MAY - 1 2015

William D. Wiley, P.E.
Chief Engineer and General Manager
Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, Arizona 85009

FLOOD CONTROL DISTRICT

Via Hand Delivery

Re: A.B.C. Sand and Rock Company, Incorporated

Dear Bill:

As you know, I have been engaged to assist A.B.C. Sand and Rock in connection with the floodplain use permit for its "Plant One" facility located off of West Camelback Road in Glendale.

Further to our recent discussions, I am submitting with this letter (i) a completed Floodplain Use Permit Application form from A.B.C., (ii) two checks from A.B.C. totaling \$12,800, (iii) an April 27, 2015 engineering report/development plan prepared by Pedro A. Calza, P.E., (iv) enlarged copies of the mining plan sheets that are attached as Appendix A to Mr. Calza's report, and (v) a CD containing electronic copies of Mr. Calza's report and appendices, as well as his engineering modeling. A signed "Warning and Disclosure of Liability" form is also enclosed, and you will note that signed owner acknowledgements are attached to Mr. Calza's report at Appendix C.

You have indicated that the District may have some concerns with the modeling being submitted, and you and I have agreed that our offices will work together to address and resolve those concerns in a prompt and productive manner. To that end, I will reach out to you early next week to schedule an initial meeting. You have also indicated that a permit of short duration would be issued upon your receipt of the enclosed submission, and I ask that you send a copy of that permit to my attention as soon as possible.

I understand that there has been a recent history of litigation and other disputes between the District and A.B.C. While our firm may become involved in one or more of those matters, my personal focus is on working with your office to resolve the permit issue and I do not anticipate becoming involved in litigation matters. As you and I have discussed, however, I need to make sure that my efforts regarding the permit do not inadvertently prejudice A.B.C.'s rights and remedies in connection with ongoing litigation matters. As such, I have mentioned, and you have graciously acknowledged, that A.B.C.'s application and corresponding fees are being submitted "under

William D. Wiley
May 1, 2015
Page 2

protest." For example, but without limitation, I understand that A.B.C. disputes the Final Decision and Order on Remand that was recently issued by the Board of Hearing Review in Case Number FA 95-048A, disputes the District's interpretation of that Order, disputes that it does not currently have a permit or that any new or temporary permit is needed at this time, disputes that a new application (as opposed to renewal) is required at this time, disputes that an amended plan of development cannot be filed, and disputes the fees that the District is presently requiring A.B.C. to pay in connection with this submission. A.B.C. is submitting the enclosed application and fees in an effort to cooperatively and amicably move this matter towards a resolution, but such submission should in no way be interpreted as an indication that A.B.C. agrees with the District's position on any of these issues.

I am glad that you are personally involved in this matter, and I look forward to working with you to efficiently and expeditiously resolve the permit issue. Again, I will contact you early next week to schedule a time to begin discussing and addressing any concerns the District may have regarding the engineering report.

Very truly yours,

GAMMAGE & BURNHAM, PLC

By



Michelle A. De Blasi

MAD/efy
Enclosure



Flood Control District of Maricopa County

www.fcd.maricopa.gov

William D. Wiley, P.E.
Chief Engineer and
General Manager
2801 West Durango Street
Phoenix, Arizona 85009
Phone: 602-506-1501
Fax: 602-506-4601

May 8, 2015

Mr. David Waltemath
President/CEO
A.B.C. Sand and Rock Company, Incorporated
1804 N. 27th Avenue
Phoenix, AZ 85009

Subject: NOTICE OF VIOLATION – CEASE AND DESIST
Unpermitted Activity in Floodway and Floodplain
Assessor's Parcel # 501-63-004 and State Trust Land (map attached)

Dear Mr. Waltemath:

An inspection of the above referenced property on March 26, April 3, April 9, April 15, April 23, and May 5, 2015, revealed that there is an on-going sand and gravel mining operation occurring without a Floodplain Use Permit. Public records reveal that A.B.C. Sand and Rock Company, Incorporated, is the operator of this unpermitted activity.

It is unlawful for any person to engage in development in the floodplain without a Floodplain Use Permit or to obstruct a watercourse without written authorization from the Flood Control District. (A.R.S. § 48-3613, Floodplain Regulations for Maricopa County, Article Four, § 401.) **You are hereby ordered immediately to cease and desist all unpermitted activity until such time as you have obtained a Floodplain Use Permit for the operations in the floodplain on the site. This order to cease and desist is effective on the date you receive this letter.**

On receipt of this notice of violation you may appear in person, by attorney or by designated representative on May 20, 2015 at 1pm at the Flood Control District offices at 2801 W. Durango Street to admit or deny these allegations, or alternatively you may mail or deliver the attached form provided with this notice of violation on or before May 20, 2015 (A.R.S. § 48-3615.01.B). If no response is received from you, it will be deemed a request for a hearing before a Hearing Officer. You will be notified of that hearing date.

Mr. David Waltemath
Page 2
May 8, 2015

Pursuant to A.R.S. § 48-3615, a person who violates floodplain regulations may be fined a civil penalty not to exceed that which is chargeable for a Class 2 Misdemeanor. Under a Class 2 Misdemeanor, an enterprise can be charged \$10,000 per day and an individual can be charged \$750 per day as a civil penalty. Furthermore, pursuant to A.R.S. § 48-3615(C), each and every day the violation continues constitutes a separate violation.

Sincerely,



William D. Wiley, P.E.
Chief Engineer and General Manager

Enclosures:
Return Form

Cc: Rare Earth, LLC, Steve White, Statutory Agent
1075 W. Todd Drive, Tempe, AZ 85283

Arizona State Land Department
1616 W. Adams Street, Phoenix, AZ 85007

Michelle A. De Blasi, Gammage & Burnham, PLLC
Two North Central Avenue, 15th Floor, Phoenix, AZ 85004

Jeri Kishiyama
207 W. Northview, Phoenix, AZ 85021

Glenn R. Dietrich CPA, Creed Dietrich & Robinson PLLC
1345 E. Chandler Blvd., #117, Phoenix, AZ 85048

Date: _____

Flood Control District of Maricopa County
2801 W. Durango St.
Phoenix, Arizona 85009

Attention: William D. Wiley, P.E., Chief Engineer

RE: NOTICE OF VIOLATION-CEASE AND DESIST
Unpermitted Activity in Floodway and Floodplain
Assessor's Parcel # 501-63-004 and State Trust Land

Dear Mr. Wiley:

I am in receipt of your NOTICE OF VIOLATION-CEASE AND DESIST. By this letter I am hereby:

- _____ 1. Admitting the violation alleged in the NOTICE OF VIOLATION-CEASE AND DESIST and agree to discontinue the illegal activity.
- _____ 2. Denying the violation alleged in the NOTICE OF VIOLATION-CEASE AND DESIST and requesting a hearing.

If you are requesting a hearing, please provide the following information so that a hearing officer may personally serve notice of the hearing date to you:

Name: _____

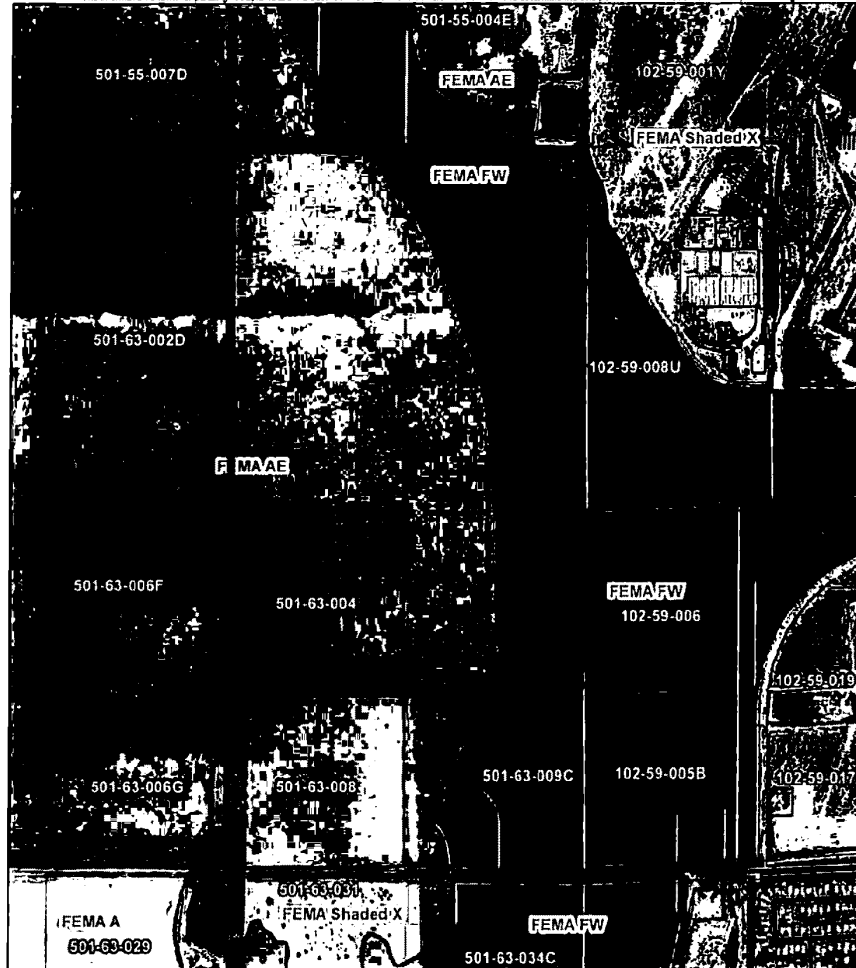
Physical Address: _____

City, State: _____

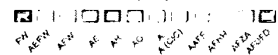
Phone: _____

Signed:

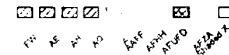
This document cannot be used for floodplain determinations. Current studies, maps, setbacks and other factors may also affect the floodplain status of the property. The information shown for pending floodplains is the best technical information available at this time to determine the one percent chance flood and are subject to change.



Current FEMA Flood Zones



Current Pending Flood Zones



0 420 840 1,680 Feet
1 inch = 833 feet

Date: 5/6/2015
Time: 11:11:26 AM



Floodplain Management & Services
2701 West Orange Street
Phoenix, Arizona 85009
Phone: (602) 556-2419
Fax: (602) 372-6332
<http://www.floodmanagerservices.com>

GAMMAGE & BURNHAM, PLC

ATTORNEYS AT LAW

TWO NORTH CENTRAL AVENUE

15TH FLOOR

PHOENIX, ARIZONA 85004

May 12, 2015

TELEPHONE (602) 256-0566
FACSIMILE (602) 256-4475

WRITER'S DIRECT LINE
(602) 256-4419

Michelle A. De Blasi
mdeblasi@gbllaw.com

Wayne Peck
Deputy Maricopa County Attorney
Maricopa County Attorney's Office
222 N. Central Avenue, 11th Floor
Phoenix, Arizona 85004

Via E-Mail and U.S. Mail

Re: A.B.C. Sand and Rock Company, Incorporated

Dear Wayne:

This letter is in response to your email of May 8, 2015 regarding the permit application for A.B.C. Sand and Rock filed on May 1, 2015. In your email, you request that A.B.C. indicate on the mining plan which areas are not within A.B.C.'s property rights. All lands on A.B.C.'s mining plan are either owned, leased or subject to a current lease application. Per the requirements of Section 403(B)(1)(c) of the Floodplain Regulations for Maricopa County, a new permit application only requires "a signed acknowledgement from the property owner that a Floodplain Use Permit is being sought and, if applicable, designation of an operator authorized to mine the property." I am not aware of a requirement in the regulations or statutes that requires an executed lease to be attached to the application. *See* A.R.S. § 48-3644. If you believe such a requirement exists, please provide me with the applicable citations. The documentation concerning the leases for BLM and Arizona State Land Department were included in Appendix C of the permit application submitted on May 1, 2015 as the owner acknowledgements allowed by Section 403(B)(1)(c).

We have not received an administrative completeness letter from the Flood Control District regarding the completeness of the application. If there are issues that need to be addressed for the administrative completeness review, we would request that the FCD send the list of issues pursuant to Section 404(D)(2) of the Floodplain Regulations and A.R.S. § 48-3645(D). Otherwise, we request that the FCD send the administrative completeness letter so we can move to the substantive review of the application.

Wayne Peck
May 12, 2015
Page 2

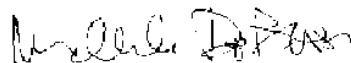
As indicated in my May 1 letter accompanying the application, we have requested that a permit of short duration be issued while working through the application process pursuant to Section 404(B)(4) of the Floodplain Regulations, and as proposed in Bill Wiley's February 12, 2015 letter. We have offered to meet with FCD to discuss the permit of short duration. I understand from speaking with you last Friday that the FCD is open to such a meeting. I request that FCD send us a date as soon as possible for a meeting to address the permit of short duration.

Finally, a Notice of Violation - Cease and Desist letter was issued to A.B.C. on May 8 despite several assurances from FCD that it would forbear enforcement action once a new permit application was submitted. The first such assurance occurred in a letter to A.B.C. dated February 12, which requested that a permit application be filed by March 6. A.B.C. filed an application on March 2 (see attachments). The second assurance occurred in a letter to A.B.C. dated April 15, which requested that A.B.C.'s filing be submitted as a "new" application with additional fees by May 1. Although there is disagreement as to these requirements, A.B.C. responded by submitting a new application and additional fees on May 1 (see attachments). I also had discussions with Bill Wiley on April 17 at FCD, and he likewise assured me that FCD would forbear enforcement action once a new permit application was submitted. During that discussion, I stated that A.B.C. would be submitting the application by the May 1 deadline, with the good faith intention of working through the technical issues during the substantive review process. In short, A.B.C. has met each of the stated deadlines, but notwithstanding its assurances to the contrary, FCD issued a Notice of Violation to A.B.C.

We request that the NOV letter be rescinded immediately, and that the parties work together to obtain a permit of short duration while the regulatory application process proceeds. Due to the deadline to respond to the NOV, we request that you provide a response by close of business on Thursday, May 14 as to whether the FCD will rescind the NOV, and provide a date for a meeting to discuss the permit of short duration.

I look forward to working with you to resolve these issues as efficiently and expeditiously as possible.

Very truly yours,
GAMMAGE & BURNHAM, PLC



By:
Michelle A. De Blasi

Enclosures



Maricopa County Attorney

BILL MONTGOMERY

VIA ELECTRONIC MAIL

May 22, 2015

Michelle De Blasi, Esq.
GAMMAGE & BURNHAM, P.L.C.
Two North Central Avenue, 15th Floor
Phoenix AZ 85004

Re: Notice of Violation
ABC Sand and Gravel

Dear Michelle:

Because of on-going confusion, contradictory messages and to avoid misunderstanding going forward, I have been asked to write to you on behalf of the Flood Control District of Maricopa County. Everything in this letter relates to the Notice of Violation (NOV) and the application for floodplain permit concerning your client, ABC Sand and Gravel.

The first thing that must be established is who the point person is for these matters. You and I have had conversations that led to one conclusion. Then, Sean Berberian contacted Steve Tully and a different conclusion was reached. In addition, we are aware that Tim LaSota is lobbying elected officials concerning the outstanding NOV (which, I believe raises a serious ethical issue). And, of course Jeri Kishiyama is involved in the case. So, we need who among the attorneys is the point person and whose conclusions should be followed.

With respect to administrative completeness review, a letter will not issue until at least tomorrow. This is because, at this point, the application is not administratively complete. But the District wants to move the matter along, so it has been decided to give ABC a few days to obtain acknowledgement from the BLM and State Land that you are applying for permits on their land. We are aware that applications for leases have been filed, but there is nothing from either BLM or State Land where they acknowledge that they are aware you are currently applying for floodplain permits for their properties. In the alternative, the offer previously made, to only permit lands for which your client has a legal property interest and allow the permit to automatically extend to BLM and/or State Land upon proof of the required acknowledgement, remains open. The District hoped the matter could be resolved before issuing a letter of administrative incompleteness.

Despite the fact the application is, at this point, not administratively complete, the Chief Engineer and General Manager has authorized staff to review the submittal and meet with your engineer to discuss what will be needed for the proposed plan to be approvable. However, until

Michelle De Blasi, Esq.
May 22, 2015
Page 2

the issue of administrative completeness has been resolved, no formal substantive review comments will be forthcoming.

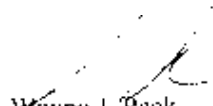
Presented to me were copies of the statements from your client that they are disputing the allegations of the NOV and requesting a hearing. Be advised that the District is endeavoring to obtain an appropriate hearing date from the Hearing Officer and notice of the hearing should issue shortly. I hope it is clearly understood that the NOV and the application for permit are two separate and distinct matters. Obtaining a permit will stop the running of the violation, but it will not obviate the necessity of a hearing for a determination of penalty for the initial violation.

I have also been asked to remind you of an offer previously made that the District believes will expedite permitting. In 2012, your client was very close to obtaining a permit. It is my understanding a few items were needed for the plan to be capable of approval and a permit issued. Unfortunately, your client never followed up and made the needed changes. The District is prepared to approve the plan, with the needed changes, and issue a permit so that your client's operation will be rendered legal. Your client can apply to amend the permit at any time thereafter. That amendment would allow for the consideration of that which your client desires to do going forward. The District believes this could bring the outstanding violation to a swift conclusion and allow both it and your client to ensure that the overall plan meets the needs of your client and the requirements of the District.

I hope this clarifies matters. Of course, if you have any questions, please do not hesitate to contact me.

Sincerely,

MARICOPA COUNTY ATTORNEY
CIVIL SERVICES DIVISION



Wayne J. Peck
Deputy County Attorney

WJP/vs

Cc: William Wiley, P.E.
Ed Raleigh, P.E.
Scott Vogel, P.E.
Stephen Tully, Esq.
Sean Berberian, Esq.
Jeri Kishiyama, Esq.

S:\C:\MISC\TV\Staff\PECK\MCD\5-21-15 De Blasi Ltr Re ABC Sand Gravel.doc

ABCSR00001008

APP271

To: Michelle De Blasi[mdeblasi@gblaw.com]; Tom Manos - CAOX[TManos@mail.maricopa.gov]; Anthony Beuché - FCDX[TonyBeuche@mail.maricopa.gov]; Scott Vogel - FCDX[csv@mail.maricopa.gov]
From: Joy Rich - PLANDEVX
Sent: Thur 6/18/2015 5:15:48 PM
Importance: Normal
Subject: RE: Summary of June 16 meeting
MAIL_RECEIVED: Thur 6/18/2015 5:15:53 PM

.....
>>>>>

Hi Michelle,

Sorry for the delayed response. We agree that you have accurately summarized our meeting.

Thank you,

Joy

From: Michelle De Blasi [mailto:mdeblasi@gblaw.com]
Sent: Wednesday, June 17, 2015 10:42 AM
To: Tom Manos - CAOX; Joy Rich - PLANDEVX; Anthony Beuché - FCDX; Scott Vogel - FCDX
Subject: Summary of June 16 meeting

Tom, Joy, Scott and Tony,

On behalf of ABC Sand and Rock Company, I would like to thank everyone for their time yesterday to discuss the permitting review process for ABC's sand and gravel permit application submitted on May 1, 2015. As we discussed in the meeting, we would like to memorialize our discussion to help ensure everyone remains on the same page.

ABC reiterated the need to follow the regulatory process for the permit application set forth in ARS 48-3641, et seq. The parties agreed to follow this regulatory process.

ABC discussed the recent permit history and correspondence indicating the County's assurances to forebear enforcement action once the permit application was submitted. The parties agreed to work in good faith to diligently proceed through the substantive review process. ABC provided the documents requested by FCD for administrative completeness. The parties agreed the substantive review period begins on June 16, 2015.

FCD committed to provide its letter outlining any substantive review issues per regulatory requirements within 15 working days. ABC will then provide a written response to address the issues. Since the parties are moving diligently to process the permit application, a temporary permit is not necessary and will not be pursued. Further, the parties agreed that a hearing for the Notice of Violation would not be set at this time to allow the parties to focus their attention on the permit application. Any inspections to be performed will follow the regulatory process set forth in ARS 48-3643.

The parties agreed that a single point of contact would be beneficial to maintaining open communication between the parties. For FCD, Tony Beuché will be the main point of contact for

technical issues, and Wayne Peck will be the point of contact for legal issues. For ABC, I will be the main point of contact for both technical and legal issues.

Please let me know if you do not agree with the summary provided above. We look forward to receiving the substantive review letter from FCD.

Best regards,

Michelle

Michelle De Blasi

602.256.4419 Direct | mdeblasi@gblaw.com | [Profile](#)



2 North Central Ave., 15th Floor | Phoenix, AZ 85004
602.256.0566 | 602.256.4475 Fax | www.gblaw.com

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To: Michelle De Blasi[mdeblasi@gblaw.com]
Cc: Scott Vogel - FCDX[csv@mail.maricopa.gov]; Jeff Riddle - FCDX[jr@mail.maricopa.gov]
From: Anthony Beuché - FCDX
Sent: Tue 6/30/2015 10:32:27 PM
Importance: Normal
Subject: SG15-003 ABC Plant 1 - Substantive Review
MAIL_RECEIVED: Tue 6/30/2015 10:32:40 PM
[20150630 SG15-003 Request For Corrections.pdf](#)
[20150630 SG15-003 Request For Corrections.docx](#)
[20150630 SG15-003 Substantive Review Form.pdf](#)
[20150630 SG15-003 De Blasi Trans Ltr.pdf](#)

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Michelle,

Please find attached hereto the substantive review form and the request for corrections.

Thank you,

Tony Beuché, P.E., Manager

Floodplain Use Permits for Sand and Gravel

Flood Control District of Maricopa County

2801 West Durango Street

Phoenix, Arizona 85009

Email: TonyBeuche@mail.maricopa.gov

Office: 602-506-2329

Fax: 602-506-4601

How are we doing? Click here to [send us your feedback](#).

From: Anthony Beuché - FCDX
Sent: Tuesday, June 16, 2015 11:48 AM
To: 'mdeblasi@gblaw.com'
Cc: Scott Vogel - FCDX; Jeff Riddle - FCDX
Subject: SG15-003 ABC Plant 1 - Administrative Completeness

Michelle,

Please find attached hereto the administrative completeness form. The substantive review commences today.

Thank you,

Tony Beuché, P.E., Manager

Floodplain Use Permits for Sand and Gravel

Flood Control District of Maricopa County

2801 West Durango Street

Phoenix, Arizona 85009

Email: TonyBeuche@mail.maricopa.gov

Office: 602-506-2329

Fax: 602-506-4601

How are we doing? Click here to [send us your feedback](#).



FLOOD CONTROL DISTRICT of Maricopa County
2801 West Durango Street
Phoenix, Arizona 85009-6399
(602) 506-1501
FAX: (602) 506-4601
TT: (602) 506-5897

LETTER OF TRANSMITTAL

TO: Michelle De Blasi
Gamunage & Burnham
Two North Central Avenue - Fifteenth Floor
Phoenix, AZ 85004-4470

June 30, 2015

SUBJECT: SG15-003 ABC Sand and Rock Co., Inc.

WE ARE SENDING YOU THE FOLLOWING ITEMS: ☒ Enclosed ☐ Under separate cover

☐ Shop Drawings ☐ Prints ☐ Legal Description ☐ Samples ☐ Reports
☐ Specification ☐ Change Order ☐ Copy of Letter ☐ Plans ☐ Other

COPIES	DATE	NO.	DESCRIPTION
1	06/30/15		Substantive Review Form
1	06/30/15		Request For Corrections

THESE ARE TRANSMITTED:

☐ For approval ☐ Approved as submitted
☐ For your use ☐ Approved as noted
☐ As requested ☒ Returned for corrections
☐ Resubmit copies for approval ☐ For review and comments
☐ Submit copies for distribution ☒ Return 2 sets of corrected prints
☐ FOR ESTIMATE DUE: ☐ Borrowed prints being returned

Remarks:
Please contact me if you need any additional information.

SIGNED: Tony Beuché
Tony Beuché, P.E. Project Manager



Flood Control District of Maricopa County

FLOODPLAIN USE PERMIT FOR SAND AND GRAVEL – REQUEST FOR CORRECTIONS

Date: 06/30/2015
To: A.B.C Sand & Rock Co., Inc.
c/o Michelle De Blas; Gammage & Burnham
From: Tony Beuché, P.E., Manager, Floodplain Use Permits - Sand and Gravel; Civil/Structures
Branch; Engineering Division *ASB 06/30/2015*
Subject: Request For Corrections
Sand and Gravel FUP No. SG15-003
A.B.C. Sand & Rock Co., Inc. Plant One – Agua Fria River
Plan of Development submitted 05/01/2015

Flood Control District of Maricopa County (FCDMC) staff have completed the review of the Plan of Development received on 05/01/2015. The Plan of Development includes plan sheets dated 02/25/2015 and an engineering report dated 04/27/2015. The proposed project includes three sand and gravel pits in the Floodway/Floodplain of the Agua Fria River from the Bethany Home Road alignment to approximately 1,300-ft south of Camelback Road. The north pit (Pit 1) is between the Bethany Home road alignment and Colter Channel, the middle pit (Pit 2) is between Colter Channel and Camelback Road and the south pit (Pit 3) lies south of Camelback Road. The north pit has a rectangular shape with a length of 3,900-ft, a width of 2,500-ft and a depth of 85-ft. The middle pit has an approximate triangular shape with a base of 600-ft, a length of 1,200-ft and a depth of 65-ft. The south pit has a square shape with sides of 1,200-ft and a depth of 85-ft. Please see the attached exhibit of the project site at the end of this document.

This Request for Corrections is submitted in accordance with the Floodplain Regulations for Maricopa County (Regulations). The applicant shall complete necessary revisions to the Plan of Development and resubmit for further review. Please submit written responses below each of the following requests and include a digital copy of the responses in MS Word format:

Engineering Application Development and River Mechanics Branch

- 1) **FCDMC Request For Corrections (06/30/2015):** The second paragraph on page 1 of the submitted report says "The engineering analysis was conducted using hydrology and hydraulics developed by JE Fuller Hydrology and Geomorphology, Inc. obtained March 18, 2014, as directed by client, see Appendix B for Scope of Work letter and Appendix D for hydrology and hydraulic and sediment transfer models". The hydrology and hydraulics developed by JE Fuller in 2014 for Arizona Rock Products Association (ARPA) are a part of a feasibility study which is still ongoing. The reduced flow rate results from

this ongoing feasibility study cannot be used as the basis for this permit application. The FEMA-effective flow rates must be used as the basis for this permit application. The FEMA-effective flow rates can be found in the FEMA-effective HEC-2 model in "Agua Fria River Floodplain Delineation Re-Study between the Gila River Confluence and the New Waddell Dam" prepared by Coe & Van Loo Consultants, Inc. in October of 1996. Please revise the hydrologic and hydraulic analyses based on the FEMA-effective HEC-2 model.

The basis for this requirement is Regulations Section 102 Statutory Authority that identifies the requirement for FCDMC to adopt and enforce floodplain regulations consistent with criteria adopted by the Arizona Department of Water Resources and the requirement that the regulations adopted by FCDMC be intended to carry out the requirements of the National Flood Insurance Program. The effect of these requirements is for the FEMA-approved hydrology for the 100-year storm event to be used as the basis for all analysis conducted in support of an application for a floodplain use permit.

For information purposes, FCDMC is currently working with ARPA to continue the second phase of the ongoing feasibility study.

- 2) **FCDMC Request For Corrections (06/30/2015):** All three pits are proposed to have 25-ft setbacks from the property boundary to top of pit slope on all sides. By engineering inspection and judgement, the 25-ft setbacks are insufficient and are unreasonable for these 85-ft and 65-ft deep pits. Please re-examine the input parameters and setup of the numerical model to eliminate unreasonable results and validate the results of modeling by comparison with other industry-standard methodologies. Revise the design of each proposed pit to eliminate the potential for erosion to cause adverse impacts to structures and surrounding properties.

The possible solutions to headcut and tailcut are to reduce the pit dimensions to create larger setbacks, to install erosion control structures to prevent headcut, to isolate the pit from the river or provide a combination of wider setbacks and structural improvements. The references listed in Section 9 of the report provide guidance for analysis of erosion.

A much larger headcut/tailcut setback distance for Agua Fria River would be expected. Because the setbacks are only 25-ft, these three pits will cause significant erosion or adverse impact to the surrounding properties and structures. For example, a typical headcut setback distance for a 40-ft deep pit in the Agua Fria River will vary from several hundred feet to 1,000-ft. A quick check based on rule-of-thumb methods shows a headcut distance of 4,000-ft to more than 10,000-ft for an 85-ft deep pit (Sand and Gravel Mining Guidelines: Skunk Creek, New and Agua Fria Rivers {draft}, US Army Corps of Engineers, 1987; Central Arizona Water Control Study: Sand and Gravel Mining Guidelines, prepared by Boyle Engineering for US Army Corps of Engineers, 1980; Williams Hu, Doeing and Phillips, Headcut Analysis Due to Overbank Sand and Gravel Mining, Association of State Floodplain Managers, Annual Conference, Phoenix, AZ, 2002).

- 3) **FCDMC Request For Corrections (06/30/2015):** The results on the CD submitted as a part of this report show that the north pit will cause significant erosion on the properties north of the property line of Pit 1. The submitted results can be found in the HEC-6T sediment transport model output file and the Excel comparison file (Compare.xls) on the CD. Based on the CD results, the headcut distance is about 1,400-ft north of the property line. This 1,400-ft was obtained by interpolating the erosion shown in the Excel file on the CD. This erosion will cause significant adverse impact to the upstream properties including City of Glendale properties and to other sand and gravel operations. A riprap-berm at one sand and gravel operation will be subject to erosion (refer to exhibit).
 - 4) **FCDMC Request For Corrections (06/30/2015):** Since the proposed Pit 1 is located in the confluence of Agua Fria River and New River channel, the headcut impact from the New River channel must be analyzed. The draft Plan of Development does not address the impact of flows from the east from New River. The New River channel has 100-year flow of 39,000 cfs which would cause significant headcut due to the proposed Pit 1. The headcut in all proposed pits could adversely impact the bank protection and levees located on both banks of New River and on the east bank of the Agua Fria River. Those levees protect the Glendale West Area Water Reclamation Facility, the City of Glendale Municipal Airport and the Camelback Ranch Baseball Park. Please provide an analysis of the effect of flow from New River on the proposed pits.
 - 5) **FCDMC Request For Corrections (06/30/2015):** The HEC-6T cross-sections include the existing pits within and west of the proposed mine site. Cross-sections should not include these pits as part of either the base condition model or the proposed condition model; otherwise, the models may fail to identify the headcut and tailcut erosion that will occur due to the proposed pits. The existing pits within the property should be represented as being filled for the base model. The HEC-6 model from the Agua Fria watercourse master plan should be used as the base model rather than the HEC-6T model from the JE Fuller feasibility study. Please revise the HEC-6T model accordingly.
 - 6) **FCDMC Request For Corrections (06/30/2015):** The proposed pits may have adverse impact on the downstream properties and structures. The tailcut may adversely impact the Colter Channel, the Camelback Road bridge (piers, spur dikes and abutments), the Agua Fria River east bank levee and the properties south of the proposed mine site. The submitted model did not identify tailcut correctly as tailcut is expected to result from such large and deep pits. Please exclude the existing pits west of the proposed mine from the modeling and model the pits within the property as being filled.
 - 7) **FCDMC Request For Corrections (06/30/2015):** Pit 2 on parcel APN 501-63-008, located south of the Colter Channel, will cause headcut that will adversely impact the channel. Please re-examine the headcut from this pit and revise the design of the pit to eliminate the adverse impact to the Colter Channel.
 - 8) **FCDMC Request For Corrections (06/30/2015):** The spur dike located on the west bank of the Agua Fria River and north of the Camelback Road bridge may be adversely impacted when flow enters Pit 2 and causes an eastward headcut. Please re-examine
-

the headcut from this pit and revise the design of the pit to eliminate the adverse impact to the spur dike.

- 9) **FCDMC Request For Corrections (06/30/2015):** The southeast corner of Pit 3 lies in the floodway/floodplain. The flow from the Agua Fria River will enter the pit and cause headcut that may adversely impact the west spur dike and the bridge. The west side of the south pit is also within the FEMA floodplain and erosion will occur when flow enters into the pit. Please re-examine the headcut from this pit and revise the design of the pit to eliminate the adverse impact to the spur dike and to the bridge.
- 10) **FCDMC Request For Corrections (06/30/2015):** The power poles located within Pit 1 and adjacent to the east top of slope of that pit will be adversely impacted as flow enters the pit and causes erosion. Please re-examine the erosion that will occur and revise the design of the pit to eliminate the adverse impact to the power poles. The other power poles are also in potential danger because they can be near the face of an excavation where headcut will occur depending upon the phasing of excavation. The excavation phasing should be described to identify how it will eliminate adverse impact to those power poles in the headcut locations.
- 11) **FCDMC Request For Corrections (06/30/2015):** The power pole located on the south side of Pit 2 will be adversely impacted as flow enters the pit and causes erosion. Please re-examine the erosion that will occur and revise the design of the pit to eliminate the adverse impact to power poles.
- 12) **FCDMC Request For Corrections (06/30/2015):** The second line on page 3 states "Pits 1 and 2 are completely in the floodway area and have the capacity to convey the entire flow". Since the proposed Pit 1 will capture river flows, it will significantly expand the main channel width and shift the watercourse dramatically from east to west causing significant lateral erosion. This lateral erosion will adversely impact properties to the west of the proposed mine site and adversely impact the west river bank. Please provide the documentation/calculation that demonstrates that the proposed lateral setback of 25-ft is adequate or revise the design of the pit to eliminate this adverse impact.
- 13) **FCDMC Request For Corrections (06/30/2015):** The Statement of Findings on page 4 indicates that the analysis is based on reduced flow rates for the Agua Fria River which are inconsistent with the FEMA-effective flow rates. Please revise the hydrologic and hydraulic analyses based on the FEMA-effective HEC-2 model and revise the Statement of Findings accordingly.
- 14) **FCDMC Request For Corrections (06/30/2015):** The first line of second paragraph on page 5 of report says "The JE Fuller hydrology and hydraulic models that model the existing pits along the Agua Fria River were further validated by the Photos taken 9-10-14 and 9-12-14 during what was labeled as a greater than 100-year storm event for most parts of the Valley." This is anecdotal information that cannot be used to justify the suitability of the Plan of Development. Additionally, according to the gage data identified in the FCDMC 9/8/2014 storm report, the storm return periods vary from 40-

yr to 51-yr for the 6-hour storm and from 13-yr to 15-yr for the 24-hr storm in the vicinity of the Lower Agua Fria watershed. The gage IDs 5650, 5470, 5515 and 5500 are used to determine the return periods. Please revise this statement to eliminate this error or omit references to the 09/08/2014 storm event.

- 15) **FCDMC Request For Corrections (06/30/2015):** There is a discrepancy between the report and the CD submitted for review. The HEC-6T sediment transport model results shown in the report do not match the output file and Excel file of the models provided on the CD. The output file and Excel file on the CD show a headcut of 4.18 ft off the property (XS 10.442) but the report (Appendix D-HEC-6T Results) has 0.02-ft of headcut at same cross-section. Please correct this discrepancy between the report and CD.
- 16) **FCDMC Request For Corrections (06/30/2015):** The report indicates that the HEC-RAS sediment transport analysis was used as a check of the results from HEC-6T. The HEC-RAS sediment transport algorithm was the topic of a study titled "Comparison of Sediment Transport Models for the Lower Hassayampa River" prepared by R2D and dated 11/21/2011. This study indicates that the HEC-RAS sediment transport model does not accurately model the transport processes associated with headcuts and tailcuts. For that reason, a HEC-RAS sediment transport model is not acceptable for headcut and tailcut analysis at this time. Please omit the results of the HEC-RAS sediment transport analysis from the report.
- 17) **FCDMC Request For Corrections (06/30/2015):** The water surface elevation of the profile (Pits_combined) does not match the HEC-RAS steady state model submitted in the CD. For example, the result from the HEC-RAS steady state model in the CD shows that the proposed condition ("Pits_combined" profile) water surface elevation at XS 10.343 is 1023-ft but Table 2 in the report has 1033.1-ft for the "Pits_combined" profile. Please correct this discrepancy.
- 18) **FCDMC Request For Corrections (06/30/2015):** There are 13 flow data files in the HEC-RAS model. Please provide the relevant ones and delete others or document all the provided flow data files in the report and summarize their purpose and results. Please retain those files relevant to the steady state flow analysis.
- 19) **FCDMC Request For Corrections (06/30/2015):** Please show the operations area and label it in the plans.
- 20) **FCDMC Request For Corrections (06/30/2015):** Please label the Colter Channel, spur dikes, bridge, levees and the rip-rap berm located in APN 501-55-004E in the mining plans.
- 21) **FCDMC Request For Corrections (06/30/2015):** Plan sheets 3, 4, 5 and 6 identify HEC-RAS cross-sections. Please label them with river stations. In addition, these cross-sections are not aligned with the FDS study cross-sections. Please see the attached exhibit (red cross-sections represent the HEC-2 cross section alignment while black lines are from the plans).

- 22) **FCDMC Request For Corrections (06/30/2015):** In cross-section E-E of Sheet 7 of 8 (Cross Section & Details), please show the setback distance from the Colter Channel fence to the pit.
- 23) **FCDMC Request For Corrections (06/30/2015):** Please label the proposed pit bottom elevations in the drawings.
- 24) **FCDMC Request For Corrections (06/29/2015):** The topographic contours on the draft Plan of Development seem to be based on conditions existing in 2009. Please base the Plan of Development on topographic survey, with 2-foot minimum contour intervals, that is less than one year old.

Civil Structures Branch

- 1) **FCDMC Request For Corrections (06/24/2015):** Plan Sheet 1 – Location Map: The labels for street names are illegible. Please modify the labels for legibility.
- 2) **FCDMC Request For Corrections (06/24/2015):** Plan Sheet 1 – Legal Description: The legal description references Parcels No. 1 through No. 4. Please depict the referenced parcels on the Location Map or on Sheet 2 – Existing Site Condition.
- 3) **FCDMC Request For Corrections (06/30/2015):** Plan Sheet 1 – Property Owner: The property owner information references A.B.C. Sand & Rock. The owners of properties included in the proposed mine site are Rare Earth, L.L.C., State Trust Land (ASLD) and the United States of America (BLM). A.B.C. Sand & Rock is the applicant. Please revise accordingly.
- 4) **FCDMC Request For Corrections (06/30/2015):** Plan Sheets 1 to 8 – Temporary Benchmark: The temporary benchmark is located north of Camelback Rd. Please add an additional temporary benchmark south of Camelback Rd. in proximity to the proposed pit located in APN 501-63-008. Identify the temporary benchmarks on the applicable mining plans and closure plans to assist in FCDMC inspections.
- 5) **FCDMC Request For Corrections (06/30/2015):** Plan Sheets 3 to 5 – The plans includes labels for Area #1 through Area #5. Please identify the purpose of the labels.
- 6) **FCDMC Request For Corrections (06/30/2015):** Plan Sheet 2 – The plan identifies adjacent properties by APN. Please label the ownership of adjacent properties. Please label the Colter Channel.
- 7) **FCDMC Request For Corrections (06/30/2015):** Plan Sheet 2 – The plan includes linework that appears to represent the floodway limits. Please label accordingly.
- 8) **FCDMC Request For Corrections (06/30/2015):** Plan Sheets 3 to 5 – Please show the access easement area dedicated by FCDMC to Rare Earth, LLC in 2012 (a portion of APN 501-63-003C and within the FCDMC Colter Channel). Please show other access roads wherever applicable and label them in the plans.
- 9) **FCDMC Request For Corrections (06/30/2015):** Report Section 2, Paragraph 1 – The report states that the average depth of proposed excavation is 85-ft. The Plan of

Development identifies the proposed depths of Pits 1 and 3 to be 85-ft and the proposed depth of Pit 2 to be 65-ft. Please revise accordingly.

- 10) **FCDMC Request For Corrections (06/30/2015):** Report Section 3 – The report references an existing agreement on file regarding setbacks from electric power transmission towers. FCDMC records include a memorandum, letters and an agreement from Salt River Project (SRP), Arizona Public Service (APS) and Tucson Electric Power (TEP) that identify requirements for minimum setbacks from towers, maximum slopes and depth at excavations adjacent to the setbacks and restrictions on the stockpiling of material within easements held by those agencies. Additionally, requirements for maintaining vehicular access to the electric facilities are identified.

Please re-examine the design of the pits to ensure that none of the power poles are will be subject to adverse impact. Note that the electric transmission monopoles most recently constructed by TEP are shown to be located as little as 20-ft from the proposed top of slope in the central pit and in the northern pit.

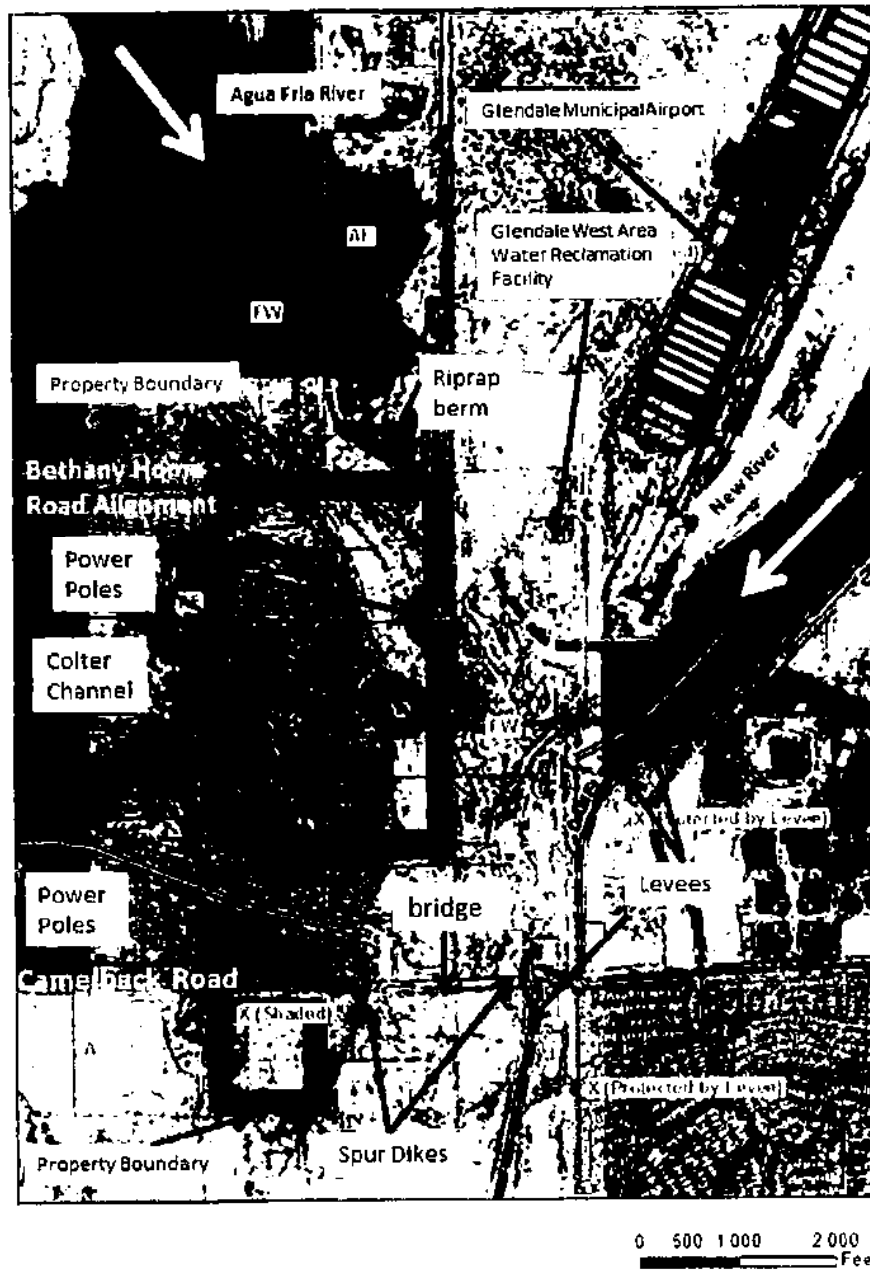
- 11) **FCDMC Request For Corrections (06/30/2015):** Report Section 3, Paragraph 1 – The structure inventory does not include the following structures located in proximity to the proposed mine site:

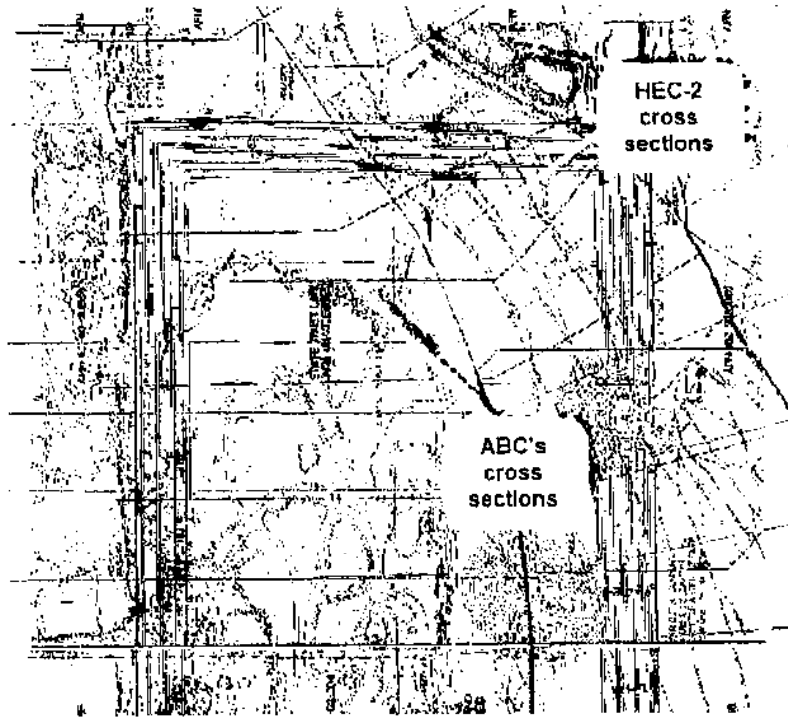
- A. Camelback Road bridge spur dikes;
- B. Camelback Ranch levee;
- C. Glendale Airport levee;
- D. Glendale Water Reclamation Facility;
- E. Flood protection berm located on APN 501-55-004E;
- F. El Paso Natural Gas facility located approximately 1,100-ft east of the eastern property boundary of the north pit.

Please verify that no existing utilities, other than the three overhead electric lines, are located within the areas proposed for mining.

- 12) **FCDMC Request For Corrections (06/30/2015):** Report Section 5, Paragraph 1 – The report states that "...Pits 1 and 2 are completely in the floodway area..." The effective hydrology identifies a portion of Pit 1 to be located within the floodway and Pit 2 to be located entirely outside of the floodway. Please revise accordingly.

- 13) **FCDMC Request For Corrections (06/30/2015):** Report Section 5, Paragraph 1 – The report states that "Approximately 1300 feet from Camelback Road the pit daylights..." Please identify to which pit or pits this statement refers and explain how a pit with bottom elevation below the thalweg of the river may daylight.







Flood Control District of Maricopa County

FLOODPLAIN USE PERMIT FOR SAND AND GRAVEL - SUBSTANTIVE REVIEW

Pursuant to A.R.S. §48-3645, the Flood Control District establishes licensing timeframes for substantive review of Floodplain Use Permit applications. This notice is a request for additional information for the following permit application:

Permit No: 5G15-003

Applicant: A.B.C. Sand and Rock Company, Inc.

Mine: Plant One – Agua Fria River north of Camelback Road

Date: June 30, 2015

The substantive review timeframe started on the date this application was found to be administratively complete on June 16, 2015. The substantive review timeframe for this application type is sixty (60) working days. As of the date of this notice, eleven (11) working days have elapsed during this substantive review.

In order for the District to complete its substantive review of this permit application, the following is a comprehensive list of the additional information required. The District's substantive review timeframe and overall timeframe are suspended from the date this notice is issued until the date that the District receives all of the required additional information from the applicant.

Additional Information Requested based on Review of Submitted Materials:
Refer to the Request For Corrections dated June 30, 2015

This notification is only for the District Floodplain Use Permit for Sand and Gravel. For additional information or clarification please contact Tony Beuché, P.E. at 602.506.2329 or TonyBeuche@mail.maricopa.gov.

NOTICE OF PERMIT RIGHTS – SUBSTANTIVE REVIEW

1. For any new ordinance or regulation requiring a license, a district shall have in place an overall time frame during which the district will either grant or deny each type of license that it issues. The overall time frame for each type of license shall state separately the administrative completeness review time frame and the substantive review time frame.
2. During the substantive review time frame, a district may make one comprehensive written or electronic request for additional information. If the permit sought requires approval of more than one department of the district, each department may issue a written or electronic request for additional information.
3. The district and applicant may mutually agree in writing or electronically to allow the district to submit supplemental requests for additional information. If a district issues a comprehensive written or electronic request or a supplemental request by mutual written or electronic agreement for additional information, the substantive review time frame and the overall time frame are suspended from the date the request is issued until the date that the district receives the additional information from the applicant.
4. By mutual written or electronic agreement, a district and an applicant for a license may extend the substantive review time frame and the overall time frame. An extension of the substantive review time frame and the overall time frame may not exceed twenty-five per cent of the overall time frame.
5. Unless a district and an applicant for a license mutually agree to extend the substantive review time frame and the overall time frame pursuant to item 4 above, a district shall issue a written or electronic notice granting or denying a license to an applicant. If a district denies an application for a license, the district shall include in the written or electronic notice at least the following information:
 - a. Justification for the denial with references to the statutes, ordinances, executive orders, substantive policy statements or delegation agreements on which the denial is based.
 - b. An explanation of the applicant's right to appeal the denial. The explanation shall include the number of working days in which the applicant must file a protest challenging the denial and the name and telephone number of a district contact person who can answer questions regarding the appeals process.

The Floodplain Use Permit application shall automatically expire at one (1) year of this notice of request for additional information if no response has been received from the applicant.

Submittal after the year shall be treated as a new application and subject to all submittal requirements and fees. If the applicant is unable to meet this timeframe a request for extension shall be requested in writing and a written extension may be authorized by the Floodplain Administrator.

Floodplain Regulations for Maricopa County, Article Four, Section 404(D)3

From: Michelle De Blasi
To: Anthony Beuché - FCDX
CC: Scott Vogel - FCDX; Jeff Riddle - FCDX
Sent: 7/24/2015 6:29:25 PM
Subject: RE: SG15-003 ABC Plant 1 - Substantive Review

Hi Tony,

We are working through the comments and hope to submit our response by the end of next week. In preparation of our responses, it would be helpful to obtain the base hydrologic models HEC-6T, HECRAS, HEC1 and any other models FCD is currently using for the Agua Fria and New River. We want to be sure we are utilizing the same models. Please let me know the best way to get the information. I can stop by next week to pick it up if that is the most expeditious.

Thanks,

Michelle

Michelle De Blasi
602.256.4419 Direct mdeblasi@gbkw.com

From: Anthony Beuché - FCDX [mailto:TonyBeuche@mail.maricopa.gov]
Sent: Friday, July 24, 2015 3:13 PM
To: Michelle De Blasi
Cc: Scott Vogel - FCDX; Jeff Riddle - FCDX
Subject: RE: SG15-003 ABC Plant 1 - Substantive Review

Hi Michelle,

Please let us know if you have any questions regarding the Request For Corrections. Also, please indicate when we may expect to receive a revised Plan of Development for second substantive review.

Thanks,

Tony Beuché, P.E., Manager

Floodplain Use Permits for Sand and Gravel

Flood Control District of Maricopa County

2801 West Durango Street

Phoenix, Arizona 85009

Email: TonyBeuche@mail.maricopa.gov

Office: 602-506-2329

Fax: 602-506-4601

How are we doing? Click here to [send us your feedback](#).

From: Michelle De Blasi | <mailto:mdeblasi@gblaw.com> |

Sent: Wednesday, July 01, 2015 12:38 PM

To: Anthony Beuché - FCDX

Cc: Scott Vogel - FCDX; Jeff Riddle - FCDX

Subject: RE: SG15-003 ABC Plant 1 - Substantive Review

Thanks Tony.

Have a nice holiday weekend,

Michelle

Michelle De Blasi

602.256.4419 Direct | mdeblasi@gblaw.com

From: Anthony Beuché - FCDX | <mailto:TonyBeuche@mail.maricopa.gov> |

Sent: Tuesday, June 30, 2015 3:32 PM

To: Michelle De Blasi

Cc: Scott Vogel - FCDX; Jeff Riddle - FCDX

Subject: SG15-003 ABC Plant 1 - Substantive Review

Michelle,

Please find attached hereto the substantive review form and the request for corrections.

Thank you,

Tony Beuché, P.E., Manager

Floodplain Use Permits for Sand and Gravel
Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, Arizona 85009

Email: TonyBeuche@mail.maricopa.gov
Office: 602-506-2329
Fax: 602-506-4601

How are we doing? Click here to [send us your feedback](#).

From: Anthony Beuché - FCDX
Sent: Tuesday, June 16, 2015 11:48 AM
To: 'mdcblasi@gbaw.com'
Cc: Scott Vogel - FCDX; Jeff Riddle - FCDX
Subject: SG15-003 ABC Plant 1 - Administrative Completeness

Michelle,

Please find attached hereto the administrative completeness form. The substantive review commences today.

Thank you,

Tony Beuché, P.E., Manager
Floodplain Use Permits for Sand and Gravel
Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, Arizona 85009

Email: TonyBeuche@mail.maricopa.gov
Office: 602-506-2329
Fax: 602-506-4601

How are we doing? Click here to [send us your feedback](#).

To: 'Anthony Beuché - FCDX'[TonyBeuche@mail.maricopa.gov]
Cc: 'Scott Vogel - FCDX'[csv@mail.maricopa.gov]
From: Michelle De Blasi
Sent: Wed 8/19/2015 6:42:52 PM
Importance: Normal
Subject: SG15-003 ABC Plant 1 - Substantive Review
MAIL_RECEIVED: Wed 8/19/2015 6:42:52 PM

....

Tony,

I was nice speaking with you yesterday about the status of ABC's permit application. As we discussed, we are amenable to reviewing the information from the previous 2012 issues that FCD had provided, and submitting a mining plan that addresses those issues. At your suggestion, we will also review the possibility of consolidating the three different mining plans into one plan. We are working diligently to complete these tasks and will likely have the revised plan submittal available by the end of September, as we discussed. To be sure we are addressing the same issues, please send me the list of issues you mentioned that would need to be addressed in our plan. I can submit a formal records request if necessary. Please don't hesitate to contact me if you need to discuss any of these issues further.

Thanks,

Michelle

Michelle De Blasi

602.256.4419 Direct | mdeblasi@qblaw.com | [Profile](#)



2 North Central Ave., 15th Floor | Phoenix, AZ 85004
602.256.0566 | 602.256.4475 Fax | www.qblaw.com

Message

From: Scott Vogel - FCDX [/O=MARICOPA COUNTY/OU=ELECTRONIC BUSINESS CENTER/CN=RECIPIENTS/CN=CSV]
Sent: 8/24/2015 2:54:13 PM
To: Anthony Beuché - FCDX [TonyBeuche@mail.maricopa.gov]; Ed Raleigh - FCDX [ear@mail.maricopa.gov]; Jeff Riddle - FCDX [jrr@mail.maricopa.gov]
Subject: RE: SG15-003 ABC Plant 1 - Substantive Review

Agree, this needs to be finalized quickly. Do you have a version of the e-mail that addresses Wayne's comment? Please get those incorporated, then send out to the group.

Thanks

Scott Vogel, P.E.
Engineering Division Manager
Flood Control District of Maricopa County
(602) 506-4771
csv@mail.maricopa.gov

How are we doing? Click here to [send us your feedback](#).

From: Anthony Beuché - FCDX
Sent: Monday, August 24, 2015 2:13 PM
To: Scott Vogel - FCDX; Ed Raleigh - FCDX; Jeff Riddle - FCDX
Subject: RE: SG15-003 ABC Plant 1 - Substantive Review

A week has passed since my conversation with Michelle. We should finalize this response to her 08/19 email. Do we need to meet to discuss this?

From: Anthony Beuché - FCDX
Sent: Friday, August 21, 2015 11:18 AM
To: Scott Vogel - FCDX; Ed Raleigh - FCDX; Jeff Riddle - FCDX
Subject: RE: SG15-003 ABC Plant 1 - Substantive Review

Second revised draft addressing comment from Bill:

From: Anthony Beuché - FCDX
Sent: Friday, August 21, 2015 9:54 AM
To: Scott Vogel - FCDX; Ed Raleigh - FCDX; Jeff Riddle - FCDX
Subject: RE: SG15-003 ABC Plant 1 - Substantive Review

Scott,

Please review the revised draft email, below. During the telephone conversation with Michelle, I offered the suggestion that preparation of a consolidated plan would be appropriate as the applicant is free to submit any plan of their choice (I do not recall mentioning updated topographic survey nor schedule). Michelle has now requested a list of issues that would need to be addressed if a new plan is based upon previously-approved plans. We are now in the position of identifying specific requirements as opposed to offering suggestions.

Since no plans are approved for construction without bearing the seal of a registrant (as a statutory requirement), is it necessary to specifically identify this as a requirement in this situation? I think that Michelle will take that as a given and, for the sake of brevity, suggest that the requirement not be stated here. Also, I understand that each of the previous plans were approved independently. For that reason, it would not appear to be correct to refer to the 1995 and 2000 plans as addenda.

Regarding schedule, if the applicant pursues this course and obtains current topographic survey, the submittal date will likely be October at the earliest. Lastly, should this be provided to Wayne for review and comment?

Redacted

Redacted

From: Scott Vogel - FCDX
Sent: Thursday, August 20, 2015 10:42 AM
To: Anthony Beuché - FCDX; Ed Raleigh - FCDX; Jeff Riddle - FCDX
Subject: RE: SG15-003 ABC Plant 1 - Substantive Review

My comments, marked up below.

One other question...we had discussed that, since we are not asking for a new engineering analysis, the engineer would be required to sign that the plan of development meets the FP Regulations. Seems that we should require this.

Thanks

Scott Vogel, P.E.
Engineering Division Manager
Flood Control District of Maricopa County
(602) 506-4771
csv@mail.maricopa.gov

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From: Anthony Beuché - FCDX
Sent: Wednesday, August 19, 2015 3:09 PM

To: Scott Vogel - FCDX; Ed Raleigh - FCDX; Jeff Riddle - FCDX
Subject: FW: SG15-003 ABC Plant 1 - Substantive Review

Please review the draft email, below, to Michelle De Blasi. Issues No. 1 to 3 are duplicates of Issues No. 2 to 4 in the settlement offer. Issue No. 1 in the settlement offer has since been resolved (owner acknowledgements).

Thanks,

Tony

Redacted

Redacted

Tony Beuché, P.E., Manager
Floodplain Use Permits for Sand and Gravel
Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, Arizona 85009

Email: TonyBeuche@mail.maricopa.gov

Office: 602-506-2329

Fax: 602-506-4601

How are we doing? Click here to [send us your feedback](#).

From: Michelle De Blasi [<mailto:mdeblasi@qblaw.com>]

Sent: Wednesday, August 19, 2015 11:43 AM

To: Anthony Beuché - FCDX

Cc: Scott Vogel - FCDX

Subject: SG15-003 ABC Plant 1 - Substantive Review

Tony,

I was nice speaking with you yesterday about the status of ABC's permit application. As we discussed, we are amenable to reviewing the information from the previous 2012 issues that FCD had provided, and submitting a mining plan that addresses those issues. At your suggestion, we will also review the possibility of consolidating the three different mining plans into one plan. We are working diligently to complete these tasks and will likely have the revised plan submittal available by the end of September, as we discussed. To be sure we are addressing the same issues, please send me the

FCD032437

APP297

list of issues you mentioned that would need to be addressed in our plan. I can submit a formal records request if necessary. Please don't hesitate to contact me if you need to discuss any of these issues further.

Thanks,

Michelle

Michelle De Blasi

602.256.4419 Direct | mdebiasi@gblaw.com | [Profile](#)

GAMMAGE & BURNHAM

World Class Counsel. Arizona Roots.

2 North Central Ave., 15th Floor | Phoenix, AZ 85004

602.256.0566 | 602.256.4475 Fax | www.gblaw.com

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From: Anthony Beuché - FCDX
To: Michelle De Blasi
CC: Scott Vogel - FCDX; Jeff Riddle - FCDX; Ed Raleigh - FCDX; Wayne Peck
Sent: 8/25/2015 12:04:45 PM
Subject: RE: SG15-003 ABC Plant 1 - Substantive Review

Hi Michelle,

As we discussed, the application for a new floodplain use permit may be supported by a new Plan of Development rather than proceeding with revision and resubmittal of the Plan of Development submitted for initial review on 05/01/2015. If the new Plan of Development is based upon the previously-approved Plans of Development dated 2000, 1995 and 1986, the District will honor the previous approvals of the 2000, 1995 and 1986 plans and not require new engineering analyses with the caveat that significant topographic changes may necessitate new engineering analysis. As requested, following is the list of issues that will need to be addressed by a new Plan of Development based upon the previously-approved Plans of Development dated 2000, 1995 and 1986:

1. The new Plan of Development will consolidate and replace the three previously-approved plans.
2. The new Plan of Development will be based upon new topographic survey, with minimum two-foot contour intervals, prepared no more than one year prior to submittal of the plan. As noted in the Request For Corrections (from review of the plan submitted on 05/01/2015), topographic survey of conditions existing in 2009 is inadequate for preparation of a new plan.
3. Mining has encroached into the minimum required 100-ft setback around the power transmission towers. Additionally, both the maximum allowable side slope of 3:1 and the maximum allowable depth of extraction of 25-ft have been exceeded. Restoration of the required setback, side slope and depth of extraction is required in accordance with the 1995 and 2000 Plans of Development.
4. Mining has encroached into the minimum required 250-ft setback from the top of pit slope to the floodway. Restoration of the setback is required in accordance with the 1995 and 2000 Plans of Development.
5. Mining has encroached into the minimum required 100-ft setback between the top of pit slope located in APN 501-63-004 and the BLM parcel APN 501-63-008. Restoration of the setback is required in accordance with the 1985 Plan of Development.
6. The new Plan of Development will depict the restoration of required setbacks, maximum side slope and maximum depth of extraction in accordance with the previously-approved plans.
7. Significant changes in topography may necessitate new engineering analysis.
8. Including the two BLM parcels near Camelback Road will require a comprehensive engineering analysis, as these parcels were not included in the 2000, 1995 and 1986 Plan of Development.

Also, the submittal of a new, comprehensive Plan of Development based upon the previously-approved Plans of Development dated 2000, 1995 and 1986 would constitute a significant change to the application received on 05/01/2015 that is not in direct response to the Request for Corrections. For this reason, the District may make one additional comprehensive request for corrections and may have an additional fifty percent of the substantive review timeframe for review of the new plan in accordance with A.R.S. §48-3645(G). The application will remain administratively complete provided that no additional owner acknowledgements are required. No additional fee is required.

The above is not a comprehensive list of the content of a new Plan of Development for submission for District review. The required content may be found in the Floodplain Regulations. Please contact me to schedule a meeting to include District staff, yourself and your client's engineer to discuss the new, comprehensive Plan of Development. This meeting will provide the opportunity for you and your client's engineer to describe the full content of the new Plan of Development and the schedule for its preparation and submission to the District. The intent of the meeting will also be to document the mutually-agreed upon approach to the preparation of the plan so as to minimize the issues identified in substantive review and to minimize the expense incurred by your client.

Please call me at your convenience to discuss this further.
Thanks.

Tony Beuché, P.E., Manager
Floodplain Use Permits for Sand and Gravel
Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, Arizona 85009

Email: TonyBeuche@mail.maricopa.gov
Office: 602-506-2329
Fax: 602-506-4601

How are we doing? Click here to [send us your feedback](#).

From: Michelle De Blasi [mailto:mdeblasi@gblaw.com]
Sent: Wednesday, August 19, 2015 11:43 AM
To: Anthony Beuché - FCDX
Cc: Scott Vogel - FCDX
Subject: SG15-003 ABC Plant 1 - Substantive Review

Tony,

I was nice speaking with you yesterday about the status of ABC's permit application. As we discussed, we are amenable to reviewing the information from the previous 2012 issues that FCD had provided, and submitting a mining plan that addresses those issues. At your suggestion, we will also review the possibility of consolidating the three different mining plans into one plan. We are working diligently to complete these tasks and will likely have the revised plan submittal available by the end of September, as we discussed. To be sure we are addressing the same issues, please send me the list of issues you mentioned that would need to be addressed in our plan. I can submit a formal records request if necessary. Please don't hesitate to contact me if you need to discuss any of these issues further.

Thanks.
Michelle

Michelle De Blasi
602 256 4419 Direct | mdeblasi@gblaw.com | Profile

GAMMAGE & BURNHAM
ATTORNEYS AT LAW
2 North Central Ave. 15th Floor | Phoenix, AZ 85004
602 256.0588 | 602 256 4475 Fax | www.gblaw.com

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Flood Control District of Maricopa County

www.fcd.maricopa.gov

William D. Wiley, P.E.
Chief Engineer and
General Manager
2801 West Durango Street
Phoenix, Arizona 85009
Phone: 602-506-1501
Fax: 602-506-4601

November 2, 2015

REC'D OSBORN MALEDON RA.

NOV 04 2015

Mr. David Waltemath
President/CEO
A.B.C. Sand & Rock Company, Incorporated
1804 North 27th Avenue
Phoenix, Arizona 85009

Subject: NOTICE OF FLOOD CONTROL DISTRICT OF MARICOPA
COUNTY HEARING

RE: NOTICE OF VIOLATION – CEASE AND DESIST HEARING
Unpermitted Activity in Floodway and Floodplain
Assessor's Parcel # 501-63-004 and State Trust Land
Floodplain Inquiry No: FI 2015 041

Dear Mr. Waltemath:

This will hereby serve as notice that:

A Hearing on the above-listed violation has been granted and a date set of Tuesday, December 1, 2015 from 9:00 A.M. to 4:00 P.M. and continuing as necessary Wednesday, December 2, 2015 from 9:00 A.M. to 4:00 P.M. The Hearing will be held at the Flood Control District of Maricopa County, 2801 W. Durango St., Phoenix, AZ 85009.

The Hearing will be for the purpose of determining whether a violation of the Floodplain Statutes (A.R.S. 48-3601 et seq.) and the Floodplain Regulations for Maricopa County has occurred. The Hearing shall advance in accordance with the procedures established in Article Seven, Enforcement, of the Floodplain Regulations for Maricopa County.

Pursuant to regulation, the Hearing shall be open to the public. The proceedings shall be audio recorded. A record of the proceedings may be made by a court reporter at your expense if you so request. You and the District representative must appear before the Hearing Officer on the date, time and place designated for adjudication of the alleged violation. You may be represented by an attorney or other designated representative. The District will be represented by the county attorney. If you desire to be represented by counsel or a designated representative at the Hearing you must provide written notice

ABCSR00000671

APP301

Mr. David Waltemath
Page 2
November 2, 2015

of such representation to the Hearing Officer and opposing party a minimum of 24 hours before the scheduled date and time of the Hearing. Representation by counsel may not be permitted at the Hearing unless proof of notification is produced at the Hearing.

Sincerely,



William D. Wiley, P.E.
Chief Engineer and General Manager

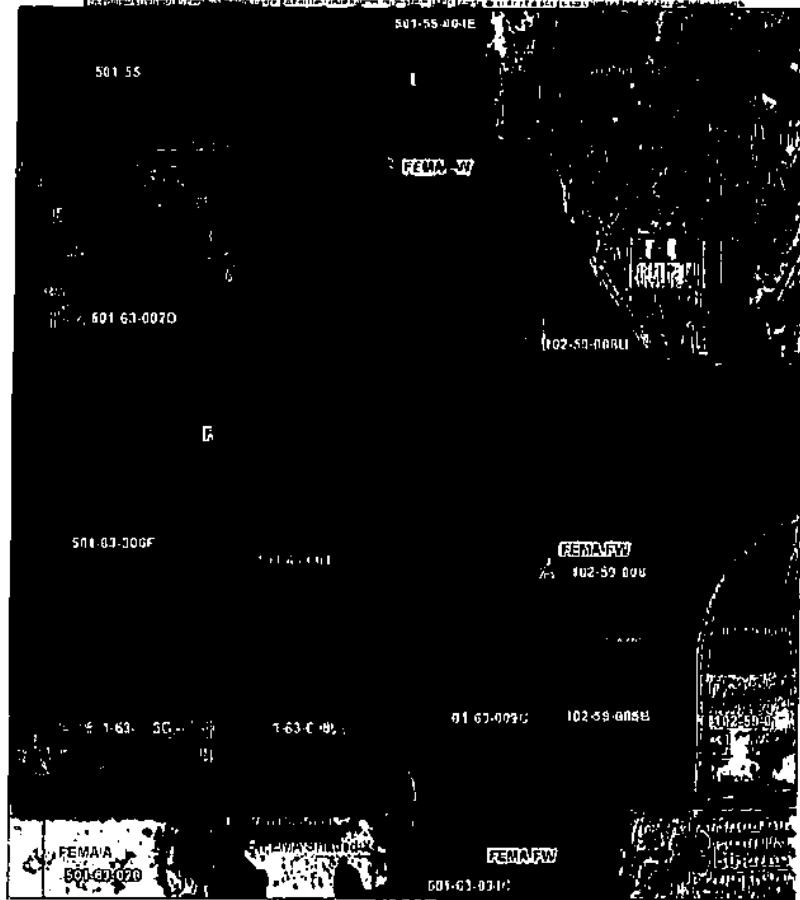
cc: Lisa A. Atkins, State Land Commissioner
Arizona State Land Department
1616 W. Adams Street, Phoenix, AZ 85007

Steve White, Statutory Agent
Rare Earth, LLC
1075 W. Todd Drive, Tempe, AZ 85283

Glenn R. Dietrich, CPA, Statutory Agent
A.B.C. Sand & Rock Company, Incorporated
Creed Dietrich & Robinson PLLC
1345 E. Chandler Blvd., #117, Phoenix, AZ 85048

Meghan H. Grabel
Osborn Maledon
2929 North Central Ave.
21st Floor
Phoenix, AZ 85012

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Current FEMA Flood Zone
 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

Current Pending Flood Zone
 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

0 400 800 1,600 Feet
 1 inch = 833 feet
 Date: 6/8/2016
 Time: 11:11:26 AM

Hydrologic Engineering & Research
 2111 West 10th Street
 Phoenix, AZ 85001
 Phone: 1 (602) 962-4412
 Fax: 1 (602) 962-4413
 E-mail: hre@hresinc.com



Flood Control District of Maricopa County

REC'D OSBORN MALEDON PA.

NOV 04 2015

LETTER OF TRANSMITTAL

TO: Meghan H. Grabel
Obsorn Maledon
2929 North Central Avenue
21st Floor
Phoenix, AZ 85012

11/02/2015

SUBJECT: Notice of Hearing
Notice of Violation – Cease and Desist
Floodplain Inquiry No. FI 2015-041

WE ARE SENDING YOU THE FOLLOWING ITEMS:

☒ Enclosed ☐ Under separate cover

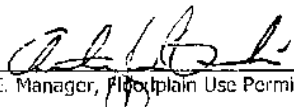
☐ Shop Drawings ☐ Prints ☐ Legal Description ☐ Samples ☐ Reports
☐ Specification ☐ Change Order ☐ Copy of Letter ☐ Plans ☐ Other

COPIES	DATE	NO.	DESCRIPTION
1	11/02/15		Notice of Hearing FI 2015-041
1	11/02/15		APN 50163004 and State Land Exhibit

THESE ARE TRANSMITTED:

☐ For approval ☐ Approved as submitted
☒ For your use ☐ Approved as noted
☐ As requested ☐ Returned for corrections
☐ Resubmit _____ copies for approval ☐ For review and comments
☐ Submit _____ copies for distribution ☐ Return _____ corrected prints
☐ FOR ESTIMATE DUE: ☐ Borrowed prints being returned

Remarks:

SIGNED: 
Tony Beuché, P.E. Manager, Floodplain Use Permits for Sand and Gravel

2801 West Durango Street, Phoenix, AZ 85009 • (602) 506-1501 • (602) 506-4601 fax

www.fcd.maricopa.gov

ABCSR00000674

APP304



Meghan H. Grabel

mgrabel@omlaw.com

2929 North Central Avenue
21st Floor
Phoenix, Arizona 85012

Direct Line 602.640.9399

Telephone 602.640.9000

Facsimile 602.640.9050
omlaw.com

November 5, 2015

Tony Beuché, P.E., Manager
Floodplain Use Permits for Sand and Gravel
Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, AZ 85009

Re: A.B.C. Sand & Rock Co., Inc.
Sand and Gravel FUP No. SG15-003

Dear Tony:

I write regarding the Notice of Hearing that I received on behalf of my client, A.B.C. Sand & Rock Co., Inc. ("A.B.C."), related, we believe, to the Notice of Violation – Cease and Desist letter dated May 8, 2015. Although I was not a party to the discussions that occurred this summer regarding that Notice of Violation, e-mail correspondence between A.B.C.'s former counsel, Michelle De Blasi, and Joy Rich from the Maricopa County Flood Control District ("FCD") indicates that Tom Manos, Joy Rich, Scott Vogel, and you met with A.B.C. representatives on June 16 and agreed, among other things, to "forebear enforcement action" related to the Notice of Violation and that "a hearing for the Notice of Violation would not be set at this time to allow the parties to focus their attention on the permit application." See Attachment A. To my knowledge, my client has received nothing to date that would cause him to believe that FCD did not intend to continue to adhere to this agreement.


My client recognizes that several months have passed since the June meeting, but nonetheless assumed and still hopes that the agreement reached then would remain effective. Rest assured, A.B.C. continues to diligently pursue its permit application. We received FCD's nine page Request for Corrections on A.B.C.'s permit application on June 30. That Request raises 37 detailed and complex considerations, which A.B.C. has been reviewing. Unfortunately, the attorney that had been tasked with drafting the comments to FCD's Request had, unbeknownst to my client, made little progress on them to date. As of this week, she is no longer involved in this matter. I have now fully assumed responsibility for those comments, and will have them to you no later than November 30. If it would be helpful for FCD's review of A.B.C.'s permit application, I can provide our comments in stages: (1) responses to requests for correction that do not require engineering analyses will be provided by next Friday, November 13; and (2) responses to those requests that do require additional engineering modeling will be provided by November 30. Getting A.B.C.'s comments to you on an expedited basis is my top near-term priority.

Tony Beuché, P.E., Manager
November 5, 2015
Page 2

I therefore respectfully request that the FCD cancel the Notice of Violation- Cease and Desist Hearing set for December 1 and 2, 2015. A.B.C. will continue to honor the commitments made this summer so that the parties can work productively on the May 1 permit application, and asks that FCD do the same. I am happy to meet with you or discuss by phone at your earliest convenience.

I look very forward to hearing from you.

Sincerely,



Meghan H. Grabel

MHG:dh
Enclosure
6373960



Maricopa County Attorney
BILL MONTGOMERY

Sent via email

November 10, 2015

Meghan H. Grabel, Esq.
OSBORN MALEDON
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012

RE: ABC Sand & Rock Co., Inc.

Dear Ms. Grabel:

Your letter of November 5, 2015, addressed to Tony Beuche, P.E. at the Flood Control District of Maricopa County, referencing ABC Sand & Rock Co., Inc., has been referred to me for response in my capacity as General Counsel to the District. Please be advised that my client will not consent to any postponement of the hearing before the Hearing Officer for the on-going violations of the Regulations. Your client, despite the forbearance of the District from scheduling a hearing to allow for the compliance with all statutes and regulation, has failed and refused to obtain necessary permits and has continued to operate in violation of the law. Any request of the Hearing Officer will be similarly opposed. The District is prepared and fully intends to prosecute its case against your client at the hearing on December 1-2, 2015.

It is clear that your definition of diligent pursuit of a permit and that employed by the District vary greatly. Your client has been advised since at least 2012 that it is operating outside of the law and that a permit is required. No progress towards obtaining required permits has occurred. I respect the fact that you have recently been hired to represent the interests of your client. However, you are not the first attorney to represent the interests of your client and each of your predecessors has similarly promised that the permit process would diligently be followed.

What your client identifies as an application was filed on May 1, 2015. In the intervening six months, absolutely no progress has been made by your client to advance that application. All the while your client continues to maintain an illegal sand and gravel operation. Frankly, the extraordinary patience exhibited by the District has been exhausted.

CIVIL SERVICES DIVISION
222 NORTH CENTRAL, SUITE 1100 • PHOENIX, AZ 85004
(602) 506-8541 • TDD (602) 506-4352 • FAX (602) 506-8567 • WWW.MARICOPACOUNTYATTORNEY.ORG

ABCSR00000644

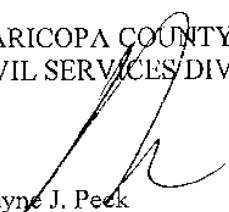
APP307

Meghan H. Gabel, Esq.
Re: ABC Sand & Rock Co., Inc.
November 10, 2015
Page 2

In the event your client were to provide information and details required by the Regulations in a timely manner, and the review by the District were to reveal compliance with the Regulations, prior to the hearing date, the District will consider reaching a final resolution with your client. However, given the history of this matter, the District will no longer accept representations that items will be provided. The District will continue to process the permit application when your client responds to the review comments which have gone unaddressed for the past four plus months. In the interim, the District will prepare for the December 1-2 hearing.

Sincerely,

MARICOPA COUNTY ATTORNEY'S OFFICE
CIVIL SERVICES DIVISION



Wayne J. Peck
Deputy County Attorney

Cc: Joy Rich, Deputy County Manager
Ed Raleigh, P.E.
Scott Vogel, P.E.
Tony Beuche, P.E.

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Flood Control District of Maricopa County

FLOODPLAIN USE PERMIT FOR SAND AND GRAVEL –REQUEST FOR CORRECTIONS

Date: 12/23/2015

To: A.B.C Sand & Rock Co., Inc.

c/o Meghan Grabel; Osborn Maledon

From: Tony Beuché, P.E., Manager, Floodplain Use Permits - Sand and Gravel; Civil/Structures Branch; Engineering Division ~~ASB~~ 12/23/2015

Subject: Request For Corrections

Application for Floodplain Use Permit No. SG15-003

A.B.C. Sand & Rock Co., Inc. Plant One – Agua Fria River

Plan of Development submitted 05/01/2015

The application for the subject permit was determined to be administratively complete on 06/16/2015 and Flood Control District of Maricopa County (FCDMC) staff completed the substantive review of the Plan of Development received on 05/01/2015 and issued a Request For Corrections, dated 06/30/2015, to A.B.C. Sand & Rock Co., Inc. The Plan of Development includes plan sheets dated 02/25/2015 and an engineering report dated 04/27/2015. The proposed project includes three sand and gravel pits in the Floodway/Floodplain of the Agua Fria River from the Bethany Home Road alignment to approximately 1,300-ft south of Camelback Road. The north pit (Pit 1) is between the Bethany Home road alignment and Colter Channel, the middle pit (Pit 2) is between Colter Channel and Camelback Road and the south pit (Pit 3) lies south of Camelback Road. The north pit has a rectangular shape with a length of 3,900-ft, a width of 2,500-ft and a depth of 85-ft. The middle pit has an approximate triangular shape with a base of 600-ft, a length of 1,200-ft and a depth of 65-ft. The south pit has a square shape with sides of 1,200-ft and a depth of 85-ft. Please see the attached exhibit of the project site at the end of this document.

On 11/13/2015 FCDMC received the letter titled "A.B.C. Response to FCDMC's Request for Corrections – Phase One", dated 11/13/2015 (ABC Response – Phase One). Please be advised that the letter fails to address all of the substantive review comments provided to A.B.C. Sand & Rock Co., Inc. pursuant to an application for a floodplain use permit to operate a sand and gravel mine.

The letter dated 11/13/2015 states that the ABC Response – Phase One consists of responses to the substantive review comments that do not require engineering analysis and that responses that do require additional modeling or that are best addressed in revisions to the first submitted report will be provided by 11/30/2015. No plans, report or modeling files were provided with the letter.

On 11/30/2015 FCDMC received via email the letter titled "A.B.C. Response to FCDMC's Request For Corrections – Phase Two", dated 11/30/2015 (ABC Response – Phase Two). On 12/01/2015 FCDMC received via courier delivery a copy of the aforementioned letter and the Plan of Development including eight sheets and the engineering report all seal dated 11/28/2015 and a CD dated 11/30/2015. No models were submitted.

Please be advised that the letter dated 11/30/2015 fails to address all of the substantive review comments provided to A.B.C. Sand & Rock Co., Inc. pursuant to an application for a floodplain use permit to operate a sand and gravel mine.

This Request For Corrections is submitted in accordance with the Floodplain Regulations for Maricopa County (Regulations). The applicant shall complete necessary revisions to the Plan of Development and resubmit for further review. Please submit written responses below each of the following requests and include a digital copy of the responses in MS Word format.

Engineering Application Development and River Mechanics Branch

- 1) **FCDMC Request For Corrections (06/30/2015):** The second paragraph on page 1 of the submitted report says "The engineering analysis was conducted using hydrology and hydraulics developed by JE Fuller Hydrology and Geomorphology, Inc. obtained March 18, 2014, as directed by client, see Appendix B for Scope of Work letter and Appendix D for hydrology and hydraulic and sediment transfer models". The hydrology and hydraulics developed by JE Fuller in 2014 for Arizona Rock Products Association (ARPA) are a part of a feasibility study which is still ongoing. The reduced flow rate results from this ongoing feasibility study cannot be used as the basis for this permit application. The FEMA-effective flow rates must be used as the basis for this permit application. The FEMA-effective flow rates can be found in the FEMA-effective HEC-2 model in "Agua Fria River Floodplain Delineation Re-Study between the Gila River Confluence and the New Waddell Dam" prepared by Coe & Van Loo Consultants, Inc. in October of 1996. Please revise the hydrologic and hydraulic analyses based on the FEMA-effective HEC-2 model.

The basis for this requirement is Regulations Section 102 Statutory Authority that identifies the requirement for FCDMC to adopt and enforce floodplain regulations consistent with criteria adopted by the Arizona Department of Water Resources and the requirement that the regulations adopted by FCDMC be intended to carry out the requirements of the National Flood Insurance Program. The effect of these requirements is for the FEMA-approved hydrology for the 100 year storm event to be used as the basis for all analysis conducted in support of an application for a floodplain use permit.

For information purposes, FCDMC is currently working with ARPA to continue the second phase of the ongoing feasibility study.

ABC Response – Phase One (11/13/2015): Arizona Revised Statute (A.R.S.) § 48-3644 prohibits a county flood control district from basing a licensing decision on a licensing requirement or condition that is not specifically authorized by statute, rule, regulation, ordinance, executive order, or delegation agreement. A.B.C. has not been able to locate any specific statute, rule, regulation, ordinance, executive order, or delegation

agreement that requires a Sand and Gravel permit application to be based on the specific data inputs from the "Agua Fria River Floodplain Delineation Re-Study between the Gila River Confluence and the New Waddell Dam" prepared in 1996 by Coe & Van Loo ("Coe & Van Loo Delineation"). While the July 1996 "Floodplain and Floodway Delineation in Riverine Environments Standard" by the Arizona Department of Water Resources ("ADWR") generically states that "any existing study that has been adopted by FEMA shall be considered the minimum base for floodplain management for the specific study area or flooding source," that Standard is not a "specific statute, rule, regulation, ordinance, executive order, or delegation agreement" as those terms are used in A.R.S. § 48-3644. Moreover, reading ADWR's generic statement to suggest that floodplain use permit applicants must use, in their engineering analyses, hydrology data that is more than a decade old would run afoul of state and federal requirements that floodplain management regulations be based upon current data to achieve accurate results. In addition, any requirement that an applicant apply FEMA-effective flow rates would be predicated on the assumption that the FCDMC has complied with its legal obligation to update those rates and revise the floodplain delineation as necessary to reflect current topography and hydrology, which FCDMC has not done.

A.R.S. § 48-3605(A) requires the ADWR to develop and adopt criteria for establishing the 100-year flood and delineating floodplains. Those criteria are the guidelines set forth by the Federal Emergency Management Agency ("FEMA") for flood insurance studies. The FEMA guidelines, in turn, require the Flood Control District to delineate floodplains based on existing conditions, and to timely submit new technical data when physical changes to the topography would impact flooding conditions. See 44 C.F.R. § 65.3. The regulations expressly state that such a requirement exists to ensure that "risk premium rates and flood plain management requirements will be based upon current data." See *id.* Changed physical conditions that would merit a revision to the floodplain delineation include changes affecting hydrologic conditions, such as the addition of detention basins, and topographic conditions. See, e.g., 44 C.F.R. § 65.6(c). See also 44 C.F.R. § 65.3 (requiring the Flood Control District, when revising base flood elevation determinations, to use the same hydraulic computer model used to develop the base flood elevations shown on the effective Flood Insurance Rate Map and to update it "to show present conditions in the flood plain.")

The FCDMC's obligation to ensure that floodplain management requirements be based on current data so as to produce realistic results is underscored in ADWR's several State Standards, particularly the Requirement for Floodplain and Floodway Delineation in Riverine Environments ("Floodplain Requirements Standard") and the "State Standard for Hydrologic Modeling Guidelines In Arizona" ("Hydrologic Modeling Standard"). The first paragraph of the Floodplain Requirements Standard expressly states that "[t]he methods contained in this publication are intended to be a reasonable way of setting minimum floodplain requirements where better data or methods do not exist. As in all technical methods, engineering judgement and good common sense must be applied and the methods rejected where they do not offer a reasonable solution." Floodplain Requirements Standard, Disclaimer of Liability, July 1996 (emphasis added). Similarly,

the Hydrologic Modeling Standard notes that its purpose is to “provide technical guidance for hydrologic modeling of watersheds in Arizona, with the goal of providing a method that will produce “accurate and reproducible discharge estimates.” See Hydrologic Modeling Standard, August 2007, at 5. Because accuracy is difficult to achieve through modeling alone, the Hydrologic Modeling Standard expressly encourages the evaluation of model results quantitatively through “testing and verification against recorded data.” *Id.* Even the FCDMC’s Scope of Work for the Coe & Van Loo Delineation emphasized that “sound engineering judgement” includes refining the input parameters used in the model “in order to obtain the most realistic results.”

In this case, the Coe & Van Loo Delineation was conducted in 1996, almost 20 years ago, using hydrology data obtained from a 1995 United States Army Corps of Engineers report. Many physical changes have altered the topography in the Agua Fria River in the succeeding decades, such that the input parameters used in that study no longer produce realistic results when examined against existing, recorded data (as both the federal regulations and ADWR State Standards require). Since 1996, among other things, water surface elevations have changed and new development in the area is required by zoning ordinance to contain runoff from the property. These changed conditions were not accounted for in the Coe & Van Loo Delineation. Consistent with ADWR’s admonition, A.B.C. used “engineering judgement and common sense” in applying the more recent input parameters identified in the “Agua Fria River Hydrology Revision Feasibility Study” prepared by JF Fuller/Hydrology & Geomorphology, Inc. (“Fuller Study”). The Fuller Study, unlike the Coe & Van Loo Delineation, takes into account the water retention that exists within the relevant floodplain area to determine the relevant 100-year peak discharge.

Moreover, the hydrology inputs included in the Fuller Study produce realistic model results, as verified against recorded data. For example, the Fuller Study suggests that the 100-year discharge input for the Agua Fria River at Glendale Avenue be updated from 36,000 cfs (as reflected in the Coe & Van Loo Delineation) to 7,200 cfs. That 7,200 cfs input factor is both reasonable and, in fact, conservative when compared to recorded data for that location reflected in the FCDMC Storm Report for the September 8, 2014 storm (“FCDMC Storm Report”). The rain gage data provided in that report proves that the September 8 event was so significant that the impact to most communities would happen once every 500-1000 years, not just once every 100 years. See FCDMC Storm Report at pages 13-17. As the FCDMC explained, “[i]n the past, we have documented one or two gages that have exceeded the 1,000-year return interval, but never 20! This was truly an unusual storm, one that will play a factor in our future estimations of design rainfall.” *Id.* at 9. And according to the FCDMC Storm Report, in this “unusual” and statistically significant 500 to 1000-year event, the New River flowed at only 5,568 cfs at Glendale Avenue – well below the 36,000 cfs input measure used in the Coe & Van Loo Delineation, and even below the 7,200 cfs input suggested for use in the Fuller Study. *Id.* at 19. Clearly, in light of this recorded data, “engineering judgment and good common sense” would require that the hydrology input parameters should

reflect what is recommended in the recent Fuller Study and not the Coe & Van Loo Delinication in order to obtain the most realistic results.

In these circumstances, when recorded data shows that the FCDMC's 20-year old hydrology inputs would result in unrealistic floodplain management regulations, it is both appropriate and consistent with state and federal law to revise those inputs so as to avoid imposing inappropriate restrictions on the applicant's use of his land. Failure to do so would result in a taking of A.B.C.'s property, in violation of his federal and state constitutional rights.

FCDMC Request For Corrections (11/23/2015): The duly and properly adopted Regulations set forth the standard for obtaining a floodplain use permit. In the case of a proposed sand and gravel operation, the requirement is that engineering demonstrate that there will be no adverse impacts to structures or surrounding properties from all flows up to and including the 100-year flood (Regulations Section 403.B.1.e.3). The 100-year flood is a flood that has a one percent chance of being equaled or exceeded in any given one-year period based up criteria established by ADWR (Regulations Section 205).

Regulations Section 102 identifies the requirement for FCDMC to adopt and enforce floodplain regulations consistent with criteria adopted by ADWR and the requirement that the regulations adopted by the FCDMC be intended to carry out the requirements of the National Flood Insurance Program. The effect of these requirements is for the FEMA-approved hydrology for the 100-year storm event to be used as the basis for analysis conducted in support of an application for a floodplain use permit.

The hydrologic model prepared by JE Fuller Hydrology and Geomorphology, Inc. used in support of the A.B.C. Sand & Rock Co., Inc. application for a floodplain use permit for sand and gravel is not adopted by FEMA. Should A.B.C. Sand & Rock Co., Inc. wish to do so, hydrology that differs from that which had previously been adopted by FEMA may be submitted to FEMA and affected communities including cities in the watershed and the FCDMC. Should support from the affected communities be forthcoming and the hydrologic model be approved by FEMA, that model may be used in support of an application for a floodplain use permit for sand and gravel.

The application for floodplain use permit for sand and gravel must be based upon the current FEMA-effective hydrology. This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Please see November 13, 2015 Phase One submittal.

FCDMC Request For Corrections (12/23/2015): This comment is not resolved.

- 2) **FCDMC Request For Corrections (06/30/2015):** All three pits are proposed to have 25-ft setbacks from the property boundary to top of pit slope on all sides. By engineering inspection and judgement, the 25-ft setbacks are insufficient and are unreasonable for these 85-ft and 65-ft deep pits. Please re-examine the input parameters and setup of the numerical model to eliminate unreasonable results and validate the results of modeling by comparison with other industry-standard methodologies. Revise the design

of each proposed pit to eliminate the potential for erosion to cause adverse impacts to structures and surrounding properties.

The possible solutions to headcut and tailcut are to reduce the pit dimensions to create larger setbacks, to install erosion control structures to prevent headcut, to isolate the pit from the river or provide a combination of wider setbacks and structural improvements. The references listed in Section 9 of the report provide guidance for analysis of erosion.

A much larger headcut/tailcut setback distance for Agua Fria River would be expected. Because the setbacks are only 25-ft, these three pits will cause significant erosion or adverse impact to the surrounding properties and structures. For example, a typical headcut setback distance for a 40-ft deep pit in the Agua Fria River will vary from several hundred feet to 1,000-ft. A quick check based on rule-of-thumb methods shows a headcut distance of 4,000-ft to more than 10,000-ft for an 85-ft deep pit (Sand and Gravel Mining Guidelines: Skunk Creek, New and Agua Fria Rivers (draft), US Army Corps of Engineers, 1987; Central Arizona Water Control Study: Sand and Gravel Mining Guidelines, prepared by Boyle Engineering for US Army Corps of Engineers, 1980; Williams Hu, Doeing and Phillips, Headcut Analysis Due to Overbank Sand and Gravel Mining, Association of State Floodplain Managers, Annual Conference, Phoenix, AZ, 2002).

ABC Response – Phase One (11/13/2015): A.R.S. § 48-3644 prohibits a county flood control district from basing a licensing decision on a licensing requirement or condition that is not specifically authorized by statute, rule, regulation, ordinance, executive order, or delegation agreement. A.B.C. has not been able to locate any specific statute, rule, regulation, ordinance, executive order, or delegation agreement that requires a Sand and Gravel permit application to validate the results of its engineering model based on “rule of thumb” methods or by comparison to the results of the outdated studies cited in this Request for Correction. Notably, some of the studies suggested for use in verifying the setbacks reflect data existing even prior to the significant changes resulting from the New Waddell Dam. Such outdated data would not be a reliable source of verification.

A.B.C. used HEC-6 as its engineering model, the same model used by FCDMC. The 25 foot setbacks were the output of that model using current hydrologic data. The 25 foot setbacks are reasonable when the current topography is considered, as FEMA requires. See A.B.C. Response to FCDMC Request for Corrections # 1.

With respect to the reference to “adverse impact,” A.B.C. understands this term to be that contained in FCDMC’s Floodplain Use Permit Requirements § 403.B.1.e, which states: “Applications for Floodplain Use Permits for Sand and Gravel extraction shall . . . demonstrate that there will be no adverse impacts to structures or surrounding properties from all flows up to and including the 100-year flood.” A.B.C. does not take issue with this requirement as applied to impacts on bridges, roads, utilities, and other necessary public works. However, for the following reasons, A.B.C. objects to FCDMC

imposing an "adverse impact" standard regarding commercial or other private property that might be affected by an aggregate mining permit.

In April 2014, Maricopa County convened an Ad Hoc Task Force to review the Flood Control District. Notably, at the Task Force's initial meeting, the first item identified for discussion by the "Regulatory Review Subcommittee" was that having a "zero [adverse] impact standard creates enormous mitigation expense and is not realistic for what is actually being permitted." See Flood Control District Issues/Items Identified at KICK-OFF Meeting – April 29, 2014, at 2. On May 12, 2014, Deputy County Attorney Wayne Peck informed the Subcommittee that there was nothing in federal law or statute that deals with a zero adverse impact standard and recommended that the FCDMC's Floodplain Regulations should be amended to remove the standard as applied to situations where private actions result in an impact on only private property.

At a May 29, 2014 Regulatory Review Subcommittee meeting, the Subcommittee members concluded that "when there are no structures involved the standard [is] overly restrictive," and that the standard may implicate property rights. See Ad Hoc Task Force – Flood Control District meeting notes from the Regulatory Review Subcommittee Meeting, May 29, 2014 @ 1:30pm. The Task Force ultimately recommended that a key stakeholder group be formed to review, in part, the regulatory standard as it applies to "adverse impact," noting specifically that "[m]embers were clear that the current zero impact standard is overly restrictive." See Flood Control District of Maricopa County, Recommendations from the Ad Hoc Task Force convened April 29, 2014 at page 4.

That recommended stakeholder committee process is currently underway. The minutes from a January 9, 2015 meeting of the stakeholder committee reports Chief Engineer Bill Wiley as questioning "whether the District has authority" to regulate "between neighboring properties." See Stakeholder Review Committee – Adverse Impact Subcommittee, Additions to January 9, 2015 Meeting Notes. More recently, the Stakeholder Review Committee, Adverse Impact Subcommittee offered a draft text change to the Floodplain Regulations for Maricopa County, in which it deleted the application of the zero adverse impact standard to adjacent or nearby property. See March 6, 2015 Draft Text Change to Floodplain Regulations for Maricopa County.

In light of the facts that: (1) FCDMC officials have repeatedly stated that the "adverse impact" standard as applied to adjacent or nearby property is overly restrictive and not required by any state or federal law, rule, or regulation; and (2) that revisions to the Floodplain Use Permit regulations removing the adverse impact requirement as to neighboring properties are currently being considered, that requirement should not be insisted upon by FCDMC as the basis for a Floodplain Use Permit.

FCDMC Request For Corrections (11/23/2015): Please note that HEC-6 is a computer program used to prepare hydraulic models and is one of several programs appropriate for determination of erosion. It is necessary for the hydrologic data entered into the program to be the FEMA-effective flow rates in order to prepare a model that is acceptable. The FCDMC is not questioning the use of the computer program used to

support the application. However, because the data entered into the model is not data approved by FEMA, the results of the model are not acceptable.

The model upon which the application is based does not utilize the FEMA-effective flow rates. Therefore, the FCDMC cannot accept the model submitted in support of the application. The issue is not whether the flow rates approved by FEMA are the most up to date. The issue is that, where it exists, the FCDMC accepts only modeling based upon hydrologic data that has been approved by FEMA.

With respect to your objection to the no adverse impact standard being applied to private property and your references to the Task Force recommendations at this time, none of the Task Force recommendations has been adopted as new regulation by the Board of Directors. A.B.C Sand & Rock Co., Inc. is obligated to comply with the existing Regulations.

Further, your characterization of the advice given by the General Counsel to the FCDMC is inaccurate. Mr. Peck advised that there was nothing in the statute or federal law that defined zero adverse impact. The Regulations currently in place have passed review by FFMA and are both valid and the regulations to which the FCDMC is legally required to regulate. This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Please see November 13, 2015 submittal. In addition, the south pits have been removed entirely from the plans and pit setbacks have been revised from 25' to 260', and depth revised from 85' to 65'.

FCDMC Request For Corrections (12/23/2015): The middle and south pits are eliminated, the setbacks are revised from 25-ft to 260-ft and the depth is revised from 85-ft to 65-ft. However, no model, calculations or documentation are provided to demonstrate that the setbacks are sufficient to prevent adverse impact due to erosion to the structures and neighboring properties. Please provide the updated model, calculations and documentation for 65-ft deep pit with 260-ft setbacks.

The newly added cross-section B-B on plan sheet 3 does not represent the proposed cross-section B-B shown in plan sheets 7 and 8. Please verify and update plan sheets 7 and 8. This comment is not resolved.

- 3) **FCDMC Request For Corrections (06/30/2015):** The results on the CD submitted as a part of this report show that the north pit will cause significant erosion on the properties north of the property line of Pit 1. The submitted results can be found in the HEC-6T sediment transport model output file and the Excel comparison file (Compare.xls) on the CD. Based on the CD results, the headcut distance is about 1,400-ft north of the property line. This 1,400-ft was obtained by interpolating the erosion shown in the Excel file on the CD. This erosion will cause significant adverse impact to the upstream properties including City of Glendale properties and to other sand and gravel operations. A riprap-berm at one sand and gravel operation will be subject to erosion (refer to exhibit).

ABC Response – Phase One (11/13/2015): Please see A.B.C. Response to FCDMC Request for Corrections # 2, with respect to FCDMC's statements related to regulating adverse impact between neighboring properties. This Request for Correction provides a perfect example of why such adverse impact regulation is inappropriate. In this case, the properties north of A.B.C.'s Pit 1 have developed the land up to the A.B.C. property line and 60 feet deep – and are currently operating. Requiring A.B.C. to amend its plan to A.B.C.'s detriment in order to avoid "adverse impact" to the neighboring property based on its neighbor's own actions would deprive A.B.C. from using its property to the same extent allowed its neighbor – a restraint on property rights that is neither fair nor equitable.

FCDMC Request For Corrections (11/23/2015): The application process is not the appropriate venue to question the necessity for a regulation. The FCDMC must, and will, regulate to adopted Regulations. This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Please see November 13, 2015 Phase One submittal.

FCDMC Request For Corrections (12/23/2015): Table 1 in the report and the Excel file (HEC-6T Comparison) both show adverse impact to the adjacent property on the upstream side of the proposed pit. Based on the table and Excel file, the headcut distance is still about 1,400-ft north of the property line. The updated models for the modified pit must be submitted to verify the result in the Table 1 and the Excel file. This comment is not resolved.

- 4) **FCDMC Request For Corrections (06/30/2015):** Since the proposed Pit 1 is located in the confluence of Agua Fria River and New River channel, the headcut impact from the New River channel must be analyzed. The draft Plan of Development does not address the impact of flows from the east from New River. The New River channel has 100-year flow of 39,000 cfs which would cause significant headcut due to the proposed Pit 1. The headcut in all proposed pits could adversely impact the bank protection and levees located on both banks of New River and on the east bank of the Agua Fria River. Those levees protect the Glendale West Area Water Reclamation Facility, the City of Glendale Municipal Airport and the Camelback Ranch Baseball Park. Please provide an analysis of the effect of flow from New River on the proposed pits.

ABC Response – Phase One (11/13/2015): A.B.C. will address this Request for Correction with an updated engineering analysis, to be provided on November 30, 2015.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): A.B.C. has not yet completed the New River Analysis. To do so, we have requested the topographic and other mapping associated with the base models that A.B.C. received from FCDMC on November 18, 2015.

FCDMC Request For Corrections (12/23/2015): FCDMC provided all applicable hydrologic and hydraulic computer models for the Agua Fria River and New River in the vicinity of the mine site to ABC on 08/04/2015 and 11/18/2015. A public records

request for topographic data for New River from the mine location to a point two miles upstream was submitted to FCDMC on 12/17/2015. The topographic data has been provided to ABC. This comment is not resolved.

- 5) **FCDMC Request For Corrections (06/30/2015):** The HEC-6T cross-sections include the existing pits within and west of the proposed mine site. Cross-sections should not include these pits as part of either the base condition model or the proposed condition model; otherwise, the models may fail to identify the headcut and tailcut erosion that will occur due to the proposed pits. The existing pits within the property should be represented as being filled for the base model. The HEC-6 model from the Agua Fria watercourse master plan should be used as the base model rather than the HEC-6T model from the JE Fuller feasibility study. Please revise the HEC-6T model accordingly.

ABC Response – Phase One (11/13/2015): As discussed in A.B.C. Response to FCDMC Request for Corrections #1, it would be inappropriate to use the HEC-6 model from the Agua Fria Watercourse Master Plan rather than the Fuller model, given that the Fuller model reflects existing conditions. FCDMC has not been authorized by statute to implement the Agua Fria Watercourse Master Plan, and FEMA Guidelines expressly prohibit floodplain delineations from being based on proposed projects or future conditions. See 44 CFR § 65.6(3). The Agua Fria Watercourse Master Plan envisions a future project and does not reflect existing circumstances. Delineating a floodplain based on the inaccurate inputs contained therein is not permissible under the governing regulations. Please see A.B.C. Response to FCDMC Request for Corrections #1 for a full discussion on this issue.

It is similarly unrealistic to assume that all of the existing pits on and adjacent to the property will be filled, and any model that requires such assumptions would produce unrealistic results. A.B.C. is not aware of any statute, rule, regulation, ordinance, executive order, or delegation agreement that requires existing pits on the property to be represented as being filled for base model purposes.

FCDMC Request For Corrections (11/23/2015): Please refer to Comment No. 1. This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Please see November 13, 2015 Phase One submittal.

FCDMC Request For Corrections (12/23/2015): This comment is not resolved.

- 6) **FCDMC Request For Corrections (06/30/2015):** The proposed pits may have adverse impact on the downstream properties and structures. The tailcut may adversely impact the Colter Channel, the Camelback Road bridge (piers, spur dikes and abutments), the Agua Fria River east bank levee and the properties south of the proposed mine site. The submitted model did not identify tailcut correctly as tailcut is expected to result from such large and deep pits. Please exclude the existing pits west of the proposed mine from the modeling and model the pits within the property as being filled.

ABC Response – Phase One (11/13/2015): A.B.C. will address this Request for Correction with an updated engineering analysis, to be provided on November 30, 2015.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Pits 2 & 3 have been removed from the plan. See response to FCDMC Request for Correction #5 with regards to the filling of existing pits.

FCDMC Request For Corrections (12/23/2015): Please provide the model updated for the modification of pits. This comment is not resolved.

- 7) **FCDMC Request For Corrections (06/30/2015):** Pit 2 on parcel APN 501-63-008, located south of the Colter Channel, will cause headcut that will adversely impact the channel. Please re-examine the headcut from this pit and revise the design of the pit to eliminate the adverse impact to the Colter Channel.

ABC Response – Phase One (11/13/2015): A.B.C. will address this Request for Correction with an updated engineering analysis, to be provided on November 30, 2015.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Pit 2 has been removed from the plan.

FCDMC Request For Corrections (12/23/2015): This comment is resolved.

- 8) **FCDMC Request For Corrections (06/30/2015):** The spur dike located on the west bank of the Agua Fria River and north of the Camelback Road bridge may be adversely impacted when flow enters Pit 2 and causes an eastward headcut. Please re-examine the headcut from this pit and revise the design of the pit to eliminate the adverse impact to the spur dike.

ABC Response – Phase One (11/13/2015): A.B.C. will address this Request for Correction with an updated engineering analysis, to be provided on November 30, 2015.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Pit 2 has been removed from the plan.

FCDMC Request For Corrections (12/23/2015): This comment is resolved.

- 9) **FCDMC Request For Corrections (06/30/2015):** The southeast corner of Pit 3 lies in the floodway/floodplain. The flow from the Agua Fria River will enter the pit and cause headcut that may adversely impact the west spur dike and the bridge. The west side of the south pit is also within the FEMA floodplain and erosion will occur when flow enters into the pit. Please re-examine the headcut from this pit and revise the design of the pit to eliminate the adverse impact to the spur dike and to the bridge.

ABC Response – Phase One (11/13/2015): A.B.C. will address this Request for Correction with an updated engineering analysis, to be provided on November 30, 2015.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Pit 3 has been removed from the plan.

FCDMC Request For Corrections (12/23/2015): This comment is resolved.

- 10) FCDMC Request For Corrections (06/30/2015):** The power poles located within Pit 1 and adjacent to the east top of slope of that pit will be adversely impacted as flow enters the pit and causes erosion. Please re-examine the erosion that will occur and revise the design of the pit to eliminate the adverse impact to the power poles. The other power poles are also in potential danger because they can be near the face of an excavation where headcut will occur depending upon the phasing of excavation. The excavation phasing should be described to identify how it will eliminate adverse impact to those power poles in the headcut locations.

ABC Response – Phase One (11/13/2015): This Request for Correction was raised and addressed in prior A.B.C. permit applications. As demonstrated in the attached agreement, Tucson Electric Power Company (the utility that owns the power poles referenced in this Request) only requires A.B.C. to indemnify TEP if any A.B.C. action causes adverse impact to the power poles. See Attachment A. In an abundance of caution, A.B.C. provided the utility with a 100 foot radial setback. A.B.C. is not aware of any statute, rule, regulation, ordinance, executive order, or delegation agreement that requires a mining operator to provide a more conservative setback estimate than what is required by the utility.

FCDMC Request For Corrections (11/23/2015): The Regulations require no adverse impact to structures. The Plan of Development must demonstrate how adverse impact to those power poles will be eliminated. An agreement with a private party does not obviate either the requirement that the District regulate or the obligation of a sand and gravel operation to comply with adopted Regulations. This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Please see November 13, 2015 Phase One submittal.

FCDMC Request For Corrections (12/23/2015): Please provide calculations and documentation to demonstrate no adverse impact to the power poles. This comment is not resolved.

- 11) FCDMC Request For Corrections (06/30/2015):** The power pole located on the south side of Pit 2 will be adversely impacted as flow enters the pit and causes erosion. Please re-examine the erosion that will occur and revise the design of the pit to eliminate the adverse impact to power poles.

ABC Response – Phase One (11/13/2015): Please see A.B.C. Response to FCDMC Request for Corrections #10.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Pit 2 has been removed from the plan. Please see A.B.C. Response to FCDMC Request for Corrections #10.

FCDMC Request For Corrections (12/23/2015): This comment is resolved.

- 12) FCDMC Request For Corrections (06/30/2015):** The second line on page 3 states “Pits 1 and 2 are completely in the floodway area and have the capacity to convey the entire flow”. Since the proposed Pit 1 will capture river flows, it will significantly expand the main channel width and shift the watercourse dramatically from east to west causing significant lateral erosion. This lateral erosion will adversely impact properties to the west of the proposed mine site and adversely impact the west river bank. Please provide the documentation/calculation that demonstrates that the proposed lateral setback of 25 ft is adequate or revise the design of the pit to eliminate this adverse impact.

ABC Response – Phase One (11/13/2015): Please see A.B.C. Response to FCDMC Request for Corrections # 2, with respect to FCDMC’s statements related to regulating adverse impact between neighboring properties. That discussion notwithstanding, A.B.C. will address this Request for Correction with an updated engineering analysis, to be provided on November 30, 2015.

FCDMC Request For Corrections (11/23/2015): Please refer to Comment No. 2. This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Please see A.B.C. Response to FCDMC Request for Corrections # 2, submitted on November 13, 2015, with respect to FCDMC’s statements related to regulating adverse impact between neighboring properties. That discussion notwithstanding, a 260 foot setback has been added to the perimeter between pit and property boundary to mitigate any lateral migration.

FCDMC Request For Corrections (12/23/2015): The 260-ft setback is provided but there are no calculations or documentation to show that 260-ft of setback will be sufficient to mitigate any lateral migration. Please refer to chapter 11.9 of Drainage Design Manual for Maricopa County, Hydraulics 2013 (identified in the references section of the report). This comment is not resolved.

- 13) FCDMC Request For Corrections (06/30/2015):** The Statement of Findings on page 4 indicates that the analysis is based on reduced flow rates for the Agua Fria River which are inconsistent with the FEMA-effective flow rates. Please revise the hydrologic and hydraulic analyses based on the FEMA-effective HEC-2 model and revise the Statement of Findings accordingly.

ABC Response – (Phase One 11/13/2015): Please see A.B.C. Response to FCDMC Request for Corrections #1, regarding the appropriateness of using the Fuller Study.

FCDMC Request For Corrections (11/23/2015): Please refer to Comment No. 1. This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Please see November 13, 2015 Phase One submittal.

FCDMC Request For Corrections (12/23/2015): This comment is not resolved.

- 14) **FCDMC Request For Corrections (06/30/2015):** The first line of second paragraph on page 5 of report says “The JE Fuller hydrology and hydraulic models that model the existing pits along the Agua Fria River were further validated by the Photos taken 9-10-14 and 9-12-14 during what was labeled as a greater than 100-year storm event for most parts of the Valley.” This is anecdotal information that cannot be used to justify the suitability of the Plan of Development. Additionally, according to the gage data identified in the FCDMC 9/8/2014 storm report, the storm return periods vary from 40-yr to 51-yr for the 6-hour storm and from 13-yr to 15-yr for the 24-hr storm in the vicinity of the Lower Agua Fria watershed. The gage IDs 5650, 5470, 5515 and 5500 are used to determine the return periods. Please revise this statement to eliminate this error or omit references to the 09/08/2014 storm event.

ABC Response – Phase One (11/13/2015): Please see the discussion in A.B.C. Response to FCDMC Request for Corrections #1 regarding the recorded data reported in FCDMC’s September 8, 2014 Storm Report. That Storm Report indicates that the Peak Flow recorded for the Agua Fria at Buckeye Road was 10,274 cfs and declares it to be the highest reading ever recorded for that location. A 10,274 cfs reading measured at the Agua Fria and Buckeye Road gauge validates the 7,200 cfs input used in the Fuller Study for ABC’s Glendale location because the Glendale location is north of the Agua Fria and Buckeye Road gauge location, and as FCDMC’s gauges indicate, the cfs increases over that section of the Agua Fria, likely due to runoff into the Agua Fria along that section. That background notwithstanding, A.B.C. will address this Request for Correction with an updated engineering analysis, to be provided on November 30, 2015.

FCDMC Request For Corrections (11/23/2015): Please refer to Comment No. 1. Validating a model that has not been approved by FEMA does not satisfy the requirement that only FEMA-approved models be used. This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Please see November 13, 2015 Phase One submittal. That discussion notwithstanding, the reference to the 100 year storm has been removed.

FCDMC Request For Corrections (12/23/2015): The reference to the 100-year storm is removed from page 5 of the report but the caption for the picture on page 84 still refers to a storm greater than 100-year storm. This comment is not resolved.

- 15) **FCDMC Request For Corrections (06/30/2015):** There is a discrepancy between the report and the CD submitted for review. The HEC-6T sediment transport model results shown in the report do not match the output file and Excel file of the models provided on the CD. The output file and Excel file on the CD show a headcut of 4.18 ft off the property (XS 10.442) but the report (Appendix D-HEC-6T Results) has 0.02-ft of headcut at same cross-section. Please correct this discrepancy between the report and CD.

ABC Response – Phase One (11/13/2015): A.B.C. will address this Request for Correction with an updated engineering analysis, to be provided on November 30, 2015.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Please see the attached report and CD files. The discrepancy has been corrected.

FCDMC Request For Corrections (12/23/2015): The table in the report agrees with the table in the Excel file but since Pits 2 and 3 are eliminated and the depth of the Pit 1 is reduced, the models, tables and Excel files must be updated accordingly. Please submit the updated models, tables and Excel files for verification. This comment is not resolved.

- 16) **FCDMC Request For Corrections (06/30/2015):** The report indicates that the HEC-RAS sediment transport analysis was used as a check of the results from HEC-6T. The HEC-RAS sediment transport algorithm was the topic of a study titled "Comparison of Sediment Transport Models for the Lower Hassayampa River" prepared by R2D and dated 11/21/2011. This study indicates that the HEC-RAS sediment transport model does not accurately model the transport processes associated with headcuts and tailcuts. For that reason, a HEC-RAS sediment transport model is not acceptable for headcut and tailcut analysis at this time. Please omit the results of the HEC-RAS sediment transport analysis from the report.

ABC Response – Phase One (11/13/2015): A.B.C. will address this Request for Correction with an updated engineering analysis, to be provided on November 30, 2015.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Please see the attached report and CD files. The HEC-RAS sediment reference has been omitted.

FCDMC Request For Corrections (12/23/2015): The results of the HEC-RAS sediment transport model are removed from the Appendix D but the report still identifies, on the first line of page 5, the use of the HEC-RAS sediment transport model to check the results. This comment is not resolved.

- 17) **FCDMC Request For Corrections (06/30/2015):** The water surface elevation of the profile (Pits_combined) does not match the HEC-RAS steady state model submitted in the CD. For example, the result from the HEC-RAS steady state model in the CD shows that the proposed condition ("Pits_combined" profile) water surface elevation at XS 10.343 is 1023-ft but Table 2 in the report has 1033.1-ft for the "Pits_combined" profile. Please correct this discrepancy.

ABC Response – Phase One (11/13/2015): A.B.C. will address this Request for Correction with an updated engineering analysis, to be provided on November 30, 2015.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Please see the attached report and CD files. The discrepancy has been corrected.

FCDMC Request For Corrections (12/23/2015): The revised table in the report and the Excel file "HEC-RAS Comparison" differ from the previous submittal. But no HEC-RAS steady state model has been submitted for verification. Please submit the updated model. This comment is not resolved.

- 18) FCDMC Request For Corrections (06/30/2015):** There are 13 flow data files in the HEC-RAS model. Please provide the relevant ones and delete others or document all the provided flow data files in the report and summarize their purpose and results. Please retain those files relevant to the steady state flow analysis.

ABC Response – Phase One (11/13/2015): A.B.C. will address this Request for Correction with an updated engineering analysis, to be provided on November 30, 2015.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): The HEC-RAS model has been revised to address this request.

FCDMC Request For Corrections (12/23/2015): No HEC-RAS model is included in the submittal. Please submit the updated model. This comment is not resolved.

- 19) FCDMC Request For Corrections (06/30/2015):** Please show the operations area and label it in the plans.

ABC Response – Phase One (11/13/2015): A.B.C. will address this Request for Correction with an updated engineering analysis, to be provided on November 30, 2015.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): The operations area has been labeled to address this request.

FCDMC Request For Corrections (12/23/2015): This comment is resolved.

- 20) FCDMC Request For Corrections (06/30/2015):** Please label the Colter Channel, spur dikes, bridge, levees and the rip-rap berm located in APN 501-55-004E in the mining plans.

ABC Response – Phase One (11/13/2015): A.B.C. will address this Request for Correction with an updated engineering analysis, to be provided on November 30, 2015.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): The plans have been labeled as requested.

FCDMC Request For Corrections (12/23/2015): This comment is resolved.

- 21) FCDMC Request For Corrections (06/30/2015):** Plan sheets 3, 4, 5 and 6 identify HEC-RAS cross-sections. Please label them with river stations. In addition, these cross-

sections are not aligned with the FDS study cross-sections. Please see the attached exhibit (red cross-sections represent the HEC-2 cross section alignment while black lines are from the plans).

ABC Response – Phase One (11/13/2015): A.B.C. will address this Request for Correction with an updated engineering analysis, to be provided on November 30, 2015.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): The plans have been modified as requested.

FCDMC Request For Corrections (12/23/2015): HEC-RAS cross-sections are not identified and the misalignment of the cross-sections between the FDS and the draft plans is not addressed. Please see attached exhibit. This comment is not resolved.

- 22) **FCDMC Request For Corrections (06/30/2015):** In cross-section E-E of Sheet 7 of 8 (Cross Section & Details), please show the setback distance from the Colter Channel fence to the pit.

ABC Response – Phase One (11/13/2015): A.B.C. will address this Request for Correction with an updated engineering analysis, to be provided on November 30, 2015.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): The pit and section E-E have been removed from the plans.

FCDMC Request For Corrections (12/23/2015): This comment is resolved.

- 23) **FCDMC Request For Corrections (06/30/2015):** Please label the proposed pit bottom elevations in the drawings.

ABC Response – Phase One (11/13/2015): A.B.C. will address this Request for Correction with an updated engineering analysis, to be provided on November 30, 2015.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): The bottom of the pit elevation has been labeled on cross sections as requested.

FCDMC Request For Corrections (12/23/2015): This comment is resolved.

- 24) **FCDMC Request For Corrections (06/29/2015):** The topographic contours on the draft Plan of Development seem to be based on conditions existing in 2009. Please base the Plan of Development on topographic survey, with 2-foot minimum contour intervals, that is less than one year old.

ABC Response – Phase One (11/13/2015): A.R.S. § 48-3644 prohibits a county flood control district from basing a licensing decision on a licensing requirement or condition that is not specifically authorized by statute, rule, regulation, ordinance, executive order, or delegation agreement. A.B.C. has not been able to locate any specific statute,

rule, regulation, ordinance, executive order, or delegation agreement that requires a Sand and Gravel permit applicant to conduct a topographic survey that is less than one year old. To the contrary, A.R.S. § 48-3606 provides that state monies or assistance may be provided to the FCDMC to aid in preparing topographic maps and gathering similar data as necessary for determining floodplain and floodway limits, thereby suggesting that the duty to conduct topographic studies lies with the District, not the applicant. The topographic study used for this permit application is the same study provided by FCDMC for use in Sand and Gravel permit applications, and is the most recent source of data of which the applicant is aware.

(FCDMC Request For Corrections (11/23/2015): The subject properties have been mined continuously subsequent to the preparation of the 2009 topographic survey information provided in the draft Plan of Development. Current topographic information is required to be provided by the applicant to ensure that the development specified in the application complies with the Regulations (Regulations Section 401.C.). This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Please see November 13, 2015 Phase One submittal.

FCDMC Request For Corrections (12/23/2015): This comment is not resolved.

Civil Structures Branch

A.B.C. Response to FCDMC Request for Corrections (1) – (13):

A.B.C. will address each of these Requests for Corrections with an updated engineering analysis, to be provided on November 30, 2015. With specific respect to FCDMC Request for Correction # 6, A.B.C. notes that it has already provided the APN associated with the parcels on the property, which itself provides the underlying owner information. A.B.C. has not been able to locate any specific statute, rule, regulation, ordinance, executive order, or delegation agreement that requires a Sand and Gravel permit applicant to label the names of the adjacent property owners on the map in addition to the APN. Labeling the map with the multiple property owner names in addition to the APN would make the map difficult to read. Those considerations notwithstanding, A.B.C. will provide the requested property ownership information on November 30, 2015 in an appendix to its Report.

- 1) **FCDMC Request For Corrections (06/24/2015):** Plan Sheet 1 – Location Map: The labels for street names are illegible. Please modify the labels for legibility.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Additional text has been added for street names as requested.

FCDMC Request For Corrections (12/23/2015): Labels remain illegible. This comment is not resolved.

- 2) FCDMC Request For Corrections (06/24/2015): Plan Sheet 1 – Legal Description: The legal description references Parcels No. 1 through No. 4. Please depict the referenced parcels on the Location Map or on Sheet 2 – Existing Site Condition.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Two parcels have been removed & the legal description revised. Parcels 1 & 2 have been labeled on plans as requested.

FCDMC Request For Corrections (12/23/2015): This comment is resolved.

- 3) FCDMC Request For Corrections (06/30/2015): Plan Sheet 1 – Property Owner: The property owner information references A.B.C. Sand & Rock. The owners of properties included in the proposed mine site are Rare Earth, L.L.C., State Trust Land (ASLD) and the United States of America (BLM). A.B.C. Sand & Rock is the applicant. Please revise accordingly.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): The revisions have been made as requested.

FCDMC Request For Corrections (12/23/2015): This comment is resolved.

- 4) FCDMC Request For Corrections (06/30/2015): Plan Sheets 1 to 8 – Temporary Benchmark: The temporary benchmark is located north of Camelback Rd. Please add an additional temporary benchmark south of Camelback Rd. in proximity to the proposed pit located in APN 501-63-008. Identify the temporary benchmarks on the applicable mining plans and closure plans to assist in FCDMC inspections.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): The pit in APN 501-63-008 has been removed. The additional temporary benchmark for the removed pit is therefore not needed. A description of other temporary benchmarks has been added to the plans.

FCDMC Request For Corrections (12/23/2015): This comment is resolved.

- 5) FCDMC Request For Corrections (06/30/2015): Plan Sheets 3 to 5 - The plans includes labels for Area #1 through Area #5. Please identify the purpose of the labels.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): The area labels have been removed as requested.

FCDMC Request For Corrections (12/23/2015): The request was for identification of the purpose of the labels. This comment is resolved.

- 6) FCDMC Request For Corrections (06/30/2015): Plan Sheet 2 – The plan identifies adjacent properties by APN. Please label the ownership of adjacent properties. Please label the Colter Channel.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): The adjacent ownerships and Colter Channel has been labeled on plans as requested.

FCDMC Request For Corrections (12/23/2015): This comment is resolved.

- 7) **FCDMC Request For Corrections (06/30/2015):** Plan Sheet 2 – The plan includes linework that appears to represent the floodway limits. Please label accordingly.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Plan Sheet 2 and additional sheets have been labeled as requested.

FCDMC Request For Corrections (12/23/2015): This comment is resolved.

- 8) **FCDMC Request For Corrections (06/30/2015):** Plan Sheets 3 to 5 – Please show the access easement area dedicated by FCDMC to Rare Earth, LLC in 2012 (a portion of APN 501-63-003C and within the FCDMC Colter Channel). Please show other access roads wherever applicable and label them in the plans.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): The access easement recorded in document 2012-1098323, m.c.r. has been drafted and shown on the plans as requested.

FCDMC Request For Corrections (12/23/2015): This comment is resolved.

- 9) **FCDMC Request For Corrections (06/30/2015):** Report Section 2, Paragraph 1 – The report states that the average depth of proposed excavation is 85-ft. The Plan of Development identifies the proposed depths of Pits 1 and 3 to be 85-ft and the proposed depth of Pit 2 to be 65-ft. Please revise accordingly.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Pits 2 & 3 have been removed from the plan. Only 1 pit remains, and its depth has been revised from 85' to 65'.

FCDMC Request For Corrections (12/23/2015): The proposed pit depth is identified as 65-ft. However, Section 2, Paragraph 2 and Appendix C include references to BLM that are no longer applicable with the elimination of Pits 2 and 3. This comment is not resolved.

- 10) **FCDMC Request For Corrections (06/30/2015):** Report Section 3 – The report references an existing agreement on file regarding setbacks from electric power transmission towers. FCDMC records include a memorandum, letters and an agreement from Salt River Project (SRP), Arizona Public Service (APS) and Tucson Electric Power (TEP) that identify requirements for minimum setbacks from towers, maximum slopes and depth at excavations adjacent to the setbacks and restrictions on the stockpiling of material within easements held by those agencies. Additionally, requirements for maintaining vehicular access to the electric facilities are identified.

Please re-examine the design of the pits to ensure that none of the power poles are will be subject to adverse impact. Note that the electric transmission monopoles most recently constructed by TEP are shown to be located as little as 20-ft from the proposed top of slope in the central pit and in the northern pit.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): Pits 2 & 3 have been removed from the plan. The remaining pit setbacks have revised from 25' to 260' and depth revised from 85' to 65'.

FCDMC Request For Corrections (12/23/2015): No analysis is provided that demonstrates no adverse impact to the electric power transmission towers. This comment is not resolved.

- 11) **FCDMC Request For Corrections (06/30/2015):** Report Section 3, Paragraph 1 – The structure inventory does not include the following structures located in proximity to the proposed mine site:

- A. Camelback Road bridge spur dikes;
- B. Camelback Ranch levee;
- C. Glendale Airport levee;
- D. Glendale Water Reclamation Facility;
- E. Flood protection berm located on APN 501-S5-004E;
- F. El Paso Natural Gas facility located approximately 1,100-ft east of the eastern property boundary of the north pit.

Please verify that no existing utilities, other than the three overhead electric lines, are located within the areas proposed for mining.

ABC Response – Phase Two (11/30/2015): The structures have been added to the report.

FCDMC Request For Corrections (12/23/2015): The structures have been added to the inventory. However, no response is provided regarding the request for verification that no utilities, other than the three overhead electric lines, are located within the area proposed for mining. This comment is not resolved.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

- 12) **FCDMC Request For Corrections (06/30/2015):** Report Section 5, Paragraph 1 – The report states that "...Pits 1 and 2 are completely in the floodway area..." The effective hydrology identifies a portion of Pit 1 to be located within the floodway and Pit 2 to be located entirely outside of the floodway. Please revise accordingly.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): The revision has been made to the report.

FCDMC Request For Corrections (12/23/2015): The statement that Pits 1 and 2 are completely in the floodway has been stricken. This comment is resolved.

- 13) FCDMC Request For Corrections (06/30/2015): Report Section 5, Paragraph 1 –** The report states that "Approximately 1300 feet from Camelback Road the pit daylights..." Please identify to which pit or pits this statement refers and explain how a pit with bottom elevation below the thalweg of the river may daylight.

FCDMC Request For Corrections (11/23/2015): This comment is not resolved.

ABC Response – Phase Two (11/30/2015): The transition from pit bottom to existing ground elevation has been explained in the report.

FCDMC Request For Corrections (12/23/2015): The statement that the pit daylights has been stricken. This comment is resolved.

MARICOPA COUNTY
FLOOD CONTROL DISTRICT

HEARING OFFICER'S
REPORT AND
RECOMMENDATION
TO CHIEF ENGINEER

FILE NO: FI2015-041

PROPERTY LOCATION: 5401 N. 119th Ave. (Camelback & 119th Ave.),
Glendale, Arizona

Parcel No. 501-63-004 & State Trust Land

PROPERTY LESSEE: ABC Sand & Rock Company

PROPERTY OWNERS: Rare Earth LLC & Arizona State Land Department

HEARING DATE: January 4, 2016

APPEARANCES: Respondent, ABC Sand & Rock Company and Rare Earth LLC, appeared through their principal, David Waltemath, and were represented by Meghan Grabel and Anne Chapman, Attorneys at Law. The District was represented by Wayne Peck, Deputy County Attorney.

CHARGES:

1). Article Four, Section 401 of the Floodplain Regulations for Maricopa County which reads in part: "It is unlawful for any person to engage in any Development or to divert, retard or obstruct the flow of waters in any watercourse without obstruct a watercourse without written authorization from the Flood Control District.

FINDINGS:

ABC Sand & Gravel conducts sand and gravel mining at 5401 N. 119th Avenue, Glendale, AZ within the Agua Fria River delineated floodplain which requires that any development in the watercourse without securing written authorization from the Flood Control District is a violation of the Maricopa County Flood Control District regulations and Arizona Revised Statutes

(ARS), Section 48-3603 (C)(22) upon which civil penalties may be assessed "for violations of its regulations or ordinances and for unauthorized damage and interference to those district facilities".

Respondent, ABC Sand & Rock Company, has mining leases from the Arizona State Land Department for the above-described property and there is a commonality of ownership between ABC Sand & Rock Company and Rare Earth LLC on which Respondent also conducts mining activities. ABC Sand & Rock Company began operations in 1985 and it had valid floodplain permits issued by the District until 2011.

After a hearing before the undersigned in September 2011, the Chief Engineer adopted the undersigned's recommendation for a Cease & Desist Order and the imposition of civil penalties against ABC. The Chief Engineer's Order was reviewed by the Board of Hearing Review and, on March 28, 2012, unanimously voted to deny the Chief Engineer's Order. Litigation about the Board of Hearing Review's orders ensued and the matter was remanded to the Board of Hearing Review to complete Findings of Fact and Conclusions of Law to support its orders.

On January 28, 2015, the Board of Hearing Review issued its Final Decision and Order on Remand in which it supported the Order of the Chief Engineer that ABC had not renewed its permit in 2011, found that the Chief Engineer was not arbitrary about finding that ABC is required by law to have a valid permit, and ordered that the Chief Engineer's Order be upheld that "ABC must obtain and maintain a Floodplain Use Permit".

Additional litigation about the Final Decision and Order on Remand has ensued but, as of the date of hearing on January 4, 2016, no stay of the January 28, 2015 Decision and Order had been stayed by any Court, no resolution about the Order had been made by any court, and the Final Decision and Order stands as a valid Order of the Board of Hearing Review. No evidence exists in the record of this matter to show that any Court has issued a stay of the Final Decision and Order on Remand at any time. Pursuant to the Decision and Order, ABC was required to obtain a valid floodplain use permit in order to continue its operations.

On February 12, 2015, Chief Engineer Wiley wrote to ABC and reminded ABC about the Board of Hearing Review's Final Decision and Order on Remand, including the requirement "to pursue a Floodplain Use Permit and pay appropriate fees". Wiley also informed ABC that, if an application was filed by March 6, 2015, the District would forebear enforcement action for ABC's operation without a permit.

Instead of submitting an application for a permit, on February 27, 2015, ABC submitted a proposed amended plan of development for its expired permit and David Waltemath wrote "ABC disagrees with the Board of Hearing Review's ruling that its permit was not renewed in 2011. ABC

maintained, and continues to maintain, that its permit was renewed in 2011".

Two weeks later, on March 13, 2015, the District's attorney wrote to ABC's attorneys, informing them that, although an appeal of the Board of Hearing Review's Order was filed, "that order is still legally binding" and that ABC does not have a permit to operate. The application to amend the plan from the expired permit was rejected (a cursory review showed that the plan submitted to the Flood Control District did not address the impact to surrounding properties and structures, it did not address the impact of flows from New River, it was based on outdated topography, it used incorrect hydraulic models) and counsel wrote "The Flood Control District of Maricopa County wants to make sure there is no confusion. ABC Sand & Rock Company, Inc. cannot mine or conduct related operations on any of the property subject to the lapsed permit. A.R.S. §48-3615 (A). If it mines with the hope that a court will find that it has a permit, ABC is doing so at its own risk. If it is mining currently, it is in violation of law and subject to fines, up to \$10,000 per day. A.R.S. §48-3615 (B) and A.R.S. §13-803 (A)(2). If ABC wants to resume mining, it will need to file a new application and pay the appropriate fee". An application form accompanied counsel's letter.

On April 15, 2015, District counsel again wrote to ABC's attorneys and indicated:

The Flood Control District has reason to believe ABC Sand and Rock Company, Inc. is continuing to mine in the floodplain. As I am sure you can understand, the Flood Control District cannot look the other way while these violations of state law and the District's regulations occur. Accordingly, if by Friday May 1, 2015 ABC has not submitted the necessary paperwork and paid the fees required to obtain a permit or otherwise obtained some relief from the court, the Flood Control District will be forced to commence a new enforcement action. And to be clear, the Flood Control District is looking for a good faith submittal and evidence of vigorous follow up to get the permit issued.

On May 1, 2015, ABC counsel Michelle DeBlasi wrote to the District and submitted an application for a "sand & gravel permit" together with the required fees and engineering documentation -- all submitted "under protest". On May 8, 2015, the Flood Control District issued a Notice of Violation -- Cease and Desist Order to ABC.

On June 16, 2015, Michelle DeBlasi met with Anthony Beuche, Scott Vogel and Deputy County Manager Joy Rich about ABC's application. She

memorialized the meeting on the following day with an email and wrote "The parties agreed to work in good faith to diligently proceed through the substantive review process" which began on June 16. On June 30, 2015, Anthony Beuche sent a list of correction requests to the documentation submitted in connection with ABC's May 1 application to Michelle DeBlasi (there were 37 items needing correction). On July 24, 2015, Michelle DeBlasi informed Anthony Beuche "We are working through the comments and hope to submit our response by the end of next week". On August 19, 2015, Michelle DeBlasi wrote to Anthony Beuche and wrote "we are working diligently to complete these tasks and will likely have the revised plan submittal available by the end of September" and she asked for a list of items that needed to be addressed for the plan. On August 25, 2015, Beuche sent an email to DeBlasi and listed 8 items that needed to be addressed (not a comprehensive list), including a consolidated plan of development, a new topographic survey, restoration of setback areas on encroached areas, maximum slide slopes, maximum depths of extraction, a new engineering analysis for significant changes in topography, and a new engineering analysis of BLM parcels.

The District did not receive corrected plans, engineering analyses or information from ABC so, on November 2, 2015, the District set a hearing on its May 8, 2015 Cease and Desist Notice of Violation. The hearing was set for December 1, 2015. On November 5, 2015, Meghan Gabel, counsel for ABC, wrote to Anthony Beuche about the Notice of Hearing in light of the agreement of forbearance made on June 16 and she wrote:

To my knowledge, my client has received nothing to date that would cause him to believe that FCD did not intend to continue to adhere to this agreement.

My client recognizes that several months have passed since the June meeting, but nonetheless assumed and still hopes that the agreement reached then would remain effective. Rest assured, ABC continues to diligently pursue its permit application. We received FCD's nine page Request for Corrections on ABC's permit application on June 30. That request raises 37 detailed and complex considerations, which ABC has been reviewing. Unfortunately, the attorney that had been tasked with drafting the comments to FCD's Request has, unbeknownst to my client, made little progress on them to date. As of this week, she is no longer involved in this matter. I have now fully assumed responsibility for those comments, and will

have them to you no later than November 30...Getting ABC's comments to you on an expedited basis is my top near-term priority.

On November 10, 2015, General Counsel for the District, Wayne Peck, responded to Grabel's letter in which denied a request to postpone the December 1 hearing and he wrote:

It is clear that your definition of diligent pursuit of a permit and that employed by the District vary greatly. Your client has been advised since at least 2012 that it is operating outside of the law and that a permit is required. No progress towards obtaining required permits has occurred. I respect the fact that you have recently been hired to represent the interests of your client. However, you are not the first attorney to represent the interests of your client and each of your predecessors has similarly promised that the permit process would diligently be followed.

What your client identifies as an application was filed on May 1, 2015. In the intervening six months, absolutely no progress has been made by your client to advance that application. All the while your client continues to maintain an illegal sand and gravel operation. Frankly, the extraordinary patience exhibited by the District has been exhausted.

In the event your client were to provide information and details required by the Regulations in a timely manner, and the review by the District were to reveal compliance with the Regulations, prior to the hearing date, the District will consider reaching a final resolution with your client. However, given the history of this matter, the District will no longer accept representations that items will be provided. The District will continue to process the permit application when your client responds to the review comments which have gone unaddressed for the past four plus months. In the interim, the District will prepare for the December 1-2 hearing.

On November 13 and on November 30, 2015, ABC, through its

attorney Meghan Grabel, submitted its responses to the corrections listed by the District in June 2015. The hearing that was set for December 1, 2015 was postponed to January 4, 2016 due to the death in David Waltemath's family. The hearing was then held on January 4, 2016.

From and after the time the District issued a Cease & Desist Order to Respondent on May 8, 2015, Respondent has continued to operate in the Agua Fria floodway and adjacent floodplain. As of the date of hearing, the Flood Control District had not found that ABC's November 2015 submissions were sufficient to support its application for the issuance of a permit. No credible evidence exists in the record of this matter to show that, at any time since May 8, 2015, the Flood Control District of Maricopa County has expressly conceded that ABC has been operating under a valid permit and no credible evidence exists in the record of this matter to show that any of the District's actions since May 8, 2015, expressly or impliedly, consented to ABC operating without a permit.

CONCLUSIONS:

1. This matter is within the jurisdiction of the Chief Engineer and General Manager of the Maricopa County Flood Control District pursuant to Title 48, Arizona Revised Statutes and Flood Control District regulations.

2. Pursuant to the District's Enforcement Rules, "development" includes mineral mining (sand and gravel) in a floodway and associated delineated floodplain.

3. Pursuant to Arizona Revised Statutes and the District's Enforcement Rules, it is unlawful for any person to engage in any development in a delineated floodplain without securing the written authorization from the Flood Control District, as required by the Floodplain Regulations for Maricopa County in force at the time of the violation.

4. ABC Sand & Rock's ongoing sand and gravel mining operation in the Agua Fria floodway and delineated floodplain, after the expiration of its short term floodplain permits which expired on July 16, 2012, constitutes a "development" within the meaning of the District's rules and regulations.

5. Notwithstanding the Final Decision and Order on Remand issued by Board of Hearing Review on January 28, 2015 which found that "ABC's permit authorizing its activities and development in the floodplain expired in May 2011; ABC did not obtain a renewal permit to continue its activities" and "Based on consideration of the evidence before it, the BoHR finds that ABC's (sic) did not successfully renew its permit by merely submitting the required application fees. Instead a complete permit application meeting applicable

regulatory requirements is needed" and which ordered that "The Chief Engineer was not arbitrary in finding that ABC is required by law to have a valid permit. The BoHR upholds the Chief Engineer's decision that ABC must obtain and maintain a Floodplain Use Permit and pay the appropriate fees to do so", ABC continued its sand and gravel mining operations in the Agua Fria floodway and delineated floodplain, which constitutes continuing "development" within the meaning of the District's rules and regulations. From the time of issuance of the Board of Hearing Review's Final Decision and Order in January 2015 and without the express issuance of a renewal permit, ABC Sand & Rock does not have the legal authority to mine in the floodway and floodplain. No evidence exists in the record of this matter on which to conclude that any Court has issued a stay of the Board of Hearing Review's January 2015 final decision and order.

6. ABC Sand & Rock's development within a delineated floodplain, without Respondents' obtaining a renewal permit from the District, constitute daily, ongoing violations within the meaning of the Arizona Revised Statutes and the District's rules and regulations.

7. The District properly issued a Cease & Desist Order to ABC Sand & Rock on May 8, 2015, long after the expiration of ABC Sand & Rock's permit to operate in a floodplain.

8. ABC Sand & Rock's violations constitute a basis on which to impose civil penalties until the violations of operating without a permit are resolved.

9. The attempt of ABC Sand & Rock to submit an outdated and incomplete proposed permit amendment for its plan of development to its Plant One operations, knowing that the Board of Hearing Review found that ABC did not have a valid permit, was a sham submittal on February 27, 2015 as its submittal failed, in every respect, to conform to the written instructions given to it by the February 12, 2016 letter from the Flood Control District which instructed it to "pursue a Floodplain Use Permit and pay appropriate fees".

10. The failure of ABC Sand & Rock to timely submit documentation for substantive review in connection with its May 1, 2015 application for renewal of its permit and following its June 16, 2015 meeting with Deputy County Manager Joy Rich, and its failure to work in good faith to diligently proceed through the substantive review process, all constitute daily violations of the Cease and Desist Order -- Notice of Violation issued by the Flood Control District on May 8, 2015 against ABC Sand & Rock, all of which daily violations continued to exist up to the time of hearing on January 4, 2016, notwithstanding its November 13 and 30, 2015 submissions to the Flood Control District responding the District's requests for corrections.

11. ABC is not entitled to take advantage of the District's offer to withhold enforcement action after July 25, 2015 as it failed to act in good faith in addressing the District's findings of deficiencies in a timely manner

and it failed to pursue renewal of its operating permit diligently, despite its numerous promises to do so.

12. No credible evidence exists in the record of this matter on which to conclude that, at any time since May 8, 2015, the Flood Control District of Maricopa County has expressly conceded that ABC has been operating under a valid permit and no credible evidence exists in the record of this matter on which to conclude that any of the District's actions since May 8, 2015 consented to ABC operating without a permit.

HEARING OFFICER'S RECOMMENDED DECISION:

It is the recommendation of the undersigned hearing officer that the Chief Engineer enter an Order directing ABC Sand & Rock to immediately obtain an approved permit for its mining operations and cease and desist from conducting any mining or associated activities until it obtains such permit and further, because of the duration of the violations committed by ABC Sand & Rock, as well as Respondents' failure to timely effect a resolution of these violations, the Chief Engineer also enter an Order imposing a financial penalty of \$500.00 per day for ABC's violations, despite repeated notification of such violation by the District, as well as considering the length of time these violations have existed without resolution. The undersigned further recommends that the Chief Engineer impose daily civil penalties for the period between July 30, and November 30, 2015.

The District seeks to impose civil penalties going back to the expiration of ABC's last interim operating permit in July 2012 – for each day thereafter until the present. While it is true that ABC has continued to operate without a renewed permit (and continues to operate without a permit as of the date of hearing), the final decision and order of the Board of Hearing Review dated June 27, 2012 (which order remained in effect until January 28, 2015) established a putative right for ABC to believe that continuing operations were sanctioned pursuant to the Board of Hearing Review's order. Therefore, no civil penalties are justified for that period of time.

However, after January 28, 2015, when the Board of Hearing Review found and concluded that ABC "did not successfully renew its permit" in 2011 and that the Chief Engineer "was not arbitrary in finding that ABC is required by law to have a valid permit" and upheld the Chief Engineer's decision "that ABC must obtain and maintain a Floodplain Use Permit", ABC was required to diligently and purposefully pursue renewal of its permit. Instead, ABC took the position that it continued to have a valid permit (on February 27, 2015, it wrote "ABC maintained, and continues to maintain, that its permit was

renewed in 2011" [good until 2016] and it submitted its application on May 1, 2015 "under protest") and engaged in acts that were contrary to, antithetical about, and opposite to renewing its permit *diligently* – bordering on incorrigibility. At first, ABC tried to submit an amendment to its plan of development even though it was informed in writing on February that "Per item 1 of the Final Order, ABC Sand & Rock is required to pursue a Floodplain Use Permit" and that "if the application is filed and the fees are paid by March 6, 2015, we will forebear any enforcement action for operating without a permit". Finally, it submitted a permit application on May 1, 2015 – almost 2 months after the deadline imposed by the Flood Control District.

After that time, a hiatus existed during which ABC negotiated with the County Manager's Office and the Flood Control District about obtaining a permit (ABC's attorney, Michelle DeBlasi repeatedly told the District that ABC and the District "will work together to address and resolve those concerns in a prompt and productive manner", "ABC would be submitting the application by the May 1 deadline, with the good faith intention of working through the technical issues during the substantive review process"). Indeed, DeBlasi summarized the June 16 meeting with "the parties are moving diligently to process the permit application" and "allow the parties to focus their attention on the permit application".

Underlying the poor attitude of ABC about completing an application for a renewal permit is buffered by the District's repeated efforts seeking compliance by forbearing enforcement action if ABC acted in good faith and submitted information diligently. Unfortunately, ABC decided, on its own, that it had a license to operate illegally – and for whatever period of time it chooses – to ignore the District's requests for information, clarification, and accuracy. ABC is wrong and its logic is flawed.

Interestingly, despite the lack of diligence by ABC (and the lack of any complete technical documentation to support its application for a permit), on June 30 and again on August 25, 2015, Anthony Beuche of the District outlined the deficiencies that needed to be addressed by ABC. After one month following the June 30, 2015 letter, nothing was submitted. Nothing was submitted until November 2015 and, by the time of hearing, it was unknown whether those submissions were even acceptable to the District for it to issue a renewal permit.

A discrete period of time following the June 30, 2015 itemization of 37 items that needed correction supports the imposition of civil penalties against ABC – as described in the undersigned's recommendation. If ABC had really been **diligent** and acting in **good faith**, those corrections could have been submitted within 30 days of Anthony Beuche's June 30 letter (ABC had been warned in February 2015 that it needed to be "vigorous" in its responses to the District). However, ABC was disingenuous about

conforming its actions to the Order of the Board of Hearing Review (ABC's principal has been consistent in his belief that the Board of Hearing Review was correct in its initial order and incorrect in its order on remand - the poor attitude of ABC in developing a renewal permit during 2015 is consistent with this state of mind) and, since the June 16 meeting, it has been dragging its feet about supplying complete and relevant technical information to support its application (it continued to submit hydrological data based on a discredited study). ABC has been audacious in its insubordinate responses to the District - all justifying the imposition of civil penalties (ABC even blamed one of its attorneys for delays and acting outside of corporate direction which is outrageous since the attorney could not do anything without the complete and full interaction of ABC). Accordingly, the recommendation of the undersigned supports the enforcement of the Cease and Desist Order together with the imposition of civil penalties against ABC Sand & Rock.

DATED: March 7, 2016



HAROLD J. MERKOW
Hearing Officer

Copy of the foregoing mailed to
Jeri Kishiyama, Attorney for ABC
Roberta Livesay, Attorney for FCD

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In re the Matter of:

ABC Sand and Rock Co., Inc.,

Respondents.

FI2015-041

Final Decision and Order

William D. Wiley, P.E.
Chief Engineer and General Manager
Flood Control District of Maricopa
County

Pursuant to Section 707(E)(2) of the Floodplain Regulations for Maricopa County (“Regulations”), after issuance of the Hearing Officer’s Report and Recommendation to Chief Engineer, the Chief Engineer and General Manager of the Flood Control District of Maricopa County (“District”), issues this Final Decision and Order.

I. Findings of Fact

- A. ABC Sand and Rock Company, Inc. (“ABC”) is an Arizona Corporation.
- B. ABC operates a sand and gravel mine on properties owned by Rare Earth, LLC, an Arizona Limited Liability Company and by Arizona State Land Department.
- C. The sand and gravel mine operated by ABC is located in unincorporated Maricopa County, within the jurisdiction of the District.
- D. The sand and gravel mine operated by ABC is located within regulated floodplain of the Agua Fria River.
- E. Section 401(A) of the Regulations requires that any development which will “divert, retard, or obstruct the flow of water in any watercourse and threaten public health or safety or the general welfare” occur only upon written authorization by the Board of Directors of the District or its designee.
- F. The Board of Directors of the District has authorized the Chief Engineer and General Manager to provide the written authorization necessary to allow development within a floodplain.
- G. Section 401(A) of the Regulations provides that the procedure for obtaining the required written authorization is by way of a Floodplain Use Permit.

- 1 H. A sand and gravel mining operation located within a floodplain is development
2 which will “divert, retard, or obstruct the flow of water in any watercourse and
3 threaten public health or safety or the general welfare.”
- 4 I. A permit to operate a sand and gravel mine was granted to ABC by the District
5 on March 15, 2012.
- 6 J. The permit issued on March 15, 2012 by the District to ABC expired on July
7 16, 2012.
- 8 K. Since July 16, 2012, ABC has operated a sand and gravel mine in the floodplain
9 of the Agua Fria River.
- 10 L. Since July 16, 2012, ABC has neither obtained nor possessed a validly issued
11 Floodplain Use Permit for its operation of a sand and gravel mine in the
12 floodplain of the Agua Fria River.
- 13 M. A prior Final Decision and Order by the Chief Engineer and General Manager
14 of the District was and remains the subject of litigation.
- 15 N. Because a decision on the prior Final Decision and Order by the Flood Control
16 District of Maricopa County Board of Hearing Review was to deny the Final
17 Decision and Order, but the Board of Hearing Review did not provide findings
18 of fact or conclusions, a question as to the effect of that prior Final Decision
19 and Order existed until January 28, 2015.
- 20 O. On January 28, 2015, the Board of Hearing Review found that ABC possessed
21 no valid Floodplain Use Permit authorizing the ABC operation of a sand and
22 gravel mine in the floodplain of the Agua Fria River.
- 23 P. On January 28, 2015, the Board of Hearing Review concluded that no penalty
24 or fine was justified against ABC for the operation of a sand and gravel mine
25 within the floodplain of the Agua Fria River for the violation that culminated in
26 the prior Final Decision and Order for reasons that are not applicable to the
27 current violation.
- 28

- 1 Q. The January 28, 2015 decision of the Board of Hearing Review stands as a
2 valid Order of the Board of Hearing Review.
- 3 R. From and after the January 28, 2015 decision of the Board of Hearing Review,
4 numerous correspondences were exchanged between representatives of ABC
5 and representatives of the District.
- 6 S. Each correspondence from the District advised ABC that it was not authorized
7 to operate a sand and gravel operation within the floodplain of the Agua Fria
8 River and that if ABC desired to continue to operate a valid permit must be
9 obtained.
- 10 T. Each correspondence from the District advised ABC that it was not authorized
11 to operate a sand and gravel operation within the floodplain of the Agua Fria
12 River because no valid permit existed and that any such operations must cease
13 and desist.
- 14 U. On February 27, 2015, ABC submitted an application to amend the plan of
15 development, a procedure only available to applicants with an existing and
16 valid permit.
- 17 V. Together with the February 27, 2015 application was a letter from a
18 representative of ABC expressing ABC's disagreement with the ruling by the
19 Board of Hearing Review and the view that ABC had a valid permit.
- 20 W. The submittal of February 27, 2015 was rejected by the District because it did
21 not comply with any applicable Regulation.
- 22 X. On May 1, 2015, ABC submitted an application for a Floodplain Use Permit to
23 allow a sand and gravel mine to be operated by ABC within the Floodplain of
24 the Agua Fria River.
- 25 Y. On May 27, 2015, ABC was advised that the application filed on May 1, 2015
26 was not administratively complete.
- 27 Z. On May 8, 2015, the District issued against ABC a Notice of Violation – Cease
28 and Desist Order.

1 AA. At the request of ABC, the District agreed to forebear the scheduling of a
2 hearing on the issued Notice of Violation to allow ABC sufficient time to
3 diligently pursue the filed application for a Floodplain Use Permit to allow
4 ABC to operate a sand and gravel mine within the floodplain of the Agua Fria
5 River.

6 BB. The District clearly stated to ABC that although the District agreed to
7 forebear the scheduling of a hearing on the issued Notice of Violation, ABC
8 continued to operate in violation of the Regulations and state statutes and that
9 ABC must cease and desist operations until a valid Floodplain Use Permit was
10 obtained.

11 CC. On June 16, 2015, the application by ABC for a Floodplain Use Permit to
12 allow the operation of a sand and gravel mine within the floodplain of the Agua
13 Fria River was deemed to be administratively complete.

14 DD. The substantive review of the application by ABC for a Floodplain Use
15 Permit to allow the operation of a sand and gravel mine within the floodplain of
16 the Agua Fria River began on June 16, 2015.

17 EE. On June 30, 2015, the District provided to ABC a report outlining thirty-
18 seven (37) deficiencies in the application by ABC for a Floodplain Use Permit
19 to allow the operation of a sand and gravel mine within the floodplain of the
20 Agua Fria River.

21 FF. As of November 2, 2015, no reply to the June 30, 2015 report by the District
22 outlining thirty-seven (37) deficiencies in the application by ABC for a
23 Floodplain Use Permit to allow the operation of a sand and gravel mine within
24 the floodplain of the Agua Fria River had been received by the District.

25 GG. On November 2, 2015, the District scheduled a hearing on the Notice of
26 Violation – Cease and Desist Order issued May 8, 2015.

27 HH. On November 30, 2015, ABC's complete response to the June 30, 2015
28 report by the District outlining thirty-seven (37) deficiencies in the application

1 by ABC for a Floodplain Use Permit to allow the operation of a sand and gravel
2 mine within the floodplain of the Agua Fria River was received by the District.

3 II. The November 30, 2015 response to the June 30, 2015 report by the District
4 outlining thirty-seven (37) deficiencies in the application by ABC for a
5 Floodplain Use Permit to allow the operation of a sand and gravel mine within
6 the floodplain of the Agua Fria River failed to address the substantive items set
7 forth in the June 30, 2015 report from the District.

8 JJ. On December 23, 2015, a formal report was provided to ABC by the District
9 advising ABC that the substantive issues set forth in the June 30, 2015 response
10 from the District had not been addressed.

11 KK. As of the date of this Final Decision and Order, the substantive issues set
12 forth in the June 30, 2015 report from the District to the application by ABC for
13 a Floodplain Use Permit to allow the operation of a sand and gravel mine within
14 the floodplain of the Agua Fria River have not been addressed.

15 LL. On January 4, 2016, a hearing was held before Hearing Office Harold
16 Merkow on the Notice of Violation – Cease and Desist Order issued May 8,
17 2015.

18 MM. At the hearing of January 4, 2016, ABC was represented by counsel.

19 NN. At the hearing of January 4, 2016, the District was represented by counsel.

20 OO. On March 7, 2016, Hearing Officer Harold Merkow issued his Report and
21 Recommendation to Chief Engineer.

22 PP. Hearing Officer Harold Merkow recommended that the “Chief Engineer enter
23 an Order directing ABC Sand and Rock [sic] to immediately obtain an
24 approved permit for its mining operations and cease and desist from conducting
25 any mining or associated activities until it obtains such permit.”

26 **II. Conclusions**

27 Based upon these findings of fact and recommendations, the Chief Engineer and
28 General Manager of the Flood Control District of Maricopa County concludes that ABC

1 operated and continues to operate a sand and gravel mining operation within the
2 floodplain of the Agua Fria, in unincorporated Maricopa County within the jurisdiction of
3 the District, without written authorization from the Chief Engineer and General Manager,
4 the designee of the Board of Directors of the District. The Chief Engineer and General
5 Manager further finds that said operation constitutes a violation of the Floodplain
6 Regulations for Maricopa County as well as applicable state statutes. The Chief Engineer
7 and General Manager further finds that the actions by ABC, including (i) the continual
8 operation of the sand and gravel mine in violation of the Regulations; (ii) the disregard of
9 repeated demands by the District that a permit be obtained; and (iii) the refusal to cease
10 and desist operations until a permit was obtained, justifies the imposition of penalties
11 against ABC, as outlined in this Decision and Final Order.

12 The Regulations make it clear that the reason development within a floodplain is
13 regulated is that such development threatens the health, safety and general welfare of the
14 public. These Regulations provide a great deal of leeway to allow a sand and gravel mine
15 to operate as the applicant desires, provided the applicant demonstrates, through the use of
16 generally accepted and acceptable engineering, that the proposed operation will not
17 threaten the health, safety and welfare of the general public. By continuing to operate
18 without authorization, and in spite of repeated demands that the operation cease until ABC
19 demonstrates compliance with the Regulations, ABC has consciously and intentionally
20 considered only its own economic needs while disregarding the health, safety and general
21 welfare of the citizens of Maricopa County. Therefore, the imposition of penalties that
22 ABC can view as simply another cost of doing business will not serve as a compulsion for
23 ABC to demonstrate compliance with the Regulations by obtaining a Floodplain Use
24 Permit and will not serve as a warning to others that operations in floodways and
25 floodplains will not be tolerated unless and until compliance with the Regulations has
26 been demonstrated.

27 Furthermore, despite the fact that the District took every opportunity to assist ABC
28 and to provide options that would allow for expeditious resolution of the violation, both

1 before and after the Notice of Violation was issued on May 8, 2015, ABC chose to
2 obstruct the process rather than comply. Overall, this matter, due solely to the dilatory
3 actions and callous disregard demonstrated by ABC, has cost the District tens of
4 thousands of dollars that would have been better spent protecting the public from the
5 hazards from flooding.

6 In the view of the Chief Engineer and General Manager, there are four periods of
7 time that must be considered when the decision as to the appropriate penalties to be
8 imposed is reached. The first period of time is that from the expiration of the last valid
9 permit possessed by ABC until the Board of Hearing Review Order (Period #1). Period #1
10 is from July 16, 2012 until January 28, 2016. Despite the fact that ABC was fully aware
11 that the permit had expired, the Hearing Officer did not recommend any penalty for this
12 period of time. The Chief Engineer and General Manager finds that there was a legitimate
13 question whether or not the Board of Hearing Review had made any determination on the
14 validity of the permit ABC maintained had been renewed in 2011. Although ABC offered
15 no intelligible explanation why it accepted a permit on March 15, 2012 if it believed the
16 permit of 2011 was valid, the recommendation of the Hearing Officer for no penalty for
17 Period #1 offers the benefit of the doubt to ABC and that recommendation is accepted.
18 Therefore, no penalty shall be imposed for any violation of the Regulations that occurred
19 prior to January 28, 2015.

20 The second period of time to be considered is that between the date of the issuance
21 of the Order by the Board of Hearing Review, January 28, 2015, and July 30, 2015
22 (Period #2). The Board of Hearing Review specifically held that "a complete permit
23 application meeting applicable regulatory requirements is needed." It was not until May 1,
24 2015 that an application that even arguably could be considered an attempt to fulfill this
25 requirement was submitted. The Hearing Officer found that attempts by ABC to comply
26 with the Order of the Board of Hearing Review prior to May 1, 2015 were a sham.
27 Nevertheless, ABC continued to operate its unpermitted sand and gravel mine within the
28 floodplain of the Agua Fria River throughout Period #2.

1 On June 30, 2015, the District advised ABC that the application submitted on May
2 1, 2015, did not meet the Regulations. In fact, the letter of June 30, 2015 described thirty-
3 seven (37) substantive deficiencies in that application. On July 24, 2015, ABC advised
4 the District that a response to the June 30, 2015 letter would be received by the District
5 “by the end of next week.” That response did not come as promised, but instead was
6 finally received three (3) months later.

7 It is unclear if the Hearing Officer recommended any penalty for Period #2.
8 Because no specific finding relative to this period is contained in the Report and
9 Recommendation, it appears no penalty was recommended. To the extent the Hearing
10 Officer recommended no penalty for this period of time, that recommendation is rejected.

11 During Period #2, ABC continued its violation of the Regulations despite the clear
12 determination by the Board of Hearing Review that no valid permit existed. Furthermore,
13 the District spent considerable resources in staff time and the payment of legal fees during
14 this period of time in an effort to bring ABC into compliance with the Regulations. At
15 each turn, ABC thwarted the legitimate and concerted efforts by the District to expedite
16 compliance. The Hearing Officer described the action by ABC during this period as
17 “contrary to, antithetical about, and opposite to renewing its permit *diligently* – bordering
18 on incorrigibility.” It was also the conclusion of the Hearing Officer that a response to the
19 June 30, 2015 letter could have occurred within thirty (30) days of receipt. Therefore, for
20 Period #2, a penalty of five thousand (\$5,000.00) is appropriate and is imposed.

21 The third period of time to be considered is that between the date the Hearing
22 Officer concluded an appropriate response to the June 30, 2015 letter should have been
23 provided by ABC, July 30, 2015, and the date the District advised ABC that its response,
24 completed on November 30, 2015, failed to address the identified thirty-seven (37)
25 substantive deficiencies in that application (Period #3). That date is December 23, 2015.

26 The Hearing Officer recommended that a penalty of Five Hundred (\$500.00)
27 Dollars per day be imposed for this period. This recommendation is accepted. It is clear
28 that during this period of time, the District repeatedly advised ABC that, because no valid

1 permit existed, as found by the Board of Hearing Review, all operations in the floodplain
2 must cease and desist. The Hearing Officer concluded "ABC was disingenuous about
3 conforming its actions to the Order of the Board of Hearing Review." According to the
4 Hearing Officer, ABC "has been dragging its feet about supplying complete and relevant
5 technical information to support its application." The recommendation and conclusions of
6 the Hearing Officer are adopted herein and a penalty in the amount of five hundred
7 (\$500.00) dollars per day is imposed for the one hundred forty six (146) days of Period
8 #3.

9 The fourth period of time to be considered is that which followed the notice by the
10 District to ABC that ABC had failed to provide any meaningful response to the thirty-
11 seven (37) deficiencies in the filed application and supporting documents (Period #4).
12 Period #4 commenced on December 23, 2015 and continues to date.

13 The Hearing Officer described this period when he stated:

14 ABC has been audacious in its insubordinate responses to the District - all
15 justifying the imposition of civil penalties (ABC even blamed one of its
16 attorneys for delays and acting outside of corporate direction which is
17 outrageous since the attorney could not do anything without the complete
18 and full interaction of ABC). Accordingly, the recommendation of the
undersigned supports the enforcement of the Cease and Desist Order
together with the imposition of civil penalties against ABC Sand & Rock.

19 The Hearing Officer took specific objection to the fact that ABC "continued to submit
20 hydrological data based on a discredited study." In its November 30, 2015 response to the
21 thirty-seven (37) deficiencies outlined by the District in its June 30, 2015 report, ABC
22 relied upon that same hydrology.

23 These conclusions by the Hearing Officer are wholly supported by the record.
24 However, the imposition of a penalty of Five Hundred (\$500) Dollars a day for Period #4
25 is unjustifiable.

26 It is clear that as the process proceeded ABC did not become more cooperative. In
27 fact, it has become less so. Rather than provide information necessary to move toward
28 approval of a permit, ABC chose to insist the District accept technical data based upon

1 models which were not approved by the Federal Emergency Management Agency. In
2 addition, rather than provide the information required, ABC sought to challenge the
3 validity of certain Regulations. Clearly, the permitting process is an inappropriate forum
4 for such challenge. The only conclusion to be drawn from the actions of ABC is that it
5 sought to provide the illusion of seeking a permit, all the while seeking nothing of the sort.

6 Serious consideration was given to imposing for this period the statutory maximum
7 fine of ten thousand (\$10,000.00) dollars per day. It is imperative that a penalty is
8 imposed sufficient to convince ABC of the serious need for proof that the public is not in
9 danger as a result of an operation that is clearly in violation of the Regulations. A penalty
10 that is not just a cost to ABC of doing business and that is sufficient to demonstrate how
11 seriously the District considers on-going violations of this nature is mandated. Therefore,
12 a penalty of two thousand five hundred (\$2,500.00) dollars a day, commencing as of
13 December 23, 2015 and continuing until ABC ceases operating without a permit issued by
14 the District pursuant to Regulations, is imposed for Period #4.

15 **III. Final Order**

16 Based upon these Findings of Fact and Conclusions, pursuant to A.R.S. §48-3615,
17 the Chief Engineer and General Manager of the Flood Control District of Maricopa
18 County orders that:

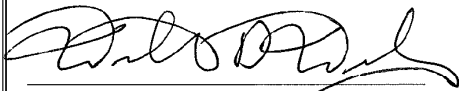
- 19 A. ABC immediately cease and desist any and all mining operations within the
20 floodplain of the Agua Fria River.
- 21 B. ABC comply with the Regulations by obtaining a Floodplain Use Permit based
22 upon a plan showing all past and proposed operations within the floodplain of
23 the Agua Fria River.
- 24 C. ABC pay all fines imposed as outlined in this Final Decision and Order as
25 follows:
- 26 1. For Period #1, zero (\$0.00) dollars;
- 27 2. For Period #2, five thousand (\$5,000.00) dollars;
- 28

- 1 3. For Period #3, five hundred (\$500.00) dollars per day for each of the one
2 hundred forty six (146) days for a total of seventy three thousand
3 (\$73,000.00) dollars.
4 4. For Period #4, two thousand five hundred (\$2,500.00) dollars per day
5 calculated from December 23, 2015 until the date ABC ceases to operate
6 in the floodplain without a valid floodplain use permit. The accumulated
7 amount of the penalty for Period #4 to the date of the Report and
8 Recommendation by the Hearing Officer, seventy-five (75) days, is one
9 hundred eighty seven thousand five hundred (\$187,500) dollars. The
10 final amount is to be determined based on the calculation set forth
11 herein.

12 The Regulations require that this Final Decision and Order advise ABC what steps
13 are necessary for ABC to come into compliance with the Regulations. Such advice seems
14 superfluous at this point because ABC has been informed of the requirements since at
15 least 2012. However, so that there can be no misunderstanding, it is reiterated that to come
16 into compliance ABC must immediately cease and desist operations of a sand and gravel
17 mine in the floodplain of the Agua Fria River. This will abate or ameliorate any further
18 potential harm as a result of the violation. In addition, ABC must obtain a permit pursuant
19 to a plan that shows existing conditions and that shows any future development within the
20 floodplain. To obtain such permit, proof that no harm will come to the public health,
21 safety or general welfare must be provided by ABC per the Regulations. However, unless
22 and until all penalties have been settled in full, no permit shall be issued and ABC may
23 not operate within the floodplain of the Agua Fria River.
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BY ORDER OF:



William D. Wiley, P.E.
Chief Engineer and General Manager
Flood Control District of Maricopa County

3-21-16
Date

From: David W
To: Grabel, Meghan
CC: Pedro Calza; Campbell, Colin; Sutton, Jana; glenn@cdrcpas.com; La Sota Law; dave_abcsandrock@cox.net
Sent: 4/7/2016 8:36:15 PM
Subject: Re: SG15-003 ABC - Meeting Action Items

REDACTED



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From: Anthony Beuché - FCDX [<mailto:TonyBeuche@mail.maricopa.gov>]

Sent: Wednesday, April 06, 2016 8:45 AM

To: Grabel, Meghan

Cc: glenn@cdrcpas.com; Pedro Calza; david@dtwassoc.com; Wayne Peck; Wayne Peck - FCDX; Jeff Riddle - FCDX; Bing Zhao - FCDX; Pramita Chitrakar - FCDX; Ed Raleigh - FCDX; Scott Vogel - FCDX

Subject: RE: SG15-003 ABC - Meeting Action Items

Good Morning Meghan,

As has been stated previously, a pre-application meeting is intended to identify an appropriate basis of design and

ABCSR00001128

APP353

analysis for preparation of a plan of development submitted in support of an application. The pre-application meeting does not eliminate the regulatory requirement for the District to conduct a substantive review nor for an applicant to demonstrate compliance with the Floodplain Regulations.

It is unfortunate that the Meeting Action Items form was not finalized prior to commencing the analysis. Post-meeting examination of some of the key issues that were discussed identified the need for clarification and correction. The issues raised with the clarifications and corrections must be addressed either in the initial preparation of the plan of development or addressed subsequently to the initial substantive review. We believed that it would be preferred by the applicant to address these issues with the initial preparation.

Key Issue No. 13:

Section 403.B.1.e.3 identifies the requirement to "...demonstrate there will be no adverse impacts to structures or surrounding properties from all flows up to and including the 100-year flood." The existing non-certified levees confine the entire peak flow to the floodway and cause it to be discharged to the proposed mine. The headcut that would result from this discharge must be demonstrated to cause no adverse impacts.

Key Issue No. 20:

Under Post-Meeting Notes/Clarification, the subtraction of hydrographs that is described is to determine the flow hydrograph of the Agua Fria River upstream of the confluence with New River. The subtraction of hydrographs is not described for determination of the flow hydrograph of New River upstream of the confluence with the Agua Fria River as the peaks are not coincident.

The peak flow of 39,000 cfs is the basis for the floodplain delineation on published FEMA mapping and is identified in data provided in response to past public records requests. Refer to Figure 3.8 and Table 3.3 in the "Final Sediment Transport Report for the New River and Skunk Creek" and page 9 in "CLOMR Request for New River – Agua Fria River to Bethany Home Road – TDN" prepared by Simons, Li and Associates, dated May 1998.

As stated above, Section 403.B.1.e.3 identifies the requirement to "...demonstrate there will be no adverse impacts to structures or surrounding properties from all flows up to and including the 100-year flood." The headcut that would result from the entry to the proposed mine of the peak flow in New River, in whole or in part, must be demonstrated to cause no adverse impacts.

Also, Section 404.B.1 states "The Plan of Development is subject to post-flood review and possible modification if necessary due to flood related changes in river morphology." It is reasonable to expect changes to morphology to occur at the confluence of two major rivers and to demonstrate that changes will not result in adverse impacts.

Please contact me if you need additional information.

Thanks,

Tony Beuché, P.E., Manager
Floodplain Use Permits for Sand and Gravel
Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, Arizona 85009

Email: TonyBeuche@mail.maricopa.gov
Office: 602-506-2329
Fax: 602-506-4601

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From: Grabel, Meghan [<mailto:mgrabel@omlaw.com>]

Sent: Tuesday, April 05, 2016 10:30 AM

To: Anthony Beuché - FCDX

Cc: glenn@cdrpcas.com; Pedro Calza; david@dtwassoc.com; Wayne Peck; Wayne Peck - FCDX; Jeff Riddle - FCDX; Bing Zhao - FCDX; Pramita Chitrakar - FCDX; Ed Raleigh - FCDX; Scott Vogel - FCDX

Subject: RE: SG15-003 ABC - Meeting Action Items

Good morning, Tony.

I have reviewed your revised Meeting Action Items form with Dr. David Williams and Pedro Calza, and some of the changes that you have made cause us significant concern. Several items in this revision materially change the parameters that FCDMC originally represented as appropriate to use to construct the Plan of Development, as reflected in the Meeting Action Item form that you sent on March 14, 2016. ABC noted in its redline to the original March 3 Meeting Action Item form that it agreed to virtually all of the items that FCDMC included, and simply expounded on others in order to clarify our mutual understanding. Our engineers have been diligently working pursuant to FCDMC's original representations in order to ensure that ABC had a plan of development on file with the FCDMC as soon as possible. To change course now in attempt to address these new, material changes would add significant time and expense to ABC's permit application filing. ABC has significant concerns with respect to the following items:

Item 13 – During our meeting of March 3, 2016, FCDMC agreed that ABC was to use only the flows in the narrowed section immediately upstream of the mining pit (the flows in the overbanks were to be ignored), extracted from the effective FEMA HEC-RAS model, to determine the flow entering the mining pit for subsequent use in the HEC6T model. To obtain these flows pursuant to the parameters agreed-upon in the March 3 meeting, ABC ran a full range of flows in HEC-RAS and developed a curve of total flow to flow in the narrowed cross section. We then used this curve to develop the HEC6T model input hydrology to the mining pit. This analysis resulted in a peak discharge of 11,200 cfs entering the pit. This hydrology assumption was also confirmed in the FCDMC draft meeting notes sent by email on March 14, 2016; therefore, ABC continued its HEC6T modeling work based upon this assumption. However, in the revised Meeting Action item list received on March 30, 2016 (almost 4 weeks after the initial meeting and only 2 weeks before ABC had indicated that it would submit its plan of development), FCDMC deleted its previous position regarding how the inflow into the mining pit should be calculated and appears now to require ABC to use the full 30,000 cfs applicable to the total Agua Fria 100 year discharge. Doing so would materially change the engineering analysis underlying the plan of development and render superfluous much of the work already performed.

Item 20 – During the March 3, 2016 meeting, the FCDMC expressed concern that the 100 year peak discharge of the New River would enter the mining pit and result in a headcut up the New River. ABC stated that a HEC-RAS model would be constructed using the new topography that ABC had acquired as well as the 100 year discharge. It was originally agreed in the March 3, 2016 meeting, and later stated and confirmed in Action Item 1 of the draft meeting note sent on March 14 (an action item that is not amended in the revision sent on March 30, 2016), that this 100 year peak discharge would be obtained by examining the HEC6T model (input file ECAFRRev.dat) hydrology and subtracting the Agua Fria peak flow upstream of the New River from the peak flow downstream of the New River. ABC did this as instructed and it resulted in a New River 100 year peak flow of 24,000 cfs. To double check this value, ABC's engineers compared the Agua Fria FEMA 100 year discharge of 30,000 cfs at the Bethany Home alignment, which is upstream of the New River, to the FEMA 100 year discharge of 54,400 cfs at Camelback Road, which is downstream of the New River. Assuming coincident peaks (an assumption that Dr. Williams notes is often used for watershed of similar size), this calculation resulted in a peak discharge for the New River of 24,400 cfs, with the slight difference from the 24,000 cfs due to local drainage contributions between the New River and Camelback Road. ABC and its engineers were unpleasantly surprised to see that FCDMC now appears to require a static 39,000 cfs number to be used as the 100 year discharge for the New River, rather than a figure determined by using the hydrology of our previously agreed-upon official HEC6T model. Again, this revision would materially change the engineering analysis underlying the plan of development and render superfluous much of the work already performed.

Of particular note to Dr. Williams with respect to Item 20 is that the peak 100 year discharge of the Agua Fria immediately upstream of the New River is 30,000 cfs and has a contributing drainage area of 231 square miles. The New River at its confluence of the Agua Fria is required to have a 39,000 cfs 100 year discharge and has a contributing drainage area of 161 square miles. Reservoirs have impacts, but, generally, larger watersheds have the larger 100 year discharges. In this instance, the required 100 year discharge of 39,000 cfs for the New River is 30% higher than the Agua Fria discharge of 30,000 cfs even though the New River's drainage area is 30% smaller – this is not logical. Using the previously agreed-upon 24,000 cfs for the New River is more logical, because it results in New River having a 30% smaller watershed area with a 20% smaller 100 year discharge when compared to the Agua Fria.

Also in Item 20, there is a new requirement to account for future changes to the river morphology that was never mentioned in the meeting nor in the FCDMC draft meeting minutes sent out March 14, 2016. Dr. Williams believes that this type of analysis is usually reserved for the design of levees, floodwalls and guide walls, not river systems with

features that are not related to such.

ABC has expended much time and effort over the past month on the new plan of development, which our engineers have been drafting pursuant to our original pre-filing discussion. To modify the parameters agreed to during our March 3 meeting now would significantly increase the time and expense associated with filing ABC's floodplain use permit application. We all agreed that ABC's permit application should be submitted as soon as possible, and ABC has taken great care to ensure that the plan it is developing is consistent with what was discussed at our March 3 meeting. Please explain why FCDMC has determined that its previous positions are no longer reasonable. ABC plans to file its permit application this week, supported by a plan of development that is consistent with the engineering inputs agreed-upon in our original March 3, 2016 conversation.

I look forward to hearing from you.

Best,
Meghan

Meghan H. Grabel

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From: Anthony Beuché - FCDX [<mailto:TonyBeuche@mail.maricopa.gov>]

Sent: Thursday, March 31, 2016 2:13 PM

To: Grabel, Meghan

Cc: glenn@cdrpas.com; Pedro Calza; david@dtwassoc.com; Wayne Peck; Wayne Peck - FCDX; Jeff Riddle - FCDX; Bing Zhao - FCDX; Pramita Chitrakar - FCDX; Ed Raleigh - FCDX; Scott Vogel - FCDX

Subject: RE: SG15-003 ABC - Meeting Action Items

Megan,

Please find attached hereto a revised Meeting Actions Items form. Please review and revise to address any corrections, clarifications and/or additions that you identify.

Wayne provides the following response to your request for clarification of what is meant by "stated":

The District is not certain what you mean when you say that the word "stated" means that the parties agreed. If what you are saying is that the parties agreed that what is identified as "stated" was, in fact what that party said at the meeting, then the District agrees. For example, item 5. reads: "FCDMC stated that no evaluation of the 100-year WSE is necessary since no encroachment in the floodway is proposed." The District agrees that such statement was made on behalf of ABC.

If, however, your position is that the District accepted the substance of the statement, that is not correct. Viewing the above statement, the District did not, and does not, agree that "no encroachment into the floodway is proposed." The applicant will have to demonstrate the truth of that statement.

Thanks,

Tony Beuché, P.E., Manager
Floodplain Use Permits for Sand and Gravel
Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, Arizona 85009

Email: TonyBeuche@mail.maricopa.gov
Office: 602-506-2329
Fax: 602-506-4601

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From: Grabel, Meghan [<mailto:mgrabel@omlaw.com>]

Sent: Thursday, March 24, 2016 4:11 PM

To: Anthony Beuché - FCDX

Cc: 'glenn@cdrpcas.com'; Pedro Calza; 'david@dtwassoc.com'; Wayne Peck; Wayne Peck - FCDX; Jeff Riddle - FCDX; Bing Zhao - FCDX; Pramita Chitrakar - FCDX; Ed Raleigh - FCDX; Scott Vogel - FCDX; Grabel, Meghan

Subject: RE: SG15-003 ABC - Meeting Action Items

Tony:

Please find attached the draft Meeting Action Items form, redlined to reflect our agreement on the various items and adding content to some of them. Please take a look and let us know whether you agree with our additions. In addition, I want to clarify that when an item is phrased as ABC or FCDMC "stated" a certain criterion, that means that the parties reached an agreement regarding the parameters of the plan of development consistent with those "statements."

I will execute the document on ABC's behalf once we get confirmation from you that you agree with the additions we have made.

Thanks,
Meghan

Meghan H. Grabel

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From: Anthony Beuché - FCDX [<mailto:TonyBeuche@mail.maricopa.gov>]

Sent: Monday, March 14, 2016 3:48 PM

To: Grabel, Meghan

Cc: 'glenn@cdrpcas.com'; Pedro Calza; 'david@dtwassoc.com'; Wayne Peck; Wayne Peck - FCDX; Jeff Riddle - FCDX; Bing Zhao - FCDX; Pramita Chitrakar - FCDX; Ed Raleigh - FCDX; Scott Vogel - FCDX

Subject: SG15-003 ABC - Meeting Action Items

Meghan,

Please find attached hereto the draft Meeting Action Items form that summarizes our 03/03/2016 discussion of proposed revisions to the draft plan of development. Please review and revise to address any corrections, clarifications and/or additions that you identify. It would be helpful if we could incorporate into this document any information listed in your email dated 03/11/2016 that is not already included.

As we discussed in the meeting, this form is to document the basis for analysis and design of the revised plan of development. We may expect that some issues will arise from substantive review of the revised plan of development. However, the intent of this summary is to minimize significant issues and to simplify plan revision and review.

The Post-Meeting Notes/Clarifications section identifies the result of Action Item No. 1. This section also includes comments that are pertinent to our discussion but may not have been explicitly stated during the meeting. Please let me know if you have any questions.

Thanks,

Tony Beuché, P.E., Manager
Floodplain Use Permits for Sand and Gravel
Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, Arizona 85009

Email: TonyBeuche@mail.maricopa.gov
Office: 602-506-2329
Fax: 602-506-4601

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From: Grabel, Meghan
To: 'Anthony Beuché - FCDX'
CC: Wayne Peck
Sent: 4/11/2016 7:30:40 PM
Subject: ABC Response to FCD 12/23/15 Requests for Correction
Attachments: 6604602_1.pdf; 6604602_1.doc

Tony:

Attached, please find both a pdf and word version of ABC's Response to the FCD's 12/23/15 Requests for Correction associated with ABC's May 1, 2015 filing. The revised Plan of Development referenced in ABC's Response will be hand-delivered to your office this afternoon. Pursuant to Section 403(B)(3) of the Floodplain Regulations for Maricopa County, ABC requests that it be issued a permit of short duration to govern the duration of the permit application process. Please let us know what we can do to expedite that request.

Best,
Meghan

Meghan H. Grabel

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From: Anthony Beuché - FCDX
To: Grabel, Meghan
CC: Wayne Peck; Wayne Peck - FCDX
Sent: 4/12/2016 1:17:42 PM
Subject: RE: ABC Response to FCD 12/23/15 Requests for Correction

Meghan,
Issuance of a permit of short duration is at the discretion of the Chief Engineer and General Manager.
Thanks,

Tony Beuché, P.E., Manager
Floodplain Use Permits for Sand and Gravel
Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, Arizona 85009

Email: TonyBeuche@mail.maricopa.gov
Office: 602-506-2329
Fax: 602-506-4601

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From: Grabel, Meghan [mailto:mgrabel@omlaw.com]
Sent: Monday, April 11, 2016 2:38 PM
To: Anthony Beuché - FCDX
Cc: Wayne Peck; Wayne Peck - FCDX
Subject: RE: ABC Response to FCD 12/23/15 Requests for Correction

Excellent, thank you Tony. What do we need to do to get a permit of short duration to govern during this period? ABC maintains that its 2011 permit was renewed and does not intend to waive that argument through this request. However, given the FCD's position on that matter and Mr. Wiley's recent order, ABC would like a permit of short duration issued nonetheless.

Thank you,
Meghan

Meghan H. Grabel

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From: Anthony Beuché - FCDX [mailto:TonyBeuche@mail.maricopa.gov]
Sent: Monday, April 11, 2016 2:30 PM
To: Grabel, Meghan
Cc: Wayne Peck; Wayne Peck - FCDX
Subject: RE: ABC Response to FCD 12/23/15 Requests for Correction

Meghan,

The revised plan of development has been received and the substantive review period has resumed. The standard review period is fifteen (15) working days.

Thanks,

Tony Beuché, P.E., Manager
Floodplain Use Permits for Sand and Gravel
Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, Arizona 85009

Email: TonyBeuche@mail.maricopa.gov
Office: 602-506-2329
Fax: 602-506-4601

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From: Gabel, Meghan [<mailto:mgrabel@omlaw.com>]
Sent: Monday, April 11, 2016 12:31 PM
To: Anthony Beuché - FCDX
Cc: Wayne Peck
Subject: ABC Response to FCD 12/23/15 Requests for Correction

Tony:

Attached, please find both a pdf and word version of ABC's Response to the FCD's 12/23/15 Requests for Correction associated with ABC's May 1, 2015 filing. The revised Plan of Development referenced in ABC's Response will be hand-delivered to your office this afternoon. Pursuant to Section 403(B)(3) of the Floodplain Regulations for Maricopa County, ABC requests that it be issued a permit of short duration to govern the duration of the permit application process. Please let us know what we can do to expedite that request.

Best,
Meghan

Meghan H. Gabel

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April 12, 2016

William D. Wiley, P.E.
Chief Engineer and General Manager
Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, AZ 85009

Re: A.B.C. Sand & Rock Co., Inc.
Floodplain Use Permit – Request for Permit of Short Duration

Dear Mr. Wiley:

I represent ABC Sand and Rock Company (“ABC”) in its attempt to secure a Floodplain Use Permit from the Maricopa County Flood Control District. As you may know, ABC submitted yesterday a revised Plan of Development based on 2016 topography that meets the requirements of the Flood Control District’s engineers, as identified to us in a March 3, 2016 pre-application meeting and in additional communication thereafter. Given that submittal, and pursuant to Section 403(B)(3) of the Floodplain Regulations for Maricopa County, ABC requests that it be issued a permit of short duration to govern for the duration of the permit application process.

ABC maintains that it has had the District’s consent to operate in the floodplain for the past several years and does not intend to waive that argument through this request. However, given the District’s position on that matter and your March 21, 2016 Final Decision and Order, ABC respectfully requests that a permit of short duration be issued to ensure that ABC is in compliance with its permitting requirements from the District’s perspective.

I appreciate your prompt attention.

Sincerely,

Meghan H. Grabel

MHG:pdp



Flood Control District of Maricopa County

www.fcd.maricopa.gov

William D. Wiley, P.E.
Chief Engineer and
General Manager
2801 West Durango Street
Phoenix, Arizona 85009
Phone: (602) 506-4708
Fax: (602) 372-0989

April 15, 2016

Ms. Meghan H. Grabel
Osborn Maledon
2929 North Central Avenue, 21st Floor
Phoenix, AZ 85012

REC'D OSBORN MALEDON PA.

APR 18 2016

RE: A.B.C. Sand & Rock Company, Inc.
Floodplain Use Permit Application SG15-003 Request for Permit of Short Duration

Dear Ms. Grabel,

This is to advise you that your request that a Permit of Short Duration be issued to your client A.B.C. Sand & Rock Company, Inc. pursuant to Section 403(B)(3) of the Floodplain Regulations for Maricopa County is denied.

A Permit of Short Duration is issued when the Floodplain Administrator is comfortable that an application has only minor corrections that can be resolved during the pendency of the short duration permit or when there are compliance issues at a site that are not resolved before an existing permit expires. Your client does not have an existing permit.

While your client had a Floodplain Permit that expired in 2012 to operate a mine at this same location, the plans and data in support of that permit are substantially different than the plans and data that have been submitted by your client for a new permit. District staff has not yet determined through an in-depth review whether the new data supports the assumptions and conclusions made by your client's engineers in developing the new plan. It is, therefore, impossible without this review, to make a reasonable determination whether only minor corrections are necessary or if substantial changes, revisions or information will be required to move forward.

Finally, the March 21, 2016 Final Decision and Order you reference provides: "unless and until all penalties have been settled in full, no permit shall be issued and ABC may not operate within the floodplain of the Agua Fria River." Therefore, unless and until the imposed fines have been settled, it is not possible to issue the Permit you request.

Sincerely,

William D. Wiley

WDW:pt

Cc: Wayne Peck, MCAO

ABCSR00001292

APP363

From: Peck Wayne
To: Grabel, Meghan
Sent: 5/17/2016 10:43:02 PM
Subject: FW: Meeting with FCD/1983 defendants

Meghan

Based on the advice of counsel in the pending litigation, as set forth below, the District is cancelling the meeting scheduled for Wednesday, May 18, 2016 at noon. The District staff has been instructed not to meet with representatives of ABC at least until direction is obtained from the court. While I understood that the purpose of the meeting was to discuss your client's response to the most recent substantive review letter from the District dated May 6, 2016, all of the issues involving the application, the litigation and the pending appeal before the Board of Hearing Review have become intertwined.

I have been informed by the District that your engineers are free to submit written questions concerning the review comments and staff will expeditiously respond to any such questions. However, if such written inquiries are forthcoming, they should be sent to me for distribution to appropriate staff.



Wayne J. Peck
Deputy Maricopa County Attorney
222 N. Central, 11th Floor
Phoenix, AZ 85004
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fax: 602.506-8567
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From: STully@hinshawlaw.com [mailto:STully@hinshawlaw.com]
Sent: Tuesday, May 17, 2016 2:43 PM
To: Peck Wayne
Subject: Meeting with FCD/1983 defendants

Wayne,

I have learned that a meeting has been scheduled tomorrow between an attorney for ABC and ABC's engineers and flood control district staff. I further understand that ABC has requested to tape record the meeting. I have been told that the regulations do not provide a right to such a meeting, but that they are provided as a courtesy. Given the outstanding lawsuit against a number of the individuals scheduled to be in the meeting as well as the district, the attendance by counsel and the desire to tape record it (indicating a desire to use it as part of the lawsuit). I do not think that such a meeting should go forth and cannot advise my clients to attend. Please cancel the meeting and direct ABC to submit its comments in writing. Let me know if you want to discuss further.

Steve

Stephen W. Tully
Partner
Hinshaw & Culbertson LLP
2375 E. Camelback Rd.
Suite 750

ABCSR00001304

APP364

Phoenix, AZ 85016
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Meghan H. Grabel

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July 1, 2016

William D. Wiley, P.E.
Chief Engineer and General Manager
Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, AZ 85009

Re: A.B.C. Sand & Rock Co., Inc.
Floodplain Use Permit – Request for Permit of Short Duration

Dear Mr. Wiley:

As you know, our firm represents ABC Sand and Rock Company (“ABC”) in its attempt to secure a Floodplain Use Permit from the Maricopa County Flood Control District. On February 12, 2015 you offered ABC a permit of short duration “during the application process if required.” ABC submitted its original Plan of Development on May 1, 2015 and requested a permit of short duration, which the District denied. On June 15, 2015, ABC was assured by Joy Rich and other representatives of the District that no permit of short duration was necessary. On November 2, 2015, the District initiated an enforcement action, indicating that a permit of short duration was necessary after all.

On April 11, 2016, ABC submitted a substantially revised Plan of Development based on 2016 topography that meets the requests of the Flood Control District’s engineers that were identified to us in a March 3, 2016 pre-application meeting and in additional communication thereafter. With that application, ABC again requested a permit of short duration. On April 15, 2016, you again denied ABC’s request. You claimed to base this denial on three rationales: (1) ABC’s new plan of development is substantially different from its prior plan of development; (2) the District had not yet fully reviewed the new plan of development; and (3) through your Order issued March 21, 2016, you determined that the District would not issue any new permits until all the fines you assessed had been paid.

Since that time, we have reviewed the files of numerous other sand and gravel mines operating in and around the Agua Fria River and have not found a single other instance where a permit of short duration was denied. To the contrary, we have found multiple instances where a permit of short duration was spontaneously offered by the Flood Control District for various reasons, including to allow mines to continue operating after their permits have expired but before the mine is able to successfully apply for a new or renewed permit by submitting a

Tony Beuché, P.E., Manager
July 1, 2016
Page 2

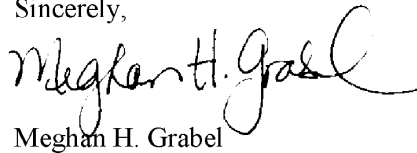
substantially different plan of development. ABC therefore respectfully submits that it is not relevant whether its new plan of development is substantially different from its prior plan.

Meanwhile, the District has now thoroughly reviewed ABC's submission, issued new guidance on what changes ABC needs to make to its new plan, and met with ABC's engineers to further discuss and clarify the District's requests. Nearly all of the District's remaining requests relate to remediation such as backfilling certain areas or restoring certain setbacks. ABC's engineers are in the process of further revising its submission to address the District's concerns. ABC therefore respectfully requests that you take notice of ABC's good faith submittal, as thoroughly reviewed by the District's engineers, and subsequent efforts on both sides to finalize ABC's new plan of development.

Finally, today the Board of Hearing Review will issue an Order under which "[t]he District shall not condition issuance of a Floodplain Use Permit on payment of the Demand." In light of the subsequent events that have occurred since ABC last formally requested a permit of short duration, ABC again respectfully requests, pursuant to Section 403(B)(3) of the Floodplain Regulations for Maricopa County, that it be issued a permit of short duration to govern for the remaining duration of the permit application process.

I appreciate your prompt attention.

Sincerely,

A handwritten signature in black ink, appearing to read "Meghan H. Grabel", with a stylized flourish at the end.

Meghan H. Grabel

MHG:pdp

**BEFORE THE MARICOPA COUNTY FLOOD CONTROL DISTRICT
BOARD OF HEARING REVIEW**

In the Matter of:

FA 95-048A-2016

ABC Sand and Rock Company, Inc.

**FINAL DECISION AND
ORDER**

Procedural Facts:

1. On May 8, 2015, Maricopa County Flood Control District (the "District") issued a Notice of Violation and Cease and Desist Order to ABC Sand and Rock Company, Inc. ("ABC").
2. On November 2, 2015, the District scheduled a hearing on the Notice of Violation - Cease and Desist Order issued May 8, 2015.
3. On January 4, 2016, Hearing Officer Harold J. Merkow heard oral argument and reviewed briefing submitted by the District and ABC, both of which were represented by counsel.
4. On March 7, 2016, the Hearing Officer issued a Report and Recommendation ("Recommended Decision"). The Hearing Officer recommended that the Chief Engineer of the District ("Chief Engineer") order: (1) ABC immediately obtain an approved permit and cease and desist mining or associated activities until it obtains such permit; and (2) ABC pay a penalty as a result of mining without the required permit.
5. On March 21, 2016, the Chief Engineer, William D. Wiley, issued a Final Decision and Order ("Final Order") containing findings of fact and conclusions of law. The Final Order ordered ABC to: (1) Comply with the Floodplain Regulations of Maricopa County by obtaining a Floodplain Use Permit; and (2) pay a penalty. The penalty was divided into four periods: Period #1 – no penalty; Period #2 – \$5,000.00 penalty; Period #3 – penalty of \$500.00 per day imposed for the 146 days, totaling \$73,000.00; Period #4 – penalty of \$2,500.00 per day imposed for 75 days (through date of the Recommended Decision), totaling \$187,500.00, to continue accruing daily.
6. On April 4, 2016, ABC appealed the Chief Engineer's Final Order to the Maricopa County Flood Control District Board of Hearing Review (the "BoHR"). ABC's Notice of Appeal and Request for Briefing Schedule ("Notice of Appeal") was "hand-delivered" to

the "Clerk of the Board of Directors" at the District offices, listing Jolene Maiden as Clerk of the Board of Directors. Ms. Maiden is the Clerk for the BoHR and located at the address of BoHR counsel. The Notice of Appeal was forwarded to Ms. Maiden by District Chief Engineer Wiley on April 6, 2016. ABC gave notice that it "appeals the Final Decision and Order issued by the Chief Engineer...on March 21, 2016." See Notice of Appeal.

7. The BoHR held a review hearing on June 16, 2016, and ABC and the District, both represented by counsel, presented arguments. The hearing was continued until July 1, 2016.
8. After hearing oral argument and deliberating in open session, the BoHR voted unanimously to approve in part and modify in part the Chief Engineer's Final Order.

Findings of Fact:

The Board of Hearing Review has reviewed the administrative record including the Recommended Decision, the Final Order, and oral argument from both parties, and finds the following facts:

1. The BoHR finds both parties to be credible, although equal weight is not given to all evidence.
2. ABC Sand and Rock Company, Inc. is an Arizona Corporation. ABC operates a sand and gravel mine on properties owned by Rare Earth, LLC, an Arizona Limited Liability Company and by the Arizona State Land Department. The sand and gravel mine operated by ABC is located in unincorporated Maricopa County, within the jurisdiction of the District.
3. The sand and gravel mine operated by ABC is located within the regulated floodplain of the Agua Fria River.
4. Any development which will "divert, retard, or obstruct the flow of water in any watercourse and threaten public health or safety or the general welfare" may occur only upon written authorization by the Board of Directors of the District or its designee. See Maricopa County Floodplain Regulations, 401(A).
5. The Board of Directors of the District has authorized the Chief Engineer and General Manager to provide the written authorization necessary to allow development within a floodplain. Maricopa County Floodplain Regulations, 201. The procedure for obtaining the required written authorization is by way of a Floodplain Use Permit. See Maricopa County Floodplain Regulations, 401(A).

6. A sand and gravel mining operation located within a floodplain is development which will "divert, retard, or obstruct the flow of water in any watercourse and threaten public health or safety or the general welfare." *See* Maricopa County Floodplain Regulations, 205.
7. The District granted ABC a permit to operate a sand and gravel mine for a short duration on March 15, 2012 and expired on July 16, 2012. *See* Final Order at I.I and I.J.
8. Since July 16, 2012, ABC has operated a sand and gravel mine in the floodplain of the Agua Fria River. *See* Final Order at I.K.
9. Since July 16, 2012, ABC has neither obtained nor possessed a validly issued Floodplain Use Permit for its operation of a sand and gravel mine in the floodplain of the Agua Fria River. *See* Final Order at I.L.
10. Between July 16, 2012 and January 28, 2015, ABC's Floodplain Use Permit status was unclear and subject to litigation before the BoHR, the Maricopa County Superior Court, and the Court of Appeals for the State of Arizona. On January 28, 2015, the BoHR issued an Order holding that ABC did not possess a valid Floodplain Use Permit authorizing ABC's operation of the sand and gravel mine in the floodplain of the Agua Fria River. *See* Maricopa County Flood Control District Board of Hearing Review Final Decision and Order (January 28, 2015), Exhibit 47.¹
11. In the January 28, 2015 Order, the BoHR concluded that no penalty or fine was justified against ABC for the 2012 Final Decision and Order due to mitigating circumstances described in the BoHR's Order. *See* BoHR January 28, 2015 Order, Exhibit 47.
12. The January 28, 2015 decision of the BoHR stands as a valid Order of the BoHR. The January 28, 2015 Order was upheld by the Maricopa County Superior Court and is now being appealed to the Court of Appeals for the State of Arizona. *See* Final Order at I.Q., Exhibit 47, *ABC Sand and Rock v. Maricopa County*, LC2015-000096 (March 18, 2016), *ABC Sand and Rock v. Maricopa County*, CV16-0294 (Ariz. Ct. App., filed May 20, 2016).
13. From and after the January 28, 2015 Order, numerous correspondence was exchanged between representatives of ABC and representatives of the District, including but not limited to the exchanges described throughout paragraphs 14-33 below.
14. On February 27, 2015, ABC filed an amendment to their last valid floodplain use permit, which expired in 2011, including a filing fee. *See* Exhibit 50.
15. On March 13, the District rejected ABC's February 27, 2015 submittal, finding that the submittal did not comply with applicable regulations partially because ABC could not file

¹ This is the second in a series of cases between the District and ABC. The prior history is recited in the BoHR's January 28, 2015 Order.

an amendment to an expired permit. ABC was notified that it was mining at its own risk without a permit and subject to daily fines up to \$10,000.00. *See Exhibit 52.*

16. On April 15, 2015, the District again told ABC that it was mining without a floodplain use permit, subject to fines. The District also stated that if by May 1, 2015 ABC has not submitted the necessary paperwork and fees, the District would be forced to commence a new enforcement action. *See Exhibit 53.*
17. On May 1, 2015, ABC submitted to the District an application for a Floodplain Use Permit to allow a sand and gravel mine to be operated by ABC within the Floodplain of the Agua Fria River (the "application"). *See Exhibit 55.*
18. On May 8, 2015, the District issued to ABC a Notice of Violation – Cease and Desist for unpermitted activities. *See Exhibit 58.*
19. On May 12, 2015, ABC informed the District that ABC had not received an administrative completeness letter or a list of issues to achieve completeness. ABC also reiterated its belief that the District would not take enforcement action against ABC during the application process. *See Exhibit 60.*
20. On June 15, 2015, ABC and the District met to discuss permitting issues. The parties agreed that a hearing for the Notice of Violation would not be set at that time to allow the parties to focus their attention on the permit application. *See Exhibit 63.*
21. The District frequently stated to ABC that although the District agreed to forbear the scheduling of a hearing on the issued Notice of Violation, ABC continued to operate in violation of the Regulations and state statutes and that ABC must cease and desist operations until a valid Floodplain Use Permit was obtained. *See Final Order at LBB.*
22. On June 16, 2015, ABC's application was deemed to be administratively complete by the District, thereby beginning substantive review. *See Exhibits 63 and 64.*
23. On June 30, 2015, the District provided to ABC a report outlining thirty-seven (37) deficiencies in the application. The District did not provide ABC a specific due date for responses. *See Exhibit 64.*
24. On July 24, 2015, the District and ABC traded correspondences, with ABC stating that it hoped to submit a response to the thirty-seven (37) deficiencies identified in the June 30, 2015 letter. *See Exhibit 66.*
25. On August 19, 2015, ABC stated they are diligently working to complete various tasks and hope to be done by the end of September. This included reviewing whether developing a new Plan of Development (coordinating ABC's three mining plans into one plan) is possible. *See Exhibit 71.* The District responded with a detailed list of issues to review if ABC were to proceed with a new Plan of Development. The District did not provide ABC a specific due date for responses. *See Exhibit 73.*

26. In September and October 2015, ABC changed counsel. ABC's new counsel met with the District. ABC claimed that it was not given a specific due date in which to submit its responses. *See* ABC Brief at 6.
27. As of November 2, 2015, the District had not received a reply to the June 30, 2015 report outlining thirty-seven (37) deficiencies in ABC's floodplain use permit application. *See* Final Order at LFF.
28. On November 2, 2015, the District sent to ABC a Notice scheduling the hearing on the Notice of Violation - Cease and Desist Order issued May 8, 2015. *See* Exhibit 76.
29. On November 5, 2015, ABC responded to the District, reiterating their understanding that the District would not schedule a hearing for the Notice of Violation. *See* Exhibit 77.
30. On November 10, 2015, the District responded to ABC, stating that ABC continued to operate in violation of the law since 2012 and made no progress since the application filed in May 2015. The District also stated that if ABC provided responses that met the applicable regulations in a timely manner before the hearing, the District would consider reaching a final resolution with ABC. *See* Exhibit 78.
31. On November 13, 2015, ABC provided to the District a partial response to the thirty-seven (37) deficiencies outlined in the District's June 30, 2015 report. *See* Exhibit 79.
32. On November 30, 2015, ABC provided to the District its completed response to the thirty-seven (37) deficiencies outlined in the District's June 30, 2015. *See* Exhibit 80.
33. On December 23, 2015, a formal report was provided to ABC by the District advising ABC that the November 13 and 30 responses failed to address the substantive items set forth in the June 30, 2015 report from the District. *See* Final Order at IJJ, Exhibit 47.
34. On January 4, 2016, a hearing was held before Hearing Officer Harold Merkow on the Notice of Violation - Cease and Desist Order issued May 8, 2015. Both ABC and the District was represented by counsel. *See* Recommended Decision.
35. The Hearing Officer timely heard the matter and issued a Recommended Decision to the Chief Engineer on March 7, 2016. *See* Recommended Decision.
36. Hearing Officer Harold Merkow recommended that the "Chief Engineer enter an Order directing ABC Sand and Rock [sic] to immediately obtain an approved permit for its mining operations and cease and desist from conducting any mining or associated activities until it obtains such permit." *See* Recommended Decision at p. 8.
37. The Chief Engineer timely reviewed the Hearing Officer's Recommended Decision and issued his Order on March 21, 2016. *See* Final Order.

38. The Hearing Officer and the Chief Engineer concluded that ABC's ongoing mining operation in the Agua Fria flood way and delineated floodplain, after the expiration of its floodplain permit on July 16, 2012, constituted an unpermitted "development" within the meaning of the District's rules and regulations and a violation of the Floodplain Regulations for Maricopa County. *See* Final Order FoF at I.L.; Recommended Decision at Conclusion 4-5.
39. The Hearing Officer recommended and the Chief Engineer ordered that, pursuant to A.R.S. § 48-3615, ABC must obtain a Floodplain Use Permit for its activities. *See* Final Order at I.L.B.; Recommended Decision at Conclusion 3-4.
40. The Chief Engineer found that each correspondence from the District advised ABC that it was not authorized to operate a sand and gravel operation within the floodplain of the Agua Fria River, that if ABC desired to continue to operate, it must obtain a valid permit, and that because no valid permit existed, any such operations must cease and desist. *See* Final Order at I.S and I.T.
41. The Chief Engineer found that as of the date of the Final Order on March 21, 2016, the substantive issues set forth in the June 30, 2015 report from the District to the application by ABC for a Floodplain Use Permit to allow the operation of a sand and gravel mine within the floodplain of the Agua Fria River had not been addressed. *See* Final Order at I.K.K.
42. The Chief Engineer ordered, pursuant to A.R.S. § 48-3615, to impose fines on ABC as follows: Period #1 – no penalty; Period #2 – \$5,000.00 penalty; Period #3 – penalty of \$500.00 per day imposed for the 146 days, totaling \$73,000.00; Period #4 – penalty of \$2,500.00 per day imposed for 75 days (through date of the Report and Recommendation by the Hearing Officer), totaling \$187,500.00, to continue accruing daily until the date ABC ceases to operate in the floodplain without a valid floodplain use permit. *See* Final Order at III.C.
43. The Chief Engineer stated that the fine was based on (i) the continual operation of the sand and gravel mine in violation of the Regulations; (ii) the disregard of repeated demands by the District that a permit be obtained; and (iii) the refusal to cease and desist operations until a permit was obtained. *See* Final Order at p. 6.
44. At the Review Hearing on June 16, 2016, both ABC and the District, represented by counsel, provided briefs and gave oral argument on ABC's appeal of the Final Order. ABC argued the Chief Engineer's Final Order was arbitrary, that enforcement was not necessary based on the District's statement it would forbear enforcement during the application process, that ABC was diligently pursuing the application, that the District never provided response deadlines, and that a penalty was not supported by the record. The District argued that ABC did not possess a valid floodplain use permit, that the District never promised to forbear actual enforcement, that it only promised to forbear scheduling of the enforcement hearing provided ABC diligently pursued the application, that ABC did not diligently pursue the application, that the District repeatedly told ABC

to cease and desist operations or be subject to a penalty, and that a penalty is appropriate and necessary. *See* Final Order, ABC Notice of Appeal, District Brief, and June 16, 2016 oral argument.

45. Based on consideration of the evidence before it, the BoHR finds that ABC was and is operating without a Floodplain Use Permit since at least July 16, 2012, and that the District has not issued a new Floodplain Use Permit to ABC since that time. Additionally, the conduct of the District as described by ABC has not created a permit.
46. Based on the consideration of the evidence before it, the BoHR also finds that the District's "stay of enforcement" while ABC went through the permit application process following the BoHR's January 28, 2015 Order did not permit ABC to operate without a permit. While the District did agree to forbear enforcement during the application process, the District's stay of enforcement referred to scheduling a hearing on the Notice of Violation, not the suspension of the Floodplain Regulations, and was tied to ABC's diligent pursuit of the application. ABC has not provided sufficient evidence to establish that the District's agreement to forbear enforcement was broader than this. ABC operated under its mistaken understanding of the District's offer to forbear enforcement partially due to the parties' difficulties in communicating with one another. Nevertheless, the weight of the evidence shows that the District adequately stated its enforcement posture on numerous occasions, as stated throughout these findings.
47. Based on the consideration of the evidence before it, the BoHR also finds that ABC did not so diligently pursue its application that substantial mitigation of the Chief Engineer's penalty is warranted. While the District did not provide specific response dates for ABC to adhere to during the substantive review period, ABC took an unreasonable amount of time to respond to the stated deficiencies in the application. If ABC believed the District was unreasonable in its demands regarding the application, it was ABC's responsibility to take the necessary action to bring those complaints to a body which could grant relief. ABC did not timely respond to outstanding deficiencies in the application and did not seek relief elsewhere.
48. Based on the consideration of the evidence before it, the BoHR also finds that ABC was properly notified that it was operating without a permit and ordered to cease and desist operations until a permit was obtained. While there is no evidence that the District told ABC in "each correspondence" to cease and desist operations, ABC was told to cease and desist operation on multiple occasions during this process, which ABC still has not done.
49. Based on the consideration of the evidence before it, the BoHR finds that the District, while clear in expressing its intention that ABC proceed expeditiously, did not provide concrete dates by which it expected responses to its statement of deficiencies and that ABC did not seek to clarify such dates. As a result, the parties did not, and still may not, share expectations on when and how a Floodplain Use Permit should be issued.
50. Based on the consideration of the evidence before it and statements of ABC representatives, the BoHR finds that there is a reasonable possibility that ABC will

continue to operate its sand and gravel operation within the delineated floodplain of the Aqua Fria River even after this board issues its decision and order.

Conclusions of Law:

Based upon the foregoing Findings of Fact, the BoHR concludes as follows:

1. The BoHR reviews this matter pursuant to Resolution FCD 2012R002, Appendix A ("BoHR Review Procedures") and A.R.S § 48-3615.01. The BoHR is limited to review of the record of proceedings before the Hearing Officer, including the Chief Engineer's Final Order, the parties' briefs, and oral argument before the BoHR; no new evidence shall be introduced nor is a trial *de novo* permitted. See BoHR Review Procedures, A; A.R.S § 48-3615.01(II).
2. The BoHR has jurisdiction to hear this matter. ABC's Notice of Appeal was timely, in writing, addressed to the Clerk of the Board of Directors, and appealed the entire Final Order. See A.R.S. § 48-3615.01(H), BoHR Review Procedures, B. Any perceived procedural deficiency is technical at worst, and the Notice of Appeal was ultimately delivered to the BoHR clerk by the Chief Engineer. The District was on notice and not misled nor prejudiced by ABC's Notice of Appeal. See *Hanen v. Willis*, 102 Ariz. 6, (1967) (finding that "[t]he necessary test is...whether sufficient notice of the appeal was conveyed to all of the appellees, neither misleading nor prejudicing them").
3. The BoHR is to "review any decision and order of the chief engineer or hearing officer." A.R.S. §48-3615.01(H).
4. The BoHR "may deny, approve or modify the order of the chief engineer or the order of the hearing officer." See A.R.S. §48-3615.01(I); BoHR Review Procedures, H; *ABC Sand and Rock v. Maricopa County*, LC2015-000096 (March 18, 2016).
5. The Chief Engineer has jurisdiction over this matter pursuant to A.R.S § 48-3615 and Floodplain Regulations article 7.
6. It is unlawful for any person to engage in development in the floodplain without a Floodplain Use Permit or to engage in any development that is not in compliance with an active Floodplain Use Permit; and it is unlawful without written authorization from the District to damage or interfere with a facility that is owned, operated or otherwise under the jurisdiction of the District. See A.R.S. § 48-3615.
7. ABC's activities (ongoing mining operation in the Agua Fria floodway and delineated floodplain, after the expiration of its floodplain permit of short duration on July 16, 2012, and after the issuance of the BoHR's Order on January 28, 2015 finding ABC did not have a permit) fall within the meaning of the District's Enforcement Rules for "development," which require written authorization from the District as required by the

Floodplain Regulations for Maricopa County in force at the time of the violation. *See* A.R.S. §§ 48-3615(A) and 48-3613.

8. The submission of applications, related supporting documents, and application fees alone does not grant a valid permit or create a permit shield, and therefore no effective permit is currently in place. *See* Recommended Decision Conclusions; Maricopa County Floodplain Regulations. Section 401, 403.
9. Enforcement Rules for violations of the Floodplain Regulations for Maricopa County, adopted pursuant to A.R.S. §§ 48-3603, 48-3609, 48-3615, 48-3615.01, and 48-3615.02, provide for civil penalties for violations in the form of fines not to exceed that which is chargeable for a Class 2 Misdemeanor. A Class 2 Misdemeanor allows up to \$10,000 per violation for an Enterprise with each day the violation continues constituting a separate violation. *See also* A.R.S. 13-803(A). ABC's activities without a permit constitute a basis for civil penalties until the violations are resolved. *See* Recommended Decision Conclusions; A.R.S. § 48-3615.
10. The BoHR holds that the purpose of civil penalties is to deter violations of the law and the Floodplain Regulations and to bring development into compliance with the Floodplain Regulations.
11. The BoHR holds that continued operation of a sand and gravel operation in a floodplain without a Floodplain Use Permit after receipt of a Notice of Violation and Cease and Desist Order is a violation warranting penalties. The BoHR further holds that statements made by ABC in the course of this hearing that it has "no choice" but to continue operating due to the economic impact on its owner and employees form a reasonable basis for imposition of continuing penalties until such time as ABC comes into compliance with the Floodplain Regulations or ceases such operation, as set forth in this order in more detail.

Final Order:

The BoHR finds that ABC has continued to operate without a floodplain use permit since their last permit for short duration expired in July 2012. Since this time, ABC has been repeatedly told by the District that a valid floodplain use permit is required. The BoHR is an enforcement board tasked with reviewing notices of violation issued by the Chief Engineer. The BoHR does not sit in review of the permit process and cannot issue a permit; that is the role of the Floodplain Review Board and ultimately the Board of Directors. Evidence of deficiencies in the application process, if any, may mitigate penalties. Here, it is clear that ABC needs to have a valid permit for its mining operations, that ABC has been operating without a permit, and that ABC's operation without a Floodplain Use Permit has been an ongoing issue. In mitigation, the District has been at times less than clear in providing specific deadlines for ABC, but has consistently indicated that ABC must act expeditiously. The BoHR recommends that the District consider establishing response dates in its requests for information and notices of deficiency and requesting that the applicant apply for an extension if one is needed or warranted. The BoHR believes that such a procedure would benefit both the District and future permit applicants.

While the BoHR finds that a lack of common understanding of expected deadlines is a mitigating factor, it does not find that this factor warrants setting aside penalties. Ultimately, the goal of an enforcement action is to bring about compliance. It is with that goal in mind that the BoHR issues the following order.

In consideration of these Findings of Fact and Conclusions of Law, the Flood Control District of Maricopa County Board of Hearing Review hereby determines our Order as follows:

1. The Chief Engineer was not arbitrary in finding that ABC is required by law to have a valid permit. See A.R.S. §§ 48-3615 and 48-3613. The BoHR upholds the Chief Engineer's decision that since July 16, 2012, ABC has not had a valid Floodplain Use Permit to allow the operation of a sand and gravel mine within the floodplain of the Agua Fria River. ABC is ordered to obtain and maintain a Floodplain Use Permit if it wishes to continue operations. Accordingly, the Chief Engineer's "cease and desist" order in the Final Order is upheld and each day that ABC operates without a valid Floodplain Use Permit would constitute an additional day of violation of the Floodplain Regulations and this Board's Order.
2. The Chief Engineer was not arbitrary in finding that ABC is subject to penalties for operating in a floodplain without a valid Floodplain Use Permit and that penalties are appropriate. See A.R.S. § 48-3615. The BoHR upholds the Chief Engineer's Final Order for Periods #1 through #3 and modifies the penalties for Period #4. ABC is ordered to pay the following penalties: Period #1 no penalty; Period #2 – \$5,000.00; Period #3 – \$500.00 per day for 146 days totaling \$73,000.00; and Period #4 – \$1,000.00 per day from December 23, 2015, until the District determines to issue or deny a Floodplain Use Permit. The BoHR expects both the District and ABC to cooperate to arrive at the decision to issue or deny within a reasonable period of time.
3. At the time the District reaches the decision to issue or deny a Floodplain Use Permit, the District shall calculate the penalty then owing and serve a written demand upon ABC for the amount due. The service of the demand shall fix the amount of penalty under paragraph 2 of this order and no additional penalties shall accrue under that paragraph of this order. ABC shall pay the demand amount not later than 30 days after demand. The District shall not condition issuance of a Floodplain Use Permit on payment of the demand, but may seek judicial enforcement of the order and any other penalties authorized by law if ABC does not pay within the 30 days.
4. If the District denies the permit, penalties under paragraph 2 of this order shall cease, but the District may seek such other relief and penalties from the BoHR or the courts as justice may require should ABC continue operations.
5. The BoHR shall retain continuing jurisdiction over this matter until an appeal of this order is perfected or the later of permit issuance, penalty payment, or resolution of any permit appeal. If either party acts obstructively or with undue delay not in accordance with this order or if there is an allegation that the penalty demand is not in accordance

with this order, the aggrieved party may petition the BoHR for such relief as justice may require. Disputes over permitting requirements must be taken to the Floodplain Review Board or other appropriate hearing body. The BoHR's expectation is that no such petition will be necessary.

Done this day, July 1, 2016.

Richard J. Schauer
ACTING - Chairman of the Board of Hearing Review

Jolene Maiden
Attest: Jolene Maiden
Clerk of the Board of Hearing Review



Maricopa County Attorney

BILL MONTGOMERY

VIA EMAIL

July 7, 2016

Meghan H. Grabel, Esq.
Osborn Maldon, P.A.
2929 N. Central Avenue, 21st Floor
Phoenix, AZ 85012

Re: A.B.C. Sand & Rock Co., Inc.
Request for Permit of Short Duration

Dear Ms. Grabel:

Your letter of July 1, 2016, to William D. Wiley, Chief Engineer and General Manager of the Flood Control District of Maricopa County ("District") has been referred to me for response. Please recall that your office is representing A.B.C. Sand & Rock Co., Inc. in on-going litigation in which both the District and Mr. Wiley personally are named defendants. Therefore, your direct communication with Mr. Wiley is improper absent consent from counsel for the District and Mr. Wiley. Further recall that I have specifically instructed you in the past that you are not to have direct communications with Mr. Wiley, but that all correspondence are to be processed through this office.

You correctly state in your letter the Board of Hearing Review has determined that the payment of all outstanding fines and penalties by your client shall not be a prerequisite to the issuance of a permit to your client. Of course, the District will honor that decision.

As the caption of your letter correctly notes, a permit of short duration is a floodplain use permit, albeit for a specific period of time that is shorter than the general life of a floodplain use permit, which, under the current regulations, shall not exceed five (5) years. The Floodplain Regulations for Maricopa County, at Section 403 B.(1)(e) require that a floodplain use permit for the extraction of sand and gravel be tied to a plan of development. *See also*, Section 404B. (1), (2) and (5).

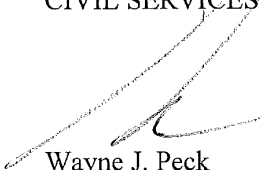
The Chief Engineer and General Manager has reviewed your letter and your client's request for a permit of short duration. The Chief Engineer and General Manager has determined that

Meghan H. Grabel, Esq.
July 7, 2016
Page 2

he will issue a permit of short duration as your client has requested once A.B.C. Sand & Rock Co., Inc. demonstrates that the on-going operation is substantially in compliance with the last plan of development to support a floodplain use permit which is the Plan of Development dated July 25, 2000 and mine report dated March 4, 2000 prepared by CMG Drainage Engineering, Inc. and approved under FA95-048 issued on May 14, 2001 including references to earlier permits, which are: the Plan of Development with revised plans dated December 21, 1995 and mine report revised July 17, 1995 and approved under FA95-48 issued on July 2, 1996 and on January 22, 1996 and; the revised Plan of Development and narrative report dated April 10, 1985 approved under FA85-05 issued on April 30, 1985.

Sincerely,

MARICOPA COUNTY ATTORNEY
CIVIL SERVICES DIVISION



Wayne J. Peck
Deputy County Attorney

WJP/mf

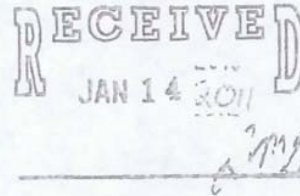
cc: William D. Wiley, P.E.

Gravel Resources of Arizona

P. O. Box 40730
Mesa, AZ 85274
Cell: 602-686-1422
E-mail: bendorris@msn.com

January 13, 2011

Jack M. Guzman
Mine Inspector, Enforcement Officer
Flood Control District of Maricopa County
Sand and Gravel Branch, Engineering Division
2801 W. Durango St
Phoenix, AZ 85009



RE: SG05-004 FUP

Mr. Guzman,

Enclosed is Gravel Resources of Arizona's application for the renewal of floodplain use permit number SG05-004. A misunderstanding resulted in our current permit to expire in July of 2010. Mr. Clint Glass has been working with MCFCD on an amendment to the permit for the past several weeks. Mr. Glass will now concentrate on the renewal of the application. We hope to have it completed by early March.

Authorization to mine is also enclosed with a check in the amount of \$6400.00.

If you need more information or would like to discuss our process, don't hesitate to call.

Sincerely


Ben Dorris



Flood Control District of Maricopa County

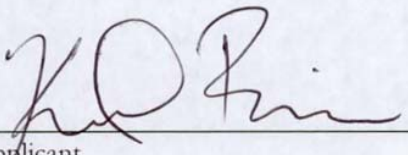
SAND AND GRAVEL FLOODPLAIN USE PERMIT

FLOODPLAIN USE PERMIT

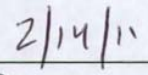
SG 05-004 Gravel Resources of Arizona

STIPULATIONS:

1. The Floodplain Use Permit shall expire on May 14, 2011 to allow you time to complete the permit renewal process. After this date you will have to apply for a new permit including paying the associated fees.
2. Development shall be in compliance with the Plan of Development & Stipulations of previous Floodplain Use Permit SG 05-004.



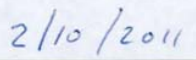
Applicant



Date



Floodplain Administrator



Date



Flood Control District of Maricopa County

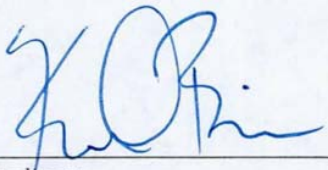
SAND AND GRAVEL FLOODPLAIN USE PERMIT

FLOODPLAIN USE PERMIT

SG 05-004 Gravel Resources of Arizona

STIPULATIONS:

1. The Floodplain Use Permit shall expire on September 14, 2011 to allow you time to complete the permit renewal process. The mine plan resubmittal (submittal #1) has been received by the District on March 29, 2011, and sent back to CMG Drainage engineering for revisions on April 14, 2011, and this short-term permit is to allow you time to complete the permit renewal process. After this date you will have to apply for a new permit including paying the associated fees.
2. Development shall be in compliance with the Plan of Development & Stipulations of previous Floodplain Use Permit SG 05-004.


Applicant

5/23/11
Date


Floodplain Administrator

5/19/2011
Date

**BEFORE THE MARICOPA COUNTY FLOOD CONTROL DISTRICT
FLOODPLAIN REVIEW BOARD**

In re A.B.C. Sand and Rock Company)	Docket FRB-2016-001
Applicant)	
)	FINAL ORDER AND
)	DECISION
_____)	

Before

Schaner, Vice Chair, Monger, Justice, Patel, and Dovalina, members, of the Floodplain Review Board ("FRB"). Chair Martin resigned before the conclusion of this matter. Member Larchick did not participate in this hearing or decision of this matter. Member Dovalina did not participate in the final decision.

Procedural History

On July 6, 2016, ABC Sand and Rock Company, Inc. ("ABC") appealed to the Floodplain Review Board ("FRB") requesting relief on two issues: (1) an interpretation of Section 403(B)(3) of the Floodplain Regulations for Maricopa County, which governs permits of short duration; and (2) the Maricopa County Flood Control District's ("District") denial of ABC's request for a permit of short duration. On August 3, 2016, ABC requested leave to supplement its July 6, 2016 appeal, which was granted on August 9, 2016. The FRB's review of ABC's appeal consisted of items in the record and any other items otherwise authorized by law. On August 1, 2016, and August 9, 2016, the FRB issued scheduling orders to assist in the conduct of the hearing. The matter was heard by the FRB on August 24, 2016.

Jurisdiction

ABC urges that the FRB has jurisdiction over its request for interpretation and the denial of its requests for permits of short duration pursuant to Floodplain Regulation 409(A). The District urges that no jurisdiction exists because ABC has not filed timely, ABC has not complied with A.R.S. § 48-3649, and that the District offered, and did not deny, the July 1, 2016 permit request for a permit of short duration, but with conditions that ABC judges unacceptable.

While there may be confusion over whether ABC's April 12, 2016 request is being appealed, in an exercise of caution, the FRB finds that it does not have jurisdiction over

appeal of the denial of the April 2016 request for a permit for short duration as such an appeal was not timely filed.

The FRB finds that it does have jurisdiction over the denial of the July 1, 2016 permit request, which was denied by the District in a letter dated July 7, 2016. In Section 409, the first dependent clause (“after substantively complying with A.R.S. § 48-3649”) relates to the first independent clause (“an applicant for a license may file an appeal seeking an interpretation of the regulations...”), but it does not apply to the second independent clause (“or an applicant may file an appeal challenging a denial of a permit”), which is separated from the dependent clause by a semicolon. MCFPR § 409(A). This interpretation makes sense: at the time of a permit denial, the District is required to provide a statement justifying “the denial or withdrawal with references to the statutes, ordinances, executive orders, substantive policy statements or delegation agreements on which the denial or withdrawal is based.” A.R.S. § 48-3645.J.I. Thus, the denial letter serves the same purpose as the written statement under the first clause and A.R.S. § 48-3649 and recourse back to the agency is unnecessary. If the District fails to provide a rationale, its failure to comply with A.R.S. § 48-3645 should not deprive the applicant of its rights.

On the District’s second argument, that the appeal should have been filed no later than August 6, 2016 rather than August 8, 2016, the FRB granted ABC’s August 3, 2016 request for leave to supplement its appeal on August 9, 2016. ABC filed the August 8, 2016 appeal as a precaution in the event the FRB did not grant ABC’s request for leave. Because ABC was permitted to supplement its appeal, ABC’s appeal of the denial of the July 1, 2016 request is timely. Regardless, where the due date falls on a Saturday, Sunday or state holiday, an appeal is timely filed if received on the next working day. *Cf.* Ariz. R. Civ. P. 6(a). Therefore, the August 8, 2016 appeal is subsumed in this order and is now moot.

On the District’s third argument, that it issued rather than denied a permit, albeit on conditions that ABC found unacceptable, the FRB holds that issuance of a permit at such variance from the request that the permit applicant refuses the permit constitutes a denial within the meaning of Section 409 and hence is within the FRB’s jurisdiction. The District’s interpretation would allow the District to indefinitely defer review by repeatedly issuing a permit known to be unacceptable to an applicant or including impossible conditions that an applicant could not accept. The FRB declines the invitation to deprive permit applicants of meaningful review.

The FRB also holds, based on the record before it, that the District’s failure to respond to ABC’s May 11, 2016 request for a permit of short duration, which is now beyond the time provided for in the licensing time frame rule, may be construed as a denial. *See, e.g.,* MCFPR § 404(D)(1) & Time Frames. The parties do not seriously

dispute that the facts of the two appeals are essentially identical. The FRB holds that it has jurisdiction over this appeal as well.

Because the FRB determines that it has jurisdiction over the July 1, 2016 permit application and July 7, 2016 permit denial and over the constructive denial of the May 11, 2016 permit application, it does not need to determine whether it also has separate jurisdiction under Section 409 of the request for interpretation.

Proper Interpretation of MCFPR § 403(B)(3)

Floodplain Regulation 403(B)(3) provides:

For extraction of sand and gravel or other materials the Floodplain Administrator may issue a permit of short duration for an applicant participation in an ongoing application process.

MCFPR § 403(B)(3). ABC seeks an interpretation that would grant a permit of short duration once the application is declared administratively complete. The District argues that issuance of the permit is at the Floodplain Administrator's "discretion" and is essentially unreviewable. The District goes on to state that its interpretation of Section 403(B)(3) allows it to issue a permit of short duration only to facilities that are existing and that apply for a permit renewal prior to the expiration date of the prior permit.

In reviewing a regulation, the FRB will interpret the plain language, giving consideration to the intent underlying the regulation. *Milner v. Colonial Trust Co.*, 198 Ariz. 24, 26 (Cl. App. 2000). The FRB will also give deference to the District's interpretation of the regulation where that interpretation is reasonable and not a *post hoc* rationalization. *Ponte v. Real*, 471 U.S. 491, 508 (1985); *Pima County v. Pima County Law Enf't Merit Sys. Council*, 211 Ariz. 224, 228 (2005). With this standard in mind, the FRB holds as follows:

First, the District's practice of issuing a permit of short duration to an applicant that submits a permit renewal prior to the expiration of the prior permit is permissible and is consistent with state policy as expressed in A.R.S. § 41-1064.B ("When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency..."). Issuance of a permit of short duration to an applicant for an entirely new facility that is not of a continuing nature generally would not be appropriate.

Second, even granting deference to the District as the administrator of the Floodplain Regulations, the FRB disagrees that its proffered restriction of permits of short duration to only those applicants that submit a request prior to permit expiration can

be squared with the language of Section 403(B)(3), which states that the Floodplain Administrator “may issue a permit of short duration for an applicant participat[ing] in an ongoing application process.” Nothing in this language suggests that the ongoing application process must start prior to the expiration of the prior permit. Given the harshness of Section 401(D), which requires operations to cease if a renewal application is not submitted before the expiration date, we decline to read Section 403(B)(3) so narrowly as to never allow relief where a renewal date is missed, particularly given that many third parties such as the operator’s employees and customers, also may suffer from an extended shutdown while permit formalities are completed. *See* MCFPR §§ 401(D) & 403(B)(3). The District may always craft conditions to avoid abuse.

Third, as both the District and ABC have recognized, a permit of short duration is still a Floodplain Use Permit. *See, e.g.,* MCFPR §§ 403 & 404. The FRB will defer to the District’s basic position that a permit of short duration should not be issued unless the application demonstrates that it is substantively “approvable” from a health and safety perspective or substantively complies with an approved plan of development from a health and safety perspective. This interpretation is permissible because it ensures that the permit of short duration meets the substantive requirements for any Floodplain Use Permit. The FRB also believes that the District may, in the exercise of its enforcement discretion, issue a permit of short duration containing conditions that will expeditiously return an applicant “participating” in an ongoing application process to full compliance with the Floodplain Regulations.

Fourth, section 403(B)(3) authorizes the Floodplain Administrator to issue a permit of short duration when the applicant is “participat[ing]” in an “ongoing application process.” Both “participating” and “ongoing application process” suggest that the Floodplain Administrator is not required to issue a permit to an applicant who is determined not to be “participating” in an ongoing application process. In addition, it is critical that the Board of Directors specified that the Floodplain Administrator “may” rather than “shall” issue a permit of short duration. The text thus indicates that the Floodplain Administrator has discretion whether to issue a permit of short duration. Thus, the Floodplain Administrator could decline to issue a permit of short duration if the application was a sham or had failed to respond meaningfully to requests for information.

Fifth, while the Floodplain Administrator has discretion whether to issue a permit of short duration, that discretion is not unfettered. It must not be exercised arbitrarily, capriciously, contrary to law, in an abuse of discretion or without substantial evidence. This is a high standard for challenging a denial of a permit of short duration. The FRB will grant appropriate deference to the technical judgment of the District’s staff about whether a permit application is “approvable” or complies with an approved plan of development. The exercise of enforcement discretion to extend a permit of short duration to a facility that does not yet have an approvable application or is not complying with an approved plan of development, but which the Floodplain Administrator believes will

facilitate a prompt return to compliance, is essentially unreviewable for all but the most egregious abuse.

Appeal of May 11, 2016 and July 1, 2016 Permit Denials

The FRB holds that the District's failure to respond to the May 11, 2016 application, which has gone beyond the licensing time frame, is a constructive denial. Similarly, the FRB holds that, under the facts and circumstances of this particular application, that the District's July 7, 2016 letter refusing to issue a permit of short duration to ABC, but holding out the offer of a permit of short duration should ABC agree to comply with a plan of development with which it is presently not in compliance, constitutes a constructive denial of the July 1, 2016 application. Pursuant to law, the District owes a written justification of its denial referencing the basis for its denials of both permits. A.R.S. §§ 48-3642(5)(a), 48-3645(J)(1).

The FRB holds that the Staff Report, which attached exhibits supporting the District's decision not to exercise discretion because of ABC's pattern of noncompliance, does not provide an adequate basis for the FRB to act upon ABC's appeal of the permit denials. In addition to the Staff Report, the District must provide the record of the appealed permit(s) to the FRB. Because of the intermixed nature of the permit of short duration, which is available only "as part of an ongoing permit application" process, see MCFPR § 403(B)(3), the relevant record includes: the original Floodplain Use Permit application (i.e., the 5 year permit application), the request(s) for the permit of short duration, all correspondence on either application upon which the District is relying, any other material that the District relied upon in granting or denying the application, and the letter of denial. The applicant may challenge omission of documents from this record.

In the absence of the record, the FRB finds that the Staff Report and the brief presentations of ABC's witness, David Williams, and District staff member Tony Beuche, do not provide an adequate basis for determining whether the District acted arbitrarily and capriciously, contrary to law, or abused its discretion. This holding is without prejudice to the District's ability to deny, in the exercise of its discretion, ABC's application for either of the two permits of short duration or the underlying permit application that supports them, but the District must do so based upon the interpretation set forth in this Order and upon a proper record.

Observations

The FRB offers the following observations in the hope that they will help advance resolution of this dispute, which has been ongoing since approximately 2011 and spawned multiple appeals. First, the parties clearly have deep mutual suspicions of each other's motives and ultimate objectives. These need to be set aside. Second, the parties need to meet to resolve their technical differences. If, in light of the litigation, there are

concerns, either multiple people from each side can attend (so that there are witnesses to what is said and agreed) or a neutral mediator could facilitate resolution. Third, the resolution should be forward looking, if possible, with conditions that expeditiously move ABC into compliance with the Floodplain Regulations without seeking to go back to an old plan of development that is not practicable. Fourth, if such conditions can be devised, the District and ABC should evaluate whether there are conditions that allow limited mining during the permit of short duration where such mining does no harm and other conditions require amelioration of existing noncompliant areas. Fifth, the FRB is inclined to agree with the District that no further overexcavation should be authorized by the permit of short duration. Sixth, on the model dispute, ABC and the District should investigate whether the existing model provides sufficient assurance to allow a permit of short duration while the District-requested model is set up, run and evaluated.

The FRB wishes to be clear: the parties need to bring this dispute to an expeditious resolution. That resolution may be a permit of short duration, a final Floodplain Use Permit, or a permit denial, in which case the FRB expects the points of disagreement to be clearly indicated in the record so that the FRB, Board of Directors, or superior court, as the case may be, can resolve the disagreement. What is not acceptable is for the current state of affairs to continue indefinitely.

Findings of Fact:

The Floodplain Review Board has reviewed the administrative record including ABC's July 1 and August 3 appeals, the District's Staff Report, presentations from both parties including testimony by engineers representing the interests of both parties, and finds the following facts:

1. The FRB finds both parties to be credible, although equal weight is not given to all evidence.
2. ABC Sand and Rock Company, Inc. is an Arizona Corporation. ABC operates a sand and gravel mine on properties owned by Rare Earth, LLC, an Arizona Limited Liability Company and by the Arizona State Land Department. The sand and gravel mine operated by ABC is located in unincorporated Maricopa County, within the jurisdiction of the District.
3. The Board of Directors of the District has authorized the Chief Engineer and General Manager to provide the written authorization necessary to allow development within a floodplain. Maricopa County Floodplain Regulations, 201. The procedure for obtaining the required written authorization is by way of a Floodplain Use Permit ("FUP"). See MCFPR § 401(A). Sand and gravel mine FUP application requirements are outlined in Section 403(B), including permits of short duration under Section 403(B)(3).

4. Since July 16, 2012, ABC has operated a sand and gravel mine in the floodplain of the Agua Fria River and has neither obtained nor possessed a validly issued Floodplain Use Permit for these operations. *See Staff Report.*
5. The District issued ABC a permit to operate a sand and gravel mine for a short duration on March 15, 2012 that expired on July 16, 2012. *See Staff Report.* ABC's permit status between July 16, 2012 and January 28, 2015 was unclear due to litigation between the parties. On January 28, 2015, the Maricopa County Flood Control District Board of Hearing Review ("BoHR") found ABC had been operating without a permit. *See Staff Report Exhibit 2.* The January 28, 2015 Order was upheld by the Maricopa County Superior Court and is now being appealed to the Court of Appeals for the State of Arizona. *See ABC Sand and Rock v. Maricopa County*, LC2015-000096 (Superior Court, Mar. 18, 2016), *ABC Sand and Rock v. Maricopa County*, CV16-0294 (Ariz. Ct. App., filed May 20, 2016). The BoHR again found that ABC was operating without a permit on July 1, 2016. The July 1, 2016 Order is now being appealed to the Maricopa County Superior Court. *See ABC Sand and Rock v. Maricopa County*, LC2016-000324 (Superior Court, filed Aug. 4, 2016).
6. ABC filed its current application for a FUP on May 1, 2015, and the application was deemed administratively completed on June 16, 2015. Requests for corrections and responses between the District and ABC have occurred on multiple occasions with the most recent Request for Corrections being sent by the District on August 10, 2016. *See Staff Report Exhibit 5.* ABC stated during the hearing that there are two items still to resolve. The District disagrees with this count. *See Appeal Hearing, August 24, 2016 ("Appeal Hearing").*
7. In the process of applying for a FUP, ABC requested permits of short duration from the District on multiple occasions, including April 12, 2016, May 11, 2016, and July 1, 2016. *See ABC July 6, 2016 Appeal ("ABC Appeal").*
8. The District formally denied the April 12, 2016 request on April 15, 2016. *See ABC Appeal.* This denial is not before the FRB.
9. The District did not provide a response to the May 11, 2016 request, which has now exceeded the 90 days permitted by the licensing timeframes. *See ABC Appeal; MCFPR § 404(1)(1) & Licensing Timeframes.*
10. The District responded to the July 1, 2016 request on July 7, 2016 with an offer for a permit of short duration with terms unacceptable to ABC. *See ABC August 3 Request to Supplement Appeal ("Supplemental Appeal").*

11. ABC appealed the denials of the May 11, 2016 and July 1, 2016 requests to the FRB on July 1, 2016 and August 3, 2016. *See ABC Appeal and Supplemental Appeal.* The parties agree that the issues between the two appeals are essentially identical. *See Appeal Hearing.*
12. The District has provided evidence that ABC has a history of recalcitrance in permitting, that ABC is currently subject to an enforcement action for operating without a permit, and that ABC is not currently operating within the bounds of an approved plan of development. *See Staff Report and Appeal Hearing.*
13. ABC has provided evidence that it is currently attempting to obtain a FUP and is actively participating in the application process. *See ABC Appeal, Supplemental Appeal, Staff Report, and Appeal Hearing.*
14. Because the full record of the underlying permit application is not before the FRB, there is insufficient basis for the FRB to determine whether a permit of short duration should be issued.

Conclusions of Law:

Based upon the foregoing Findings of Fact and analysis, the FRB concludes as follows:

1. The FRB reviews this matter pursuant to A.R.S. § 48-3612, Sections 203.D. and 409 of the Floodplain Regulations, and the Review Board Procedures, Board of Directors Resolution No. FCD 84-7, Aug. 6, 1984, revised Nov. 27, 1985 (“Review Board Procedures”).
2. The FRB has jurisdiction to hear this matter. ABC’s appeal was filed timely and is within the jurisdiction of the FRB granted in Section 409. *See MCFPR § 409(B); Review Board Procedures, Applications; see also discussion, supra, on Jurisdiction.*
3. The District’s lack of response to ABC’s May 11, 2016 request for a permit of short duration, once the relevant licensing time frame is exceeded, is a constructive denial of ABC’s request. *See MCFPR § 404(D)(1) and discussion, supra, on Jurisdiction.*
4. The District’s response to ABC’s July 1, 2016 request with an offer for a permit of short duration with revised terms unacceptable to ABC is a constructive denial of ABC’s request. *See discussion, supra, on Jurisdiction.*

5. The FRB will interpret the plain language, giving consideration to the intent underlying the regulation. *Milner v. Colonial Trust Co.*, 198 Ariz. 24, 26 (Ct. App. 2000). The FRB will also give deference to the District's interpretation of the regulation where that interpretation is reasonable and not a *post hoc* rationalization. *Ponte v. Real*, 471 U.S. 491, 508 (1985); *Pima County v. Pima County Law Enf't Merit Sys. Council*, 211 Ariz. 224, 228 (2005).
6. The FRB's interpretation of the proper application of MCFPR § 403(B)(3) is set forth on pages 3 to 4 of this order.
7. The District must process an application according to its licensing timeframes. A.R.S. § 48-3645(A); MCFPR § 404(D)(1) & Licensing Timeframes. A request for a permit of short duration is subject to the licensing timeframes because it is not "issued within seven working days after receipt of the initial application or a permit that expires within twenty-one working days after issuance." A.R.S. § 48-3645(M)(1).
8. In denying an application, the District owes a written justification of its denial referencing the basis for its denials. A.R.S. §§ 48-3642(5)(a), 48-3645(J)(1).
9. In the absence of a proper written denial, remand to the agency to explain the basis for its decision is required. *Caldwell v. Arizona State Bd. of Dental Examiners*, 137 Ariz. 396, 401 (Ct. App. 1983). The FRB is not in a position to rule on the District's decisions regarding ABC's requests for permits of short duration unless provided with an adequate record.

Order of the Floodplain Review Board:

Based upon the foregoing analysis, Findings of Fact and Conclusions of Law, the Floodplain Review Board orders as follows:

1. The District's constructive denials of ABC's May 11, 2016 and July 1, 2016 requests for a permit of short duration are consolidated and remanded to the District for further action in accordance with this opinion and Order. The District shall either grant or deny the requested permit of short duration as expeditiously as possible, but no later than 60 days of the date of this order.
2. The District shall review ABC's requests for a permit of short duration in light of the interpretation of Section 403(B)(3) set forth in this Order.
3. Notwithstanding paragraph 1 above, if the District determines, after review of the interpretation set forth in this Order, that in the exercise of its discretion it will

deny the permit of short duration because of ABC's past recalcitrance or because it must first come into compliance with an existing approved plan of development, the District shall make such determination within 10 business days of the date of this Order.

4. Any District decision to deny shall be accompanied by a written letter meeting the requirements of A.R.S. § 48-3645.J.1.
5. ABC shall not file any additional requests for a permit of short duration with the District until such time as the District acts upon the pending consolidated request, except that should ABC and the District reach agreement upon any of the remaining technical issues, ABC may request that the District consider such resolution in its decision whether to grant or deny the permit of short duration, provided that such resolution is reached at least 10 business days prior to the date that the District must issue its grant or denial under paragraph 1.
6. The District shall email a copy of the letter granting or denying the request for a permit of short duration upon the FRB's clerk and counsel.
7. If the District issues a regular Floodplain Use Permit prior to the time the permit for short duration must be granted or denied under paragraph 1 above, the District's obligations under this Order are mooted except for the interpretation in paragraph 2, which shall remain in effect. *Cf.* MCFPR § 409(C).
8. Nothing in this Order shall affect ABC's liability for violations of the Floodplain Regulations, if any.

So Ordered.

Dated this 1st day of September, 2016


Chairman, Floodplain Review Board

Attest:


Clerk, Floodplain Review Board

Copies mailed and emailed this 1st day of September, 2016 to:

Meghan H. Grabel
Colin F. Campbell
Jana L. Sutton
Osborn Maledon, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, AZ 85012
mgrabel@omlaw.com
ccampbell@omlaw.com
jsutton@omlaw.com
Counsel for ABC Sand and Rock Company, Inc.

Stephen W. Tully
Hinshaw & Culbertson LLP
2375 E. Camelback Road, Suite 750
Phoenix, AZ 85016
stully@hinshawlaw.com

Wayne Peck
Deputy County Attorney
Maricopa County Flood Control District
2809 W. Durango Street
Phoenix, AZ 85009
peckw@mcao.maricopa.gov
Counsel for Maricopa County Flood Control District

By: s/ Trevor Burggraff.....

Message

From: Anthony Beuche - FCDX [/O=MARICOPA COUNTY/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ANTHONYBEUCHE]
Sent: 3/10/2015 2:16:24 PM
To: Ed Raleigh - FCDX [ear@mail.maricopa.gov]; Scott Vogel - FCDX [csv@mail.maricopa.gov]; Jeff Riddle - FCDX [jrr@mail.maricopa.gov]
Subject: RE: SG15-003 ABC Sand & Rock Plant 1 - Permit of Short Duration
Attachments: DRAFT 20150309 ver2 SG15-003 Permit of Short Duration.docx

All,

Please find attached hereto for your review a draft PSD revised as follows:

- Duration limited to 30 days;
- Development Condition No. 2 modified to include the verbiage from FA95-048A regarding the applicable mining plan.

All are in agreement that the PSD will be issued only upon receipt of an application for a new permit. Also, I am aware that the footer on page 2 has crept onto page 3.

Thanks,

Tony

From: Anthony Beuche - FCDX
Sent: Tuesday, March 10, 2015 6:54 AM
To: Ed Raleigh - FCDX
Cc: Scott Vogel - FCDX; Jeff Riddle - FCDX
Subject: SG15-003 ABC Sand & Rock Plant 1 - Permit of Short Duration

Ed,

A draft of the permit of short duration for the ABC Aqua Fria River mine is being circulated this morning for review by Jeff and Scott. Please review the attached draft and respond with any comments that you may have.

As we discussed, the PSD references the three previously-approved Plans of Development identified in the FA95-048A (last permit allowed to expire).

Thanks,

Tony



Flood Control District of Maricopa County

2801 West Durango Street, Phoenix AZ

85009 Office 602-506-1501 Fax 602-506-4601

Sand and Gravel Floodplain Use Permit: **SG15-003**

Permit Expiration Date: 06/09/201504/10/2015

Mine Name and Location: A.B.C. Plant 1 - Agua Fria River north of Camelback Rd.

Applicant: A.B.C. Sand & Rock, Inc.
5401 N. 119th Ave.
Glendale, AZ 85307

Documentation Required

AZ State Land Dept Lease: **Yes**

Warning and Disclaimer: **Yes**

Property Owner Acknowledgement: **Yes**

Floodplain Information

Flood Zone: AE, Floodway

Floodplain: Agua Fria

Permit Conditions

Standard

1. The permittee agrees to comply with State water quality standards adopted by the State Water Quality Control Council (401) as administered by the Arizona Department of Environmental Quality before beginning excavation, if necessary. Permittee agrees to obtain a 404 permit from the United States Army Corps of Engineers, before beginning excavation, if necessary.
2. The issuance of a floodplain use permit does not negate any requirements to obtain all permits from those governmental agencies from which approval is required by Federal or State law.
3. The operator of an active sand and gravel extraction operation permitted under the Floodplain Regulations for Maricopa County shall maintain a copy on site of the permit along with an approved Plan of Development bearing the approval of the Floodplain Administrator. Failure to maintain a copy on site of the approved Floodplain Use Permit and Plan of Development shall be a violation of these Regulations, subject to revocation of the Floodplain Use Permit pursuant to Section 404 and a fine pursuant to Section 708 of these Regulations.
4. The permittee shall be responsible for being informed of any flooding that may be imminent, and for removing any portable equipment and structures.
5. The Plan of Development is subject to post-flood review and possible modification, if necessary, due to flood related changes in river morphology.
6. Any request for a major or minor change to an approved Floodplain Use Permit for the extraction of sand and gravel or other materials including an approved Plan of Development shall require an application to amend the permit.
7. The permittee shall notify the Flood Control District of Maricopa County (District) of any change in ownership of any permitted parcel and/or change of operator within 30 days.

FCD Inits: _____

Permittee Inits: _____



Flood Control District of Maricopa County

2801 West Durango Street, Phoenix AZ

85009 Office 602-506-1501 Fax 602-506-4601

Sand and Gravel Floodplain Use Permit: **SG15-003**

8. The permittee agrees to make an application to renew the permit {at least six (6) months is recommended} prior to the permit expiration date and will be subject to current Floodplain Regulations governing renewals.
9. If the permittee has not completed the closure of the site and decides not to process a renewal of the Floodplain Use Permit for mining; the permittee will submit a Floodplain Use Permit Application for closure in accordance with the approved closure plan in this permit or present an alternative plan that is acceptable to the District.
10. The permittee agrees to allow access to the District mine inspector(s) to the entire site at least semi- annually.
11. The permittee agrees to establish the property corners and to establish and maintain for the duration of the mining operation a temporary benchmark (TBM) certified by a licensed surveyor. This TBM shall be made available to District staff for each semi-annual inspection. In addition, the permittee will provide control markers as shown in the Plan of Development.
12. Approval of this Floodplain Use Permit does not convey any property rights, either real estate or material, and is not to be construed as consent, approval or authorization to cause any injury to property or invasion of rights or infringement of any Federal, State, or other local laws, rules or regulations nor does it obviate the requirement to obtain other permits. Furthermore, the plan review by the District has been solely for the purpose of determining that your application conforms with the written requirements of the Floodplain Regulations for Maricopa County and is not to be taken as a warranty that structural plans and specifications meet engineering requirements or standards or are free from failure to perform as described or designed in the application, reports or plans, as submitted. Approval does not imply that the drainage concept for this site has been reviewed or approved by the District.
13. Prior to commencement of operations, the applicant shall provide a letter to the Floodplain Administrator that certifies that all other required state and federal permits have been obtained. (Floodplain Regulations Section 201.B.1.b).
14. Development shall be in compliance with the Floodplain Regulations for Maricopa County.

Development

1. This Floodplain Use Permit of short duration is issued by the District to an applicant participating in an ongoing application process to obtain a new Floodplain Use Permit for the extraction of sand and gravel and other materials. This permit of short duration is for sand and gravel operations on Assessor's parcel number 501-63-004 and the adjacent State Land Parcel under Common Variety Minerals Leases 04-106137 and 04-113153 with A.B.C. Sand & Rock, Inc. The duration of this permit of short duration shall be deducted from the duration of the new permit.
2. Development shall be in strict compliance with the mining plan as issued in the May 2001 Floodplain Use Permit with ABC Sand and Rock Company, Inc. including references to earlier permits. Development shall be in compliance with Applicable are the Plans of Development approved with the issuance of three previous Floodplain Use Permits for sand and gravel as follows: The Plan of Development dated July 25, 2000 and mine report dated March 4, 2000 prepared by CMG Drainage Engineering, Inc. and approved under FA95-048 issued on May 14, 2001; the Plan of Development with revised plans dated December 21, 1995 and mine report revised July 17, 1995 and approved under FA95-48 issued on July 2, 1996 and on January 22, 1996 and; the revised Plan of Development and narrative report dated April 10, 1985 approved under FA85-05 issued on April 30, 1985.



Flood Control District of Maricopa County

2801 West Durango Street, Phoenix AZ

85009 Office 602-506-1501 Fax 602-506-4601

Sand and Gravel Floodplain Use Permit: SG15-003

FCD Inits: _____

Permittee Inits: _____

3. This permit of short duration expires on ~~June 9, 2015~~ April 10, 2015.

Permittee:

Printed Name

Signature

Date

Floodplain Administrator:

C. Scott Vogel, PE

FOR REVIEW ONLY

Signature

Date

Message

From: John Hathaway - FCDX [/O=MARICOPA COUNTY/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=JOHNHATHAWAY]
Sent: 3/12/2015 2:15:49 PM
To: Ed Raleigh - FCDX [ear@mail.maricopa.gov]
Subject: FW: PLEASE VOTE NO ON HOUSE BILL 2559 (S/E: Recreational Corridor; Channelization Districts)

I already forwarded to Jen.

From: Steve Trussell [mailto:Steve@azrockproducts.org]
Sent: Thursday, March 12, 2015 2:16 PM
To: John Hathaway - FCDX
Cc: William Wiley - FCDX
Subject: FW: PLEASE VOTE NO ON HOUSE BILL 2559 (S/E: Recreational Corridor; Channelization Districts)

Wow!

From: Russell Bowers [mailto:RBowers@azleg.gov]
Sent: Thursday, March 12, 2015 2:11 PM
To: Steve Trussell
Subject: FW: PLEASE VOTE NO ON HOUSE BILL 2559 (S/E: Recreational Corridor; Channelization Districts)

Steve – here is the letter from Waltemath.

Rusty

From: ABC Sand & Rock [mailto:abcsandrock@cox.net]
Sent: Thursday, March 12, 2015 12:54 PM
To: jackerly@azleg.gov; John Allen; Lela Alston; Richard Andrade; Brenda Barton; Jennifer D. Benally; Reginald Bolding; Sonny Borrelli; Russell Bowers; Paul Boyer; Kate Brophy McGee; Noel Campbell; Mark Cardenas; Heather Carter; Ken Clark; Regina Cobb; Doug Coleman; Diego Espinoza; Karen Fann; Eddie Farnsworth; Charlene Fernandez; Mark Finchem; Randy Friese; Rosanna Gabaldon; Sally Ann Gonzales; David Gowan; Rick Gray
Subject: PLEASE VOTE NO ON HOUSE BILL 2559 (S/E: Recreational Corridor; Channelization Districts)

My name is Dave Waltemath, and I own ABC Sand and Rock. I urge you to vote no on House Bill 2559 (s/e: recreational corridor; channelization districts).

I operate a sand and gravel plant at 119th Ave. and Camelback, where the Agua Fria and New Rivers come together. I have operated there since 1985. We own 40 acres, and lease 200 acres from the Arizona State land apartment and 80 acres from the Bureau of land management.

I ask you to vote no on House Bill 2559 because this special taxing district that this bill would permit to continue in existence has the potential to assess taxes against my property, with no limits spelled out in the statute. And with that comes the power to sell property at auction if the owner doesn't pay the assessment. This special taxing district also has

the power of eminent domain.

This statute compels me to be part of the special district, and potentially pay large tax assessments, even if I do not want to join the district, if the owners of 51% of the real property in the proposed district want to form the district.

I understand that the statute does not create a new special taxing district, but allows one that is supposed to expire in July to continue. Nevertheless, I feel as if we have been fortunate that no one has sought to use the statute. I would prefer that the statute cease to exist, rather than take my chances. I may not be as fortunate next time, and someone may seek to pull me in on a special taxing district that I have no interest in, but I will nonetheless have to pay taxes towards.

The proponents of this bill speak of the economic benefits that it has the potential to confer on property owners. However, if there were truly the potential for an economic Bonanza by developing this area in such a manner, the marketplace would already do that anyway. If there are economic benefits to be had, we don't need to create yet another level of government, with taxing and eminent domain power, to accomplish that.

I see very little upside in this bill. The downsides are potentially large assessments that will drive both large and small companies, that are currently creating jobs, tax revenue, and positive economic activity, away from the area.

That is why I ask that you vote no on House Bill 2559.

Thank you,

Dave Waltemath

Message

From: Michelle De Blasi [mdeblasi@gblaw.com]
Sent: 5/20/2015 5:20:48 PM
To: Ed Raleigh - FCDX [ear@mail.maricopa.gov]
CC: Wayne Peck [peckw@mcao.maricopa.gov]
Subject: Summary of issues

Ed,

Thanks for speaking with me today about moving forward on the ABC permit. I've included a summary of our conversation below:

1. FCD will send me an administrative completeness letter with a determination that either the application is complete, or outlining issues that need to be addressed. Ed indicated the letter would be sent sometime today.
2. Once the administrative completeness issues are resolved, we are willing to meet to discuss the substantive issues before receiving FCD's substantive review comments. Scott Vogel will send me some proposed dates for a meeting in early June.
3. Ed will speak with Bill Wiley to discuss how to handle the cease and desist order. We are requesting that the NOV be rescinded to allow us to move through the substantive permitting issues as quickly as possible.

We look forward to working with you to resolve these issues as expeditiously as possible.

Thanks,
Michelle

Michelle De Blasi
602.256.4419 Direct | mdeblasi@gblaw.com |

2 North Central Ave., 15th Floor | Phoenix, AZ 85004
602.256.0566 | 602.256.4475 Fax | www.gblaw.com

Message

From: Anthony Beuché - FCDX [/O=MARICOPA COUNTY/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ANTHONYBEUCHE]
Sent: 9/30/2015 2:26:35 PM
To: Ed Raleigh - FCDX [ear@mail.maricopa.gov]
Subject: RE: FI 2015-041 ABC Sand & Rock
Attachments: RE: Summary of June 16 meeting

Ed,

The meeting with Joy, Michele, David Waltemath, Tom Manos and Scott Vogel and was held on 06/16/2015. The attached email includes Michele's summary of the meeting. I understand that both Bill and Joy reviewed and accepted the notes.

The letter from ASLD in response to the NOV is [here](#).

Thanks,

Tony

From: Ed Raleigh - FCDX
Sent: Wednesday, September 30, 2015 2:14 PM
To: Anthony Beuché - FCDX
Subject: RE: FI 2015-041 ABC Sand & Rock

Thanks Tony. Could you research a couple items?

When was your meeting with Joy Rich and Michelle DeBlasi on the 10th floor downtown?

Did we receive a letter from the State Land Department regarding the N.O.V.?

From: Anthony Beuché - FCDX
Sent: Wednesday, September 30, 2015 1:55 PM
To: Ed Raleigh - FCDX
Cc: Scott Vogel - FCDX; Jeff Riddle - FCDX
Subject: FI 2015-041 ABC Sand & Rock

Ed,

Please follow the link, below, for a draft of the requested status memo. FCD staff have observed active operations at the facility on 25 occasions between March 16 and the present. Please let me know if you need additional information.

<\\fcdseng01\engshare01\Sand & Gravel\S&G Violations\FI 2015-041\Correspondence\20150930 DRAFT FI 2015-041 Status.docx>

Thanks,

Tony

Message

From: Joy Rich - PLANDEVX [/O=MARICOPA COUNTY/OU=ELECTRONIC BUSINESS CENTER/CN=RECIPIENTS/CN=JRICH]
Sent: 6/18/2015 10:15:48 AM
To: Michelle De Blasi [mdeblasi@gblaw.com]; Tom Manos - CAOX [TManos@mail.maricopa.gov]; Anthony Beuché - FCDX [TonyBeuche@mail.maricopa.gov]; Scott Vogel - FCDX [csv@mail.maricopa.gov]
Subject: RE: Summary of June 16 meeting

Hi Michelle,

Sorry for the delayed response. We agree that you have accurately summarized our meeting.

Thank you,

Joy

From: Michelle De Blasi [mailto:mdeblasi@gblaw.com]
Sent: Wednesday, June 17, 2015 10:42 AM
To: Tom Manos - CAOX; Joy Rich - PLANDEVX; Anthony Beuché - FCDX; Scott Vogel - FCDX
Subject: Summary of June 16 meeting

Tom, Joy, Scott and Tony,

On behalf of ABC Sand and Rock Company, I would like to thank everyone for their time yesterday to discuss the permitting review process for ABC's sand and gravel permit application submitted on May 1, 2015. As we discussed in the meeting, we would like to memorialize our discussion to help ensure everyone remains on the same page.

ABC reiterated the need to follow the regulatory process for the permit application set forth in ARS 48-3641, et seq. The parties agreed to follow this regulatory process.

ABC discussed the recent permit history and correspondence indicating the County's assurances to forebear enforcement action once the permit application was submitted. The parties agreed to work in good faith to diligently proceed through the substantive review process. ABC provided the documents requested by FCD for administrative completeness. The parties agreed the substantive review period begins on June 16, 2015.

FCD committed to provide its letter outlining any substantive review issues per regulatory requirements within 15 working days. ABC will then provide a written response to address the issues. Since the parties are moving diligently to process the permit application, a temporary permit is not necessary and will not be pursued. Further, the parties agreed that a hearing for the Notice of Violation would not be set at this time to allow the parties to focus their attention on the permit application. Any inspections to be performed will follow the regulatory process set forth in ARS 48-3643.

The parties agreed that a single point of contact would be beneficial to maintaining open communication between the parties. For FCD, Tony Beuché will be the main point of contact for technical issues, and Wayne Peck will be the point of contact for legal issues. For ABC, I will be the main point of contact for both technical and legal issues.

Please let me know if you do not agree with the summary provided above. We look forward to receiving the substantive review letter from FCD.

Best regards,

Michelle

Michelle De Blasi

602.256.4419 Direct | mdeblasi@qblaw.com | [Profile](#)

GAMMAGE & BURNHAM

World Class Counsel. Arizona Roots.

2 North Central Ave., 15th Floor | Phoenix, AZ 85004

602.256.0566 | 602.256.4475 Fax | www.qblaw.com

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Meghan H. Grabel

mgrabel@omlaw.com

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21st Floor
Phoenix, Arizona 85012

Direct Line 602.640.9399

Telephone 602.640.9000

Facsimile 602.640.9050
omlaw.com

December 1, 2016

Via Hand Delivery

Tony Beuché, P.E., Manager
Floodplain Use Permits for Sand and Gravel
Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, AZ 85009

Re: A.B.C. Sand & Rock Co., Inc.
Sand and Gravel FUP No. SG15-003

Dear Mr. Beauche:

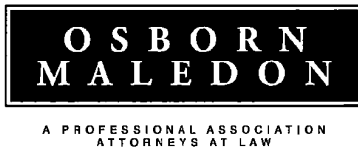
Enclosed, please find both a hard and CD copy of the revised Plan of Development supporting ABC's May 1, 2015 Floodplain Use Permit Application. ABC's response to the District's 8/10/16 requests for correction is being sent by email in an electronic version.

The attached plan of development proposes to install protection features well beyond what FCDMC required of A. B. C. Sand & Rock in its last set of comments. Our engineers have assured us that this plan greatly improves conditions on the Agua Fria River from what they were in 2009. Therefore, pursuant to the Floodplain Regulations for Maricopa County Section 403(B)(3), ABC requests that it immediately be issued a permit of short duration to apply for the duration of the permit application process.

Sincerely,

Meghan H. Grabel

MGH:pdp
Enclosures
6911689



Meghan H. Grabel

mgrabel@omlaw.com

2929 North Central Avenue
21st Floor
Phoenix, Arizona 85012

Direct Line 602.640.9399

Telephone 602.640.9000
Facsimile 602.640.9050
omlaw.com

February 28, 2017

Via Hand Delivery

Tony Beuché, P.E., Manager
Floodplain Use Permits for Sand and Gravel
Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, AZ 85009

Re: A.B.C. Sand & Rock Co., Inc.
Sand and Gravel FUP No. SG15-003

Dear Mr. Beauche:

Enclosed, please find both a hard and CD copy of the revised Plan of Development supporting ABC's May 1, 2015 Floodplain Use Permit Application. ABC's response to the District's 12/14/16 requests for correction is being sent by email in an electronic version.

The attached plan of development addresses the items raised by the District in its December 14, 2016 requests for corrections and proposes to install yet additional protection features at the mine. There can be no doubt that this plan has been designed to secure the District's approval of ABC's permit application. Therefore, pursuant to the Floodplain Regulations for Maricopa County Section 403(B)(3), ABC requests that it immediately be issued a permit of short duration to apply for the duration of the permit application process.

Sincerely,

Meghan H. Grabel

MGH:pdp
Enclosures
7041556



Flood Control District of Maricopa County

2801 West Durango Street, Phoenix AZ 85009

Office 602-506-1501 Fax 602-506-4601

Sand and Gravel Floodplain Use Permit: SG15-003

Permit Expiration Date: August 10, 2022

Mine Name and Location: A.B.C. Plant One - Agua Fria River north of Camelback Rd.

Applicant: A.B.C. Sand & Rock Co., Inc.
5401 N. 119th Ave.
Glendale, AZ 85307

Documentation Required

AZ State Land Dept Lease: Yes

Warning and Disclaimer: Yes

Property Owner Acknowledgement: Yes

Floodplain Information

Flood Zone: AE, Floodway

Floodplain: Agua Fria

Permit Conditions

Standard

1. The permittee agrees to comply with State water quality standards adopted by the State Water Quality Control Council (401) as administered by the Arizona Department of Environmental Quality before beginning excavation, if necessary. Permittee agrees to obtain a 404 permit from the United States Army Corps of Engineers, before beginning excavation, if necessary.
2. The issuance of a floodplain use permit does not negate any requirements to obtain all permits from those governmental agencies from which approval is required by Federal or State law.
3. The operator of an active sand and gravel extraction operation permitted under the Floodplain Regulations for Maricopa County shall maintain a copy on site of the permit along with an approved Plan of Development bearing the approval of the Floodplain Administrator. Failure to maintain a copy on site of the approved Floodplain Use Permit and Plan of Development shall be a violation of these Regulations, subject to revocation of the Floodplain Use Permit pursuant to Section 404 and a fine pursuant to Section 708 of these Regulations.
4. The permittee shall be responsible for being informed of any flooding that may be imminent, and for removing any portable equipment and structures.
5. The Plan of Development is subject to post-flood review and possible modification, if necessary, due to flood related changes in river morphology.
6. Any request for a major or minor change to an approved Floodplain Use Permit for the extraction of sand and gravel or other materials including an approved Plan of Development shall require an application to amend the permit.
7. The permittee shall notify the Flood Control District of Maricopa County (District) of any change in ownership of any permitted parcel and/or change of operator within 30 days.

FCD Inits:

CSN

Permittee Inits:

ICR



Flood Control District of Maricopa County

2801 West Durango Street, Phoenix AZ 85009

Office 602-506-1501 Fax 602-506-4601

Sand and Gravel Floodplain Use Permit: **SG15-003**

8. The permittee agrees to make an application to renew the permit (at least six {6} months is recommended) prior to the permit expiration date and will be subject to current Floodplain Regulations governing renewals.
9. If the permittee has not completed the closure of the site and decides not to process a renewal of the Floodplain Use Permit for mining; the permittee will submit a Floodplain Use Permit Application for closure in accordance with the approved closure plan in this permit or present an alternative plan that is acceptable to the District.
10. The permittee agrees to allow access to the District mine inspector(s) to the entire site at least semi- annually.
11. The permittee agrees to establish the property corners and to establish and maintain for the duration of the mining operation a temporary benchmark (TBM) certified by a licensed surveyor. This TBM shall be made available to District staff for each semi-annual inspection. In addition, the permittee will provide control markers as shown in the Plan of Development.
12. Approval of this Floodplain Use Permit does not convey any property rights, either real estate or material, and is not to be construed as consent, approval or authorization to cause any injury to property or invasion of rights or infringement of any Federal, State, or other local laws, rules or regulations nor does it obviate the requirement to obtain other permits. Furthermore, the plan review by the District has been solely for the purpose of determining that your application conforms with the written requirements of the Floodplain Regulations for Maricopa County and is not to be taken as a warranty that structural plans and specifications meet engineering requirements or standards or are free from failure to perform as described or designed in the application, reports or plans, as submitted. Approval does not imply that the drainage concept for this site has been reviewed or approved by the District.
13. Prior to commencement of operations, the applicant shall provide a letter to the Floodplain Administrator that certifies that all other required state and federal permits have been obtained. (Floodplain Regulations Section 201.B.1.b).
14. Development shall be in compliance with the Floodplain Regulations for Maricopa County.

Development

1. This Floodplain Use Permit is issued by the District for sand and gravel operations on Assessor parcel number 501-63-004 and the adjacent State Land Parcel under Common Variety Minerals Leases 04-106137, 04-113153 and 04-118079 with A.B.C. Sand & Rock Co., Inc.
2. The extraction depth shall not be lower than elevation 970.0-ft (NAVD 88)
3. Development shall be in compliance with the approved Plan of Development Report sealed July 7, 2017, and the 10 plan sheets, sealed July 14, 2017, prepared for ABC Sand & Rock Co., Inc. by Pedro A. Calza, P.E. CFM.

FCD Inits:

Permittee Inits:



Flood Control District of Maricopa County

2801 West Durango Street, Phoenix AZ 85009

Office 602-506-1501 Fax 602-506-4601

Sand and Gravel Floodplain Use Permit: **SG15-003**

4. This Floodplain Use Permit shall expire on August 10, 2022.
5. The Sequencing and Timeframe for Installation of Armoring shall be in accordance with the following, which supersedes the priorities in Section 2 of the Plan of Development Engineering Report, and with Exhibit A attached hereto:
 - a) As the first priority the permittee shall excavate and armor around the OHE tower on the east side at a temporary 2H:1V to a 60-foot depth and place armoring at a 3H:1V slope within 3 months of issuance of the permit.
 - b) As the second priority the permittee shall excavate and armor the Lateral Erosion Trench along the east side (New River) of the Pit beginning in the southeast corner and extending northward 1,300-feet within 9 months of completion of the first priority, above.
 - c) As the third priority the permittee shall build and armor – per the approved Plan of Development – the berms along the north side of the pit (Agua Fria River) outside of the floodway delineation within 3 months of completion of the second priority, above.
 - d) As the fourth priority the permittee shall excavate the east side slope of the pit at temporary 2H:1V and armor at a final 3H:1V slope to a depth of 60 feet within 9 months of completion of the third priority above. A maximum of a 500-foot (rolling) length along the slope will be excavated to these dimensions prior to armoring being placed on the slope.
 - e) Until the first, second and fourth priority armoring is completed a 50 foot buffer will be left in place (with 2H:1V side slopes) between the main pit (red area in Exhibit A) and the smaller pit on the east side of the mine (blue area). Excavation may occur in the west side (red area) until a 50 foot buffer remains.
 - f) No additional extraction will take place within 500-feet of the north property line until the west berm (with armoring) is constructed along the north property line. When the armored west berm is constructed, extraction may occur to a depth of 40-feet south of the berm to within 500-feet of the north rock chute construction area. The 500-foot setback on the north side of the mine (green area) shall be maintained until the construction of the north rock chute.
 - g) The construction of the north rock chute will be completed by excavating the slope at temporary 2H:1V and armor at a final 3H:1V slope to a depth of 60 feet. A maximum of a 500-foot (rolling) length along the slope will be excavated to these dimensions prior to armoring being placed on the slope. The construction of the north rock chute will be completed within 9 months of starting construction of the north rock chute.

FCD Inits: CBV

Permittee Inits: [Signature]



Flood Control District of Maricopa County

2801 West Durango Street, Phoenix AZ 85009

Office 602-506-1501 Fax 602-506-4601

Sand and Gravel Floodplain Use Permit: SG15-003

- h) After all pit slopes are armored per the Plan of Development, excavation of the entire pit may extend to 60 feet, elevation 970.0-ft (NAVD 88).
6. Permittee shall perform on-site evaluations to determine if granular filter/bedding is required under the armoring. The District Hydraulics Manual Filter Blanket Requirements equations shall be used to determine the need for and, if needed, the type of filter. This analysis shall be submitted to District for review and approval.
7. As identified on the Mining Plan and the Closure Plan, there shall be a minimum of a 50-foot setback from the property boundary around the pit area.
8. Prior to completion of armoring, permittee shall take emergency measures as necessary during flow events to prevent Adverse Impacts to structures or surrounding properties.

Permittee: ABC Sand & Rock Co., Inc.

DAVID WALTEMAH
Printed Name

[Signature]
Signature

8/10/17
Date

Floodplain Administrator

[Signature] William D. Wiley, P.E.

[Signature]
Signature

8/10/2017
Date



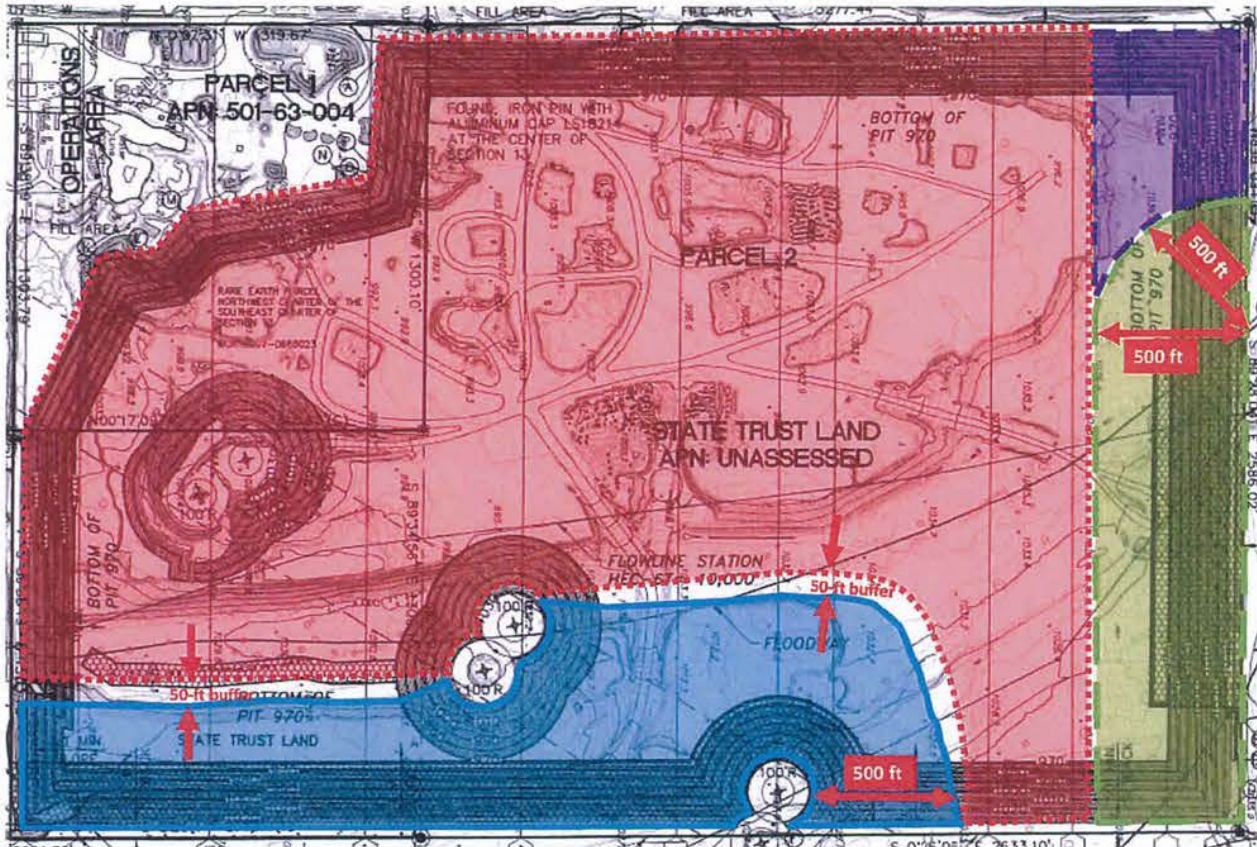
Flood Control District of Maricopa County





2801 West Durango Street, Phoenix AZ 85009

Office 602-506-1501 Fax 602-506-4601

Sand and Gravel Floodplain Use Permit: **SG15-003**

Exhibit A



-  Excavation when permit issued (40-ft deep, bottom elevation = 990 feet) .
-  Excavation (40-ft deep) after west armored berm (Priority 3) is completed.
-  Excavation after north rock chute and armored berms are completed.
-  Excavation after New River rock chute and lateral erosion trench (Priority 1, 2 and 4) are completed (the 50-ft buffer can then be eliminated).

After east and north pit slopes are armored per the Plan of Development, excavation and armoring can extend to 60-ft deep, bottom elevation = 970 feet.

CV-16-01129-PHX-JJT, July 22, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ABC Sand and Rock Company,
Incorporated, an Arizona
corporation,

Plaintiff,

vs. CV-16-01129-PHX-JJT

County of Maricopa, a public
entity; Maricopa County Flood
Control District named as Flood
Control District of Maricopa
County, a political division of
Maricopa County; et al.,

Defendants. Phoenix, Arizona
July 22, 2016
9:00 a.m.

BEFORE: THE HONORABLE JOHN J. TUCHI, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGSPRELIMINARY INJUNCTION HEARING

Day 2, Pages 236 through 410

Official Court Reporter:
Elaine Cropper, RDR, CRR, CCP
Sandra Day O'Connor U.S. Courthouse
401 West Washington Street
Suite 312, SPC 35
Phoenix, Arizona 85003-2150
(602) 322-7245

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

United States District Court

CV-16-01129-PHX-JJT, July 22, 2016

I N D E X**TESTIMONY**

WITNESS	Direct	Cross	Redirect	Recross
DAVID WILLIAMS	246	265		
DAVID W. WALTEMATH	282			
DAVID W. WALTEMATH	289			
ANTHONY J. BEUCHÉ	304	322	354	358
		324		

E X H I B I T S

Number	Ident	Rec'd
9 06/30/2015 - Request for corrections email, with attachments	282	282
30 2011 Revision - Floodplain Regulations	328	
52 03/13/15 - Letter from Stephen Tully returning the \$7440 filing fee dated 2/27/2015 and attaching a Floodplain Use Permit Application	299	
64 06/30/2015 - Request for corrections email, with attachments	271	271
96 4/11/2016 - Email from Meghan Grabel to Tony Beuché enclosing 2nd response to FCD 's request for correction	254	
106 5/06/2016 - Updated request for corrections letter from Tony Beuché to Meghan Grabel	255	256
133		287
135-147		287
152-170		287
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United States District Court

CV-16-01129-PHX-JJT, July 22, 2016

1	215	09/25/15 - Letter to Erman Christofferson	344
2		from Tony Beuché re: application for	
3		permit amendment	
4	216	01/21/16 - FCD Floodplain Use Permit for	345
5		Sand and Gravel - Compliance Inspection	
6		Report	
7	217	01/28/16 - Letter to Erman Christofferson	347
8		from Tony Beuché re: pending permit	
9		expiration	
10	218	03/09/16 - Email from Tony Beuché to Eric	348
11		Christofferson re: application for renewal	
12	304		294
13	307		323
14	308		323
15	309		323

MISCELLANEOUS NOTATIONS

16	Item	Page
17	Plaintiff rests	288
18	Defendant Maricopa County rests	359
19	Defendant Board of Hearing Review rests	359
20	Plaintiff's closing argument	360
21	Defendant Maricopa County's closing argument	374
22	Defendant Board of Hearing Review's closing argument	382
23	Plaintiff's rebuttal	394

RECESSES

24		Page	Line
25	(Recess at 10:39; resumed at 10:54.)	303	23
	(Recess at 11:21; resumed at 11:41.)	317	2
	(Recess at 11:53; resumed at 1:56.)	323	5
	(Recess at 2:55; resumed at 3:07.)	360	2

United States District Court

CV-16-01129-PHX-JJT, July 22, 2016

APPEARANCES

For the Plaintiff:

COLIN F. CAMPBELL, ESQ.**JANA L. SUTTON, ESQ.****MEGHAN H. GRABEL, ESQ.**

Osborn Maledon, P.A.

2929 North Central Avenue

21st Floor

Phoenix, AZ 85012-2794

602.640.9343/(fax) 602.640.9050

For the Defendants:

STEPHEN W. TULLY, ESQ.**WAYNE J. PECK, ESQ.****CARLOS B. GUTIERREZ, ESQ.**

Hinshaw & Culbertson, L.L.P.

2375 E. Camelback Road, Ste. 700

Phoenix, AZ 85016

602.631.4400/602.631.4404 (fax)

For Defendant Board of Hearing Review:

ERIC L. HISER, ESQ.**TREVOR J.L. BURGGRAFF, ESQ**

Jorden, Hiser & Joy, P.L.C.

5080 N. 40th Street, Ste. 245

Phoenix, AZ 85018

480.505.3900

Also Present:

Ms. Nancy Kale, Paralegal

Ms. Amy Fletcher, Paralegal

United States District Court

1 you're ready.

10:02:44

2 MS. SUTTON: Can I get the screen on?

3 **DIRECT EXAMINATION**

4 BY MS. SUTTON:

5 Q. Mr. Waltemath, can you state your full name for the
6 record, please.

10:02:48

7 A. David James Waltemath.

8 Q. And on the screen we're pulling up Exhibit 9. Do you
9 recognize this letter?

10 A. Yes, I do.

10:03:04

11 Q. Did you write it?

12 A. Yes, I did.

13 Q. About how many pages is it?

14 A. Approximately two and a half.

15 Q. Would you say this is one example of your willingness to
16 speak out against the District?

10:03:12

17 A. Yes.

18 MS. SUTTON: I would like to move in Exhibit 9.

19 MR. TULLY: No objection.

20 MR. HISER: No objection.

10:03:23

21 THE COURT: Nine is in evidence.

22 You may proceed.

23 (Exhibit Number 9 was admitted into evidence.)

24 BY MS. SUTTON:

25 Q. What year did ABC receive its first mining permit?

10:03:31

United States District Court

DAVID W. WALTEMATH - Direct

1 A. 1985.

10:03:33

2 Q. And ABC has been in existence since that time.

3 A. Yes.

4 Q. What was ABC like back in 1985?

5 A. Well, we weren't yet in the Agua Fria River. My father

10:03:45

6 was operating a small dump truck company in which he had two

7 older dump trucks and a small skip loader and leased a yard in

8 the area of 27th Avenue and McDowell that was approximately

9 half an acre and his business consisted of buying and reselling

10 sand and gravel materials that he would send the dump trucks

10:04:13

11 out to the sites like ABC Sand and Rock at this time purchased

12 those materials there and sell them to commercial interests and

13 members of the public.

14 Q. So it was kind of a small resale shop?

15 A. Yeah.

10:04:33

16 Q. And then you started digging?

17 A. I beg your pardon?

18 Q. And then you started digging?

19 A. Well, we -- we retained a lease a 40-acre parcel in the

20 area of Camelback and the allotment of 119th Avenue in 1984 and

10:04:50

21 then in 1985 we received a floodplain use permit for ten years

22 and began production on January 15 of 1986.

23 Q. So let's compare ABC back in 1985 to what it's like today.

24 How many employees does ABC now have?

25 A. Approximately 20.

10:05:17

United States District Court

C E R T I F I C A T E

04:28:07

I, ELAINE M. CROPPER, do hereby certify that I am
duly appointed and qualified to act as Official Court Reporter
for the United States District Court for the District of
Arizona.

04:28:07

I FURTHER CERTIFY that the foregoing pages constitute
a full, true, and accurate transcript of all of that portion of
the proceedings contained herein, had in the above-entitled
cause on the date specified therein, and that said transcript
was prepared under my direction and control, and to the best of
my ability.

04:28:07

DATED at Phoenix, Arizona, this 25th day of July,
2016.

04:28:07

s/Elaine M. Cropper

04:28:07

Elaine M. Cropper, RDR, CRR, CCP

United States District Court

FLOOD CONTROL DISTRICT
NOTICE OF VIOLATION - CEASE AND DESIST HEARING
A.B.C. SAND & ROCK COMPANY, INC.
FILE NO. F1-2015-041

BEFORE HEARING OFFICER HAROLD J. MERKOW

Phoenix, Arizona
January 4, 2016
8:59 a.m.

REPORTED BY:
KELLY SUE OGLESBY, RPR
Arizona CR No. 50178
Registered Reporting Firm R1012

NOTICE OF VIOLATION - CEASE AND DESIST HEARING, 1/4/2016

1	INDEX TO EXAMINATIONS			
2	WITNESS:		PAGE	
3	MICHAEL JAMES JONES			
4	Direct Examination by Mr. Peck		32	
5	Cross Examination by Ms. Chapman		37	
6	Redirect Examination by Mr. Beck		62	
7	Recross Examination by Ms. Chapman		65	
8	Further Redirect Examination by Mr. Peck		70	
9	GLENN DIETRICH			
10	Direct Examination by Ms. Grabel		83	
11	Cross Examination by Mr. Peck		147	
12	Redirect Examination by Ms. Grabel		168	
13	Recross Examination by Mr. Peck		179	
14	E X H I B I T S			
15	FCD's			
16	EXH. NO.	DESCRIPTION	MARKED	ADMITTED
17	A	Floodplain Use Permit dated 3/16/2012	34	186
18	B	Floodplain Use Permit dated 7/16/2012	35	186
19	C	Floodplain Use Permit for Sand and Gravel - Substantive Review	72	186
20	A.B.C.'s			
21	EXH. NO.	DESCRIPTION	MARKED	ADMITTED
22	1 - 38	(Offered but not marked.)	85	
23	39	Letter to Julie Lemmon from Jeri Kishiyama dated 6/27/2012	86	186
24	40	Letter to Julie Lemmon from Jeri Kishiyama dated 7/12/2012	88	186
25	41	Letter to Tim La Sota from FCD dated 7/13/2012	90	186

NOTICE OF VIOLATION - CEASE AND DESIST HEARING, 1/4/2016

1	A.B.C.'s			
2	EXH. NO.	DESCRIPTION	MARKED	ADMITTED
3	42	Letter to Jeri Kishiyama from County Attorney dated 7/17/2013	91	186
4	43	Notice of Violation - Cease and Desist Letter to David Waltemath from Timothy Phillips dated 8/7/2012	92	186
6	44	Appeal of Board of Hearing Review Decision	93	186
8	45	U.S. District Judge Wake Order	97	186
9	46	Answering Brief of Appellees	101	186
10	47	Board of Hearing Review Final Decision and Order on Remand	105	186
11	48	(Not marked.)		
12	49	Letter to David Waltemath from William Wiley dated 2/12/2015	42	186
14	50	Letter to William Wiley from David Waltemath dated 2/27/2015	53	186
15	51	Engineering Report for an Amendment to Permit (FA 95-048A)	53	186
17	52	Letter to Sean Berberian and Jeri Kishiyama from Stephen Tully dated 3/13/2015	66	186
19	53	Letter to Sean Berberian and Jeri Kishiyama from Stephen Tully dated 4/16/2015	65	186
21	54	(Not marked.)		
22	55	Letter to William Wiley from Michelle De Blasi dated 5/1/2015	51	186
23	56	Copy of Check to Flood Control District from A.B.C. Sand & Rock for \$7,440 dated 2/27/2015	113	186
24				
25				

NOTICE OF VIOLATION - CEASE AND DESIST HEARING, 1/4/2016

1	A.B.C.'s			
2	EXH. NO.	DESCRIPTION	MARKED	ADMITTED
3	57	(Not marked.)		
4	58	Notice of Violation - Cease and Desist Letter to David Waltemath from William Wiley dated 5/8/2015	119	186
5				
6	59	(Not marked.)		
7	60	Letter to Wayne Peck from Michelle De Blasi dated 5/12/2015	120	186
8				
9	61	(Not marked.)		
10	62	Email to Tom Manos from Michelle De Blasi dated 6/17/2015	59	186
11				
12	63	Email to Michelle De Blasi, Tom Manos, Anthony Beuché and Scott Vogel from Joy Rich dated 6/18/2015	61	186
13				
14	64	Email to Michelle De Blasi from Anthony Beuché, with attachments, dated 6/30/2015	126	186
15				
16	65	(Not marked.)		
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18	66	Email to Anthony Beuché from Michelle De Blasi dated 7/24/2015	127	186
19	67 - 70	(Not marked.)		
20	71	Email to Anthony Beuché from Michelle De Blasi dated 8/19/2015	128	186
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23	73	Email to Michelle De Blasi from Anthony Beuché dated 8/25/2015	129	186
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25	74 - 75	(Not marked.)		

NOTICE OF VIOLATION - CEASE AND DESIST HEARING, 1/4/2016

1	A.B.C.'s			
2	EXH. NO.	DESCRIPTION	MARKED	ADMITTED
3	76	Letter to David Waltemath from William Wiley dated 11/2/2015	134	186
4	77	Letter to Tony Beuché from Meghan Grabel dated 11/5/2015	136	186
5	78	Letter to Meghan Grabel from Wayne Peck dated 11/10/2015	138	186
6	79	Response to FCDMC's Request for Corrections - Phase I Letter to Tony Beuché from Meghan Grabel dated 11/13/2015	139	186
7				
8	80	Response to FCDMC's Request for Corrections - Phase II Letter to Tony Beuché from Meghan Grabel dated 11/30/2015	139	186
9				
10	81	Ninth Circuit Memorandum	104	186
11	82	(Not marked.)		
12	83	(Not marked.)		
13				
14		(ALL ORIGINAL EXHIBITS RETAINED BY HEARING OFFICER MERKOW.)		
15				
16				
17		R E C E S S E S		
18				PAGE
19		Recess taken from 10:21 a.m. to 10:36 a.m.		82
20		Recess taken from 12:34 p.m. to 1:33 p.m.		186
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23				
24				
25				

NOTICE OF VIOLATION - CEASE AND DESIST HEARING, 1/4/2016

1 NOTICE OF VIOLATION - CEASE AND DESIST HEARING
2 commenced at 8:59 a.m. on January 4, 2016, at the Flood
3 Control District, 2801 West Durango Street, Phoenix,
4 Arizona, before KELLY SUE OGLESBY, Arizona CR No. 50178.
5

A P P E A R A N C E S

HEARING OFFICER:

8 HAROLD J. MERKOW
9 hal.merkow@gmail.com

FOR A.B.C. SAND & ROCK COMPANY, INC.:

10 OSBORN MALEDON, P.A.
11 BY: MS. MEGHAN H. GRABEL
12 MS. ANNE M. CHAPMAN
13 2929 North Central Avenue
14 21st Floor
Phoenix, Arizona 85012
mgrabel@omlaw.com
achapman@omlaw.com

FOR FLOOD CONTROL DISTRICT OF MARICOPA COUNTY:

16 MARICOPA COUNTY ATTORNEY
17 BY: MR. WAYNE J. PECK
18 222 North Central Avenue
Suite 110
Phoenix, Arizona 85004
peckw@mcao.maricopa.gov

ALSO PRESENT:

20 Mr. Tony Beuché
21 Ms. Carol Stevens-Gobillard
22 Tim La Sota
23 Jack La Sota
24
25

NOTICE OF VIOLATION - CEASE AND DESIST HEARING, 1/4/2016

1 do.

2 MS. GRABEL: The Court did not rule that. The
3 Court ruled that they did not --

4 MR. PECK: No. The Board of Hearing -- the
5 Board of Hearing Review ruled there was no valid permit
6 and there would be no fines.

7 MS. GRABEL: I think for the judge's purposes,
8 we just need to let him know that there still is a court
9 proceeding that could result in a different law of the
10 case than what exists right now.

11 MR. PECK: Yes, it could.

12 MS. GRABEL: Thank you.

13 HEARING OFFICER: I have to take things the way
14 they are right now; not on speculation of what a judge
15 might do.

16 MS. GRABEL: Okay. Well, then with respect to
17 that, may we enter the evidence that we believe is
18 relevant to show why the 2011 permit was renewed, given
19 the fact that a Court may overturn it in the future?

20 MR. PECK: Well, obviously if the Court rules --

21 HEARING OFFICER: No. I don't want to hear any
22 evidence about the 2011 permit.

23 MR. PECK: If the Court ruled --

24 MS. GRABEL: Sir, how can you not hear any
25 evidence about the two thousand --

NOTICE OF VIOLATION - CEASE AND DESIST HEARING, 1/4/2016

1 A. Yes.

2 Q. Could you explain some of those kinds of
3 circumstances to the hearing officer?

4 A. Generally we -- the issuance of a short -- a
5 permit of short duration is to allow the permittee time to
6 gather the technical and other data he needs to complete
7 the permit application and remain in operation.

8 Q. To your knowledge, after the permit that has
9 been marked as Exhibit B expired on July 16th, 2012, has
10 A.B.C. sand and gravel obtained any other permit for the
11 property we are talking about?

12 A. No.

13 Q. Have you checked the records to see if there is
14 such a permit?

15 A. Yes.

16 Q. When did you most recently check those records?

17 A. This morning.

18 Q. And is there a permit so issued?

19 A. No.

20 Q. To your knowledge, have operations continued on
21 the property after July 16th, 2012?

22 A. Yes.

23 Q. How do you know that?

24 A. I have been out to the site several times, been
25 adjacent to the site several times to see operations

NOTICE OF VIOLATION - CEASE AND DESIST HEARING, 1/4/2016

1 continuing.

2 Q. When was the last time you saw the operation
3 continuing?

4 A. Thursday morning.

5 Q. And that would be December 31st, 2015?

6 A. Correct.

7 Q. Have you visited the site over the years?

8 A. Yes.

9 Q. Can you estimate approximately how many times
10 since July 16th, 2012?

11 A. 30 to 40.

12 Q. At any time when you were there, did you see any
13 evidence that the operations had been abandoned?

14 A. No.

15 MR. PECK: I have no further questions.

16 HEARING OFFICER: Ms. Grabel.

17 MS. GRABEL: Ms. Chapman will cross.

18 HEARING OFFICER: I'm sorry?

19 MS. GRABEL: Ms. Chapman will cross.

20

21 CROSS EXAMINATION

22

23 Q. (BY MS. CHAPMAN) Good morning, Mr. Jones. My
24 name is Anne Chapman on behalf of A.B.C.

25 So I take it your testimony is that from

NOTICE OF VIOLATION - CEASE AND DESIST HEARING, 1/4/2016

1 MS. GRABEL: It very much has to do with whether
2 or not a fine should be assessed against A.B.C.

3 HEARING OFFICER: Well, I am taking the final
4 decision and order as it stands. Unless it's changed by a
5 court, it stands as is.

6 MS. GRABEL: May we introduce evidence to you
7 that suggests it may have been biased in its entry?

8 HEARING OFFICER: No. No. I am taking it as --
9 at its face value.

10 MS. GRABEL: I would like to enter my standing
11 objection as to that ruling.

12 HEARING OFFICER: I think you did that at the
13 beginning, and I told you I would show it as a continuing
14 objection.

15 MS. GRABEL: I will just keep doing it.

16 Q. (BY MS. GRABEL) All right. Mr. Dietrich, after
17 the Board of Hearing Review issued its final decision and
18 order on remand, did A.B.C. have any additional
19 conversations with the Flood Control District about
20 renewal of this permit?

21 A. Ongoing.

22 Q. I would like to show you A.B.C. Exhibit 49.
23 This is something the Court has seen before.

24 HEARING OFFICER: We already have that.

25 Q. (BY MS. GRABEL) Have you seen this document

NOTICE OF VIOLATION - CEASE AND DESIST HEARING, 1/4/2016

1 before, Mr. Dietrich?

2 A. Yes, I have.

3 Q. Who is this letter from?

4 A. William Wiley, the chief engineer.

5 Q. Thank you.

6 would you please read the last sentence of this
7 document?

8 A. If the applicant is filed and the fees are paid
9 by March 6th, 2015, we will forbear any enforcement action
10 for operating without a permit, and per Floodplain
11 Section 403.B.3, will issue a permit of short duration
12 during the application process if required.

13 Q. Did A.B.C. comply with Mr. Wiley's request?

14 A. Yes, we did.

15 Q. Turn to A.B.C. Exhibit 50, please.

16 Have you seen this letter before?

17 A. Yes, I have.

18 Q. Will you please describe its contents?

19 A. It's a transmittal letter from David Waltemath
20 to Bill Wiley with the related check that was requested.

21 Q. Take a look at A.B.C. 51, please.

22 Have you seen this before, Mr. Dietrich?

23 A. Yes, I have.

24 Q. Would you please describe what it is?

25 A. It's an engineering report that was prepared by

NOTICE OF VIOLATION - CEASE AND DESIST HEARING, 1/4/2016

1 A.B.C. Sand & Rock by Pedro Calza, a licensed engineer.

2 Q. Would you agree that this is the amended plan of
3 development that was submitted with Mr. Waltemath's
4 letter, Exhibit 50?

5 A. Yes, it was.

6 Q. I would like to show you Exhibit 56, please.

7 MR. PECK: We haven't seen that one.

8 (Exhibit No. 56 was marked for identification.)

9 HEARING OFFICER: This also attaches the last
10 page of 55.

11 MS. GRABEL: It does, yes. That's a whole
12 different exhibit. There is a purpose to my madness.

13 Q. (BY MS. GRABEL) Mr. Dietrich, what is -- will
14 you please describe what this is.

15 A. It's a check from A.B.C. Sand & Rock to the
16 Flood Control District.

17 Q. And what is the date of this check?

18 A. 2/27/15.

19 Q. What is this check for, if you know?

20 A. This check, I believe, is for two things, and I
21 may be sketching here a little bit, but one was for an
22 application fee and one was for an engineering renewal fee
23 or something along that line.

24 Q. Was it submitted in response to Mr. Wiley's
25 letter --

NOTICE OF VIOLATION - CEASE AND DESIST HEARING, 1/4/2016

1 Q. Please review the attachments to this letter.

2 A. The application, the checks, and the warning and
3 Disclaimer of Liability.

4 Q. Were those the items that Mr. Tully had
5 requested in his letter?

6 A. Yes.

7 Q. And just to clarify, that letter is the
8 March 13th, 2015, letter, A.B.C. Exhibit 52.

9 Did Mr. Wiley send A.B.C. a permit of short
10 duration?

11 A. No.

12 Q. Had they promised that it would -- they would?

13 A. They -- I believe it said "if necessary" at the
14 end there.

15 Q. I would like to show you A.B.C. Exhibit 58.

16 (Exhibit No. 58 was marked for identification.)

17 Q. (BY MS. GRABEL) Have you seen this document,
18 Mr. Dietrich?

19 A. Yes, I have.

20 Q. Please describe it.

21 A. It's a Notice of Violation dated May 8th, 2015,
22 from William Wiley.

23 Q. What was A.B.C.'s reaction to receiving this
24 Notice of Violation?

25 A. Frustration.

NOTICE OF VIOLATION - CEASE AND DESIST HEARING, 1/4/2016

1 Q. Why were you frustrated?

2 A. Because we were working, trying to work through
3 the problems with them. And even though we believed we
4 had a permit at that time and we were working through
5 them, and they -- it seems like they just dropped it on --
6 dropped this on us.

7 Q. Why didn't they give you a permit of short
8 duration?

9 A. I have no idea.

10 Q. Had you done what you thought you needed to do
11 to comply with Mr. Tully's requests?

12 A. We did.

13 Q. I would like to show you A.B.C. Exhibit 60.

14 (Exhibit No. 60 was marked for identification.)

15 Q. (BY MS. GRABEL) would you please read the
16 second full paragraph on page 2 of this exhibit.

17 A. "Finally"?

18 Q. Beginning with "finally."

19 A. Finally, a Notice of Violation - Cease and
20 Desist letter was issued to A.B.C. on May 8th despite
21 several assurances from FCD that it would forever -- that
22 it would forbear enforcement action once a new permit
23 application was submitted. The first assurance occurred
24 in a letter to A.B.C. dated February 12, which requested
25 that a permit application be filed March 6th. A.B.C.

1 up, so -- so we had documents to this matter, should it
2 come to this matter.

3 Q. Thank you.

4 And do you agree that Ms. De Blasi accurately
5 characterized the contents of the meeting and the
6 agreement you reached?

7 A. Exactly. She did.

8 Q. Thank you.

9 And if you would look at A.B.C. Exhibit 63.

10 A. This is the one I thought I just had.

11 Q. Okay. Who is this note from?

12 MR. PECK: Objection; it speaks for itself.
13 It's already been discussed.

14 HEARING OFFICER: We have already talked about
15 this.

16 MR. PECK: We didn't object to it being
17 admitted.

18 HEARING OFFICER: It's in evidence.

19 MS. GRABEL: I will move on.

20 Q. (BY MS. GRABEL) Mr. Dietrich, would you please
21 look at A.B.C. Exhibit No. 64.

22 (Exhibit No. 64 was marked for identification.)

23 Q. (BY MS. GRABEL) Have you seen this document
24 previously?

25 A. I have.

NOTICE OF VIOLATION - CEASE AND DESIST HEARING, 1/4/2016

1 Q. What is this document?

2 A. It's a transmittal from Tony Beuché to Michelle
3 De Blasi with -- it's called what is the substantive
4 review form and request for corrections.

5 Q. What does this request for corrections require
6 of A.B.C.?

7 A. I don't know. There is 39 of them here.

8 Q. Is preparing a response to the request for
9 corrections time consuming?

10 A. In this matter, it is.

11 Q. Why?

12 A. They are very detailed, and some are engineering
13 related. Some we had a disagreement on whether they were
14 items that the Flood Control could ask for by law.

15 Q. Did A.B.C. make any representations to the Flood
16 Control District as to when it would likely receive a
17 response?

18 A. I believe they get -- said 15 days or something
19 like that, if I am not mistaken.

20 Q. If you look at A.B.C. Exhibit No. 66.

21 (Exhibit No. 66 was marked for identification.)

22 Q. (BY MS. GRABEL) Have you reviewed this email?

23 A. Yes, I have.

24 Q. Could you please describe the contents?

25 A. Michelle is asking for some hydraulic

NOTICE OF VIOLATION - CEASE AND DESIST HEARING, 1/4/2016

1 information from the District to help with some modeling
2 she was going to acquire from Tony Calza, the engineer.

3 Q. Mr. Beuché?

4 Oh, Pedro Calza do you mean, the engineer?

5 A. Pedro. Pedro. I'm sorry. I said Tony. Pedro
6 Calza, the engineer.

7 Q. And did Ms. De Blasi give any indication as to
8 when the request -- the response to the request for
9 corrections would be received?

10 A. I don't remember.

11 Q. Take a look at the first line of that email.

12 MR. PECK: We will stipulate it says by the end
13 of next week.

14 MS. GRABEL: Yes.

15 THE WITNESS: Okay.

16 Q. (BY MS. GRABEL) Did A.B.C. submit the request
17 for correction responses by the end of the following week,
18 which would have been early August 2015?

19 A. No, I don't believe that they did. I think some
20 may have been submitted at that time, but some were not.

21 Q. Was A.B.C. -- strike that.

22 I would like you to turn to A.B.C. Exhibit
23 No. 71.

24 A. Do I have it? No?

25 MR. PECK: It's coming.

NOTICE OF VIOLATION - CEASE AND DESIST HEARING, 1/4/2016

1 (Exhibit No. 71 was marked for identification.)

2 MR. PECK: Thank you.

3 Q. (BY MS. GRABEL) would you please describe the
4 nature of this document?

5 A. It's an email from Michelle to Tony Beuché,
6 setting up a timeline for getting certain things done.
7 There was a discussion about taking some existing mine
8 plans and putting them together in the so-called
9 three-in-one plan. And I think there was an issue that's
10 alluded to here, that to get some of the engineering
11 information, we would have to do a FOIA request to get
12 that engineering. He would give it to us, but we would
13 have to go through channels to get it.

14 Q. Do you believe that this demonstrates that
15 A.B.C. was working with the Flood Control District with
16 respect to its new permit application?

17 A. We were working through it.

18 Q. Did A.B.C. receive a response from Mr. Beuché
19 about the items that would need to be addressed in its
20 plan of development as Ms. De Blasi requests in this
21 email?

22 A. I don't know in particular what that response
23 would be.

24 Q. Take a look at A.B.C. Exhibit 73, if you would.

25 MR. PECK: Oh, we didn't have it yet.

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C E R T I F I C A T E

I, KELLY SUE OGLESBY, Arizona Certified Reporter No. 50178, do hereby certify that the foregoing printed pages constitute a full, true, and accurate record of the proceedings had in the foregoing matter, all to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto, nor am I in any way interested in the outcome thereof.

I CERTIFY that I have complied with the ethical obligations in ACJA Sections 7-206(F)(3) and 7-206-(J)(1)(g)(1) and (2).

Kelly Sue Oglesby
Kelly Sue Oglesby
Arizona Certified Reporter No. 50178

1/12/2016

Date

I CERTIFY that JD Reporting, Inc. has complied with the ethical obligations in ACJA Sections 7-206(J)(1)(g)(1) and (6).

JD REPORTING, INC.
Arizona Registered Reporting Firm R1012

Date

FLOOD CONTROL DISTRICT OF MARICOPA COUNTY

FLOOD CONTROL HEARING REVIEW BOARD

MEETING

AND

REVIEW HEARING

ABC Sand and Rock Company, Inc.
FA 95-048A-2016

Phoenix, Arizona

June 16, 2016

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COASH & COASH, INC.
Court Reporting, Video & Videoconferencing
1802 N. 7th Street, Phoenix, AZ 85006
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By: Colette E. Ross, CR
Certified Reporter
Certificate No. 50658

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1 BE IT REMEMBERED that the above-entitled
2 meeting came on regularly to be heard before the Flood
3 Control Hearing Review Board, in the Adobe Conference
4 Room of the Flood Control District, 2801 West Durango
5 Street, Phoenix, Arizona, commencing at 2:00 p.m. on the
6 16th of June, 2016.

7

8

9 BEFORE: RICHARD SCHANER, Chairman
10 GREGG MONGER, Member
11 DEWAYNE JUSTICE, Member

12 APPEARANCES:

13 For the Board:

14 JORDEN BISCHOFF & HISER, P.L.C.
15 By Messrs. Eric L. Hiser and Trevor J.L. Burggraff
16 7272 East Indian School Road, Suite 360
17 Scottsdale, Arizona 85251

18 For the Flood Control District:

19 Mr. Wayne Peck
20 General Counsel
21 2801 West Durango Street
22 Phoenix, Arizona 85009

23 For ABC Sand and Rock Company, Inc.:

24 OSBORN MALEDON
25 By Ms. Meghan Grabel
26 2929 North Central Avenue, 21st Floor
27 Phoenix, Arizona 85012

28 ALSO PRESENT: Ms. Jolene Maiden, Clerk of the Board of
29 Hearing Review

30

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1 with the law firm of Osborn Maledon, and I represent ABC
2 Sand and Rock in this matter.

3 This is a case of reasonable reliance. We are
4 here today for one reason: the district promised ABC
02:00:34 5 that ABC could continue mining in the floodplain without
6 having to obtain a temporary permit while ABC's
7 application for a Floodplain Use Permit was pending, and
8 that the District would not bring an enforcement action
9 against ABC during that period of time. ABC relied on

02:00:48 10 those assurances, to its apparent detriment. Had ABC
11 known the District intended to change the rules of the
12 game at half time, it would have insisted on being
13 issued a permit of short duration in 2015, as it had
14 twice requested and as the Chief Engineer had offered,
02:01:03 15 and we would not be here today.

16 As a legal matter, the District's assurances
17 that it would not bring an enforcement action against
18 ABC and that ABC did not need a temporary permit,
19 coupled with ABC's reasonable reliance on those
02:01:15 20 assurances, gave ABC the putative right to continue
21 mining during the permit application process. The
22 retroactive levy of what is now more than half a million
23 dollars in fines under these circumstances is the
24 textbook definition of arbitrary and capricious conduct.

02:01:31 25 Arbitrary means subject to unfettered

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1 with the District to make sure that its mining
2 operations complied with the regulatory requirements
3 from the District's perspective.

4 One way to do this was to file an application
02:03:55 5 for a Floodplain Use Permit and obtain a permit of short
6 duration from the District so that it could continue to
7 mine without fear of enforcement while its application
8 was being processed. And, in fact, that is precisely
9 what Chief Engineer Bill Wiley offered to ABC on
02:04:09 10 February 14th of 2015. On that date, Mr. Wiley wrote a
11 letter to ABC stating that, quote, if the application is
12 filed and the fees are paid by March 6, 2015, we will
13 forbear any enforcement action for operating without a
14 permit and, per Floodplain Regulations, will issue a
02:04:29 15 permit of short duration during the application process,
16 if required.

17 On February 27th, 2015, more than a week before
18 that March 6 deadline, ABC's principal, David Waltemath,
19 sent a letter to Bill Wiley enclosing a plan of
02:04:43 20 development supported by a seasoned engineer who once
21 worked for the District, and a check for \$7,440. ABC
22 fashioned this application as an amendment to its 2011
23 permit, because that's exactly what ABC believed it to
24 be. Although the Hearing Officer characterized this
02:04:59 25 submittal as a sham application, there is absolutely no

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1 evidence in the record to support that portrayal.
2 Rather, it was an application supported by a detailed
3 engineering and hydrology study and submitted a week
4 earlier than the deadline articulated by Mr. Wiley's
02:05:14 5 letter.

6 ABC reasonably believed that its February 27th,
7 2015 filing complied with Mr. Wiley's request and that
8 the District would thus forbear any enforcement action
9 for operating without a permit.

02:05:27 10 Two weeks later, on March 13th, 2015, an
11 attorney for the Flood Control District sent a letter to
12 ABC rejecting ABC's application, returning the filing
13 fee, and requiring ABC to submit a new application for a
14 Floodplain Use Permit. According to that attorney,
02:05:41 15 because the Board of Hearing Review had ruled that the
16 2011 permit had expired, there was no permit to amend
17 and ABC must therefore file an application for a new
18 permit and pay the higher \$12,800 filing fee.

19 ABC received the District's letter on
02:05:55 20 March 31st, 2015 and told the District that it was
21 preparing a substantive filing.

22 On April 15th, the District's lawyer again
23 wrote a letter to APS. In that letter, the District
24 told ABC that without a permit ABC must stop mining in
02:06:08 25 the floodplain, but then gave a critical caveat. He

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1 said if by Friday, May 1st, 2015, ABC has not submitted
2 the necessary paperwork and paid the fees required to
3 obtain a permit, the Flood Control District will be
4 forced to commence a new enforcement action. And he
02:06:24 5 continued: The Flood Control District of Maricopa
6 County, of course, hopes that it will not need to bring
7 an enforcement action and that ABC will file the
8 necessary documents and pay the necessary fees to obtain
9 a permit and then work diligently to obtain a permit.

02:06:37 10 ABC reasonably interpreted this letter as
11 saying that it would not be fined for continued
12 operations if it submitted the new application in the
13 appropriate form and paid the applicable fees by May
14 1st, 2015.

02:06:50 15 So that's exactly what ABC did. On May 1st,
16 the District's deadline, ABC submitted the completed
17 Floodplain Use Permit, filing fees, and other paperwork
18 outlined in the District's March 13th letter. To fully
19 ensure that it would be insulated from fines, ABC also
02:07:04 20 requested that it be given a permit of short duration to
21 apply throughout the permitting process, which would
22 resolve any ambiguity over the legality of its continued
23 operations. As counsel for ABC wrote to the District:
24 You have indicated that a permit of short duration would
02:07:19 25 be issued upon your receipt of the enclosed submission,

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1 and I ask that you send a copy of that permit to my
2 attention as soon as possible.

3 Over the next few days the attorneys for ABC
4 and the District have several communications regarding
02:07:30 5 the permit application and process. And the timeline
6 demonstrates that.

7 Then inexplicably, on May 8th, 2015, ABC
8 receives a notice of violation and cease and desist
9 order indicating that ABC must stop business until it
02:07:43 10 has secured a Floodplain Use Permit. This order, of
11 course, was wholly unexpected given the prior
12 correspondence. ABC had complied with everything asked
13 of it by the District and had received no response to
14 its request that it be given a permit of short duration
02:07:56 15 to apply during the permitting process.

16 On May 12th, 2015, ABC wrote another letter to
17 District counsel in which it both asked salient
18 questions about the permit application and then
19 requested that the District rescind the May 8th notice
02:08:09 20 of violation in light of compliance with the District's
21 permit application deadlines. In the same letter ABC
22 again requests a permit of short duration. There is no
23 response to ABC's request.

24 Rightly frustrated by the District's
02:08:23 25 about-face, ABC took the matter to then Maricopa County
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1 Manager Tom Manos and Deputy County Manager Joy Rich to
2 discuss. On June 16th, 2015, Mr. Manos, Ms. Rich, and
3 managing engineers from the Flood Control District,
4 including Tony Beuche, who is in the audience today, met
02:08:40 5 with ABC to discuss the cease and desist order, the
6 permit of short duration, and the permitting process.
7 The agreement reached by the parties in that meeting was
8 summarized in the June 17th e-mail that was later
9 endorsed by Ms. Rich. Through that e-mail the District
02:08:51 10 and ABC agreed that, quote:

11 Since the parties are moving diligently to
12 process the permit application, a temporary permit is
13 not necessary and will not be pursued. Further, the
14 parties agreed that a hearing for the notice of
02:09:04 15 violation will not be set at this time to allow the
16 parties to focus their attention on the permit
17 application.

18 ABC reasonably relied on the District's
19 assurances, believing that the parties' agreement that a
02:09:16 20 temporary permit was not necessary meant that they would
21 not be subjected to fines, either at that time or
22 retroactively at a later date, for operating without a
23 temporary permit while the permit application was
24 pending. And ABC did as it agreed, focusing its
02:09:30 25 attention on the permit application.

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1 Please take a look at the timeline. On
2 June 30th, the District sends substantive review
3 comments with 37 requests for corrections. No deadline
4 for response to the substantive review is attached, but
02:09:44 5 ABC turned attention to it immediately. The parties met
6 and corresponded about the ABC permit application
7 throughout July and August, discussing the modeling to
8 be used and whether, given a legitimate dispute over the
9 data that was used in the May 1st submission, an
02:09:58 10 alternative plan of development should be considered.

11 In an August 19th e-mail, counsel for ABC
12 informed the District that, quote, we are working
13 diligently to complete these tasks -- referring to tasks
14 that she and Tony Beuche had discussed -- and will
02:10:11 15 likely have the revised submittal by the end of
16 September.

17 The district did not object to this
18 September deadline, nor did it express any
19 dissatisfaction with the rate at which ABC was
02:10:21 20 processing its application.

21 On September 16th, 2015, for unavoidable
22 reasons, ABC terminated its prior counsel and retained
23 new counsel. At that time -- I was the new counsel -- I
24 introduced myself to the District and in mid October met
02:10:35 25 with the District to discuss the status of ABC's

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1 application. At no point during that meeting did the
2 District's representatives indicate any belief that ABC
3 was not acting in good faith in pursuing its permit or
4 that ABC needed to submit a response to the request for
02:10:48 5 corrections by any particular date or that it would be
6 fined.

7 So imagine my surprise when, on November 4th,
8 2015, ABC receives a notice of violation, cease and
9 desist hearing order dated November 2nd, 2015.

02:11:03 10 The day after receiving that order,
11 November 5th, 2015, I, as ABC's counsel, sent a letter
12 to Mr. Peck, the District's counsel, expressing surprise
13 at the notice given the District's agreement to forbear
14 a hearing and their assurance that we could mine without
02:11:16 15 any need for a permit of short duration.

16 I also informed Mr. Peck that a response to the
17 District's substantive review will be given in two
18 phases, on November 13th, 2015 and on November 30th,
19 2015. ABC submitted its responsive comments on those
02:11:31 20 dates, as promised.

21 At that point the ball was in the District's
22 court to respond, which it did on December 23rd, 2015.
23 On December 23rd, the District sent ABC a second set of
24 comments on ABC's November 13th and November 30th
02:11:43 25 submittals and indicated that many issues had in fact

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1 been resolved or would be resolved by a simple technical
2 amendment, even though other disputed issues remained
3 outstanding.

4 Since then, ABC has submitted another plan of
02:11:55 5 development that responds to virtually all of the
6 District's requests for correction. We have hired a top
7 hydrologist and obtained a new topographic map at
8 significant expense to ABC, and have again requested a
9 permit of short duration to allow ABC to operate without
02:12:09 10 being subject to fines since we now understand that ABC
11 no -- that the District no longer intends to adhere to
12 its June commitment. That request for permit of short
13 duration was denied.

14 So what does this timeline demonstrate? There
02:12:21 15 is simply no period in which ABC demonstrated a flagrant
16 disregard for its obligation to obtain the Floodplain
17 Use Permit or demonstrated bad faith in its pursuit of
18 such a permit.

19 Of the four time periods that were discussed in
02:12:31 20 the Chief's order, everyone agrees that no fine should
21 be assessed prior to January 28th, 2015. That's period
22 one. And importantly, of those four periods, even the
23 Hearing Officer only recommends fines for even a portion
24 of one of the periods, the four months between July 30th
02:12:47 25 and November 30th.

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1 However, any recommendations for fines after
2 January 28th is based on ABC's alleged lack of diligence
3 in obtaining a new permit and alleged disregard for its
4 legal obligations. But evidence in the record shows the
02:12:59 5 exact opposite. ABC continuously engaged in the
6 permitting process and asked for permit of short
7 duration repeatedly to ensure legal compliance in the
8 interim. And the District assured ABC it didn't need
9 such a permit, a temporary permit wasn't needed. That
02:13:13 10 assurance gave ABC the putative right to mine in the
11 floodplain during permitting process without penalty.

12 It bears noting specifically that the fourth
13 period of fines recommended by the Chief Engineer are
14 not just arbitrary, they are extraordinary. In this
02:13:27 15 period, the Chief Engineer, again, without -- acting
16 outside of the recommendations of the Hearing Officer,
17 orders a penalty of \$2500 per day based on evidence not
18 in the record about how ABC has behaved since
19 December 23rd. And even that evidence is selective and
02:13:42 20 fails to show the significant progress that ABC has made
21 to date in securing a mining permit. And even more
22 extreme, the Chief Engineer has ordered that ABC may not
23 ever receive a permit to mine in the floodplain until it
24 pays the unwarranted penalties that he ordered.

02:13:55 25 So, to recap, the District tells ABC it will

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1 forbear enforcement proceedings if ABC files and pursues
2 a permit application, and that it doesn't need to get a
3 temporary permit. ABC relies on those representations
4 and continues to mine while processing the permit
02:14:10 5 application. Without notice or warning, the District
6 changes the rules, starts enforcement proceedings
7 against ABC, and ultimately fines ABC a penalty that is
8 now well in excess of half a million dollars. That fine
9 is accruing at a rate of \$2500 today, an extraordinary
02:14:26 10 amount. And there is nothing ABC can do to stop the
11 exponential growth of that penalty short of ceasing
12 business, since the District has told ABC that it is not
13 going to give ABC a permit until the arbitrary fines are
14 paid.

02:14:37 15 Gentlemen, this is a family-owned company that
16 employs 25 people and pays millions of dollars in
17 royalties to the State Land Department based on its land
18 leases. ABC cannot afford to stop mining, and there is
19 simply no evidence in the record that it should have to
02:14:51 20 do so.

21 The order is simply arbitrary and capricious.
22 ABC therefore respectfully requests that the order be
23 overturned in full, that no fines be assessed against
24 ABC, and that the Flood Control District issue ABC a
02:15:03 25 permit of short duration to govern the rest of ABC's

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1 foot dragging on both parties and I would like to see
2 that over and some spirit of cooperation that we can get
3 this thing handled and would be willing to offer some
4 financial incentives in that direction if we could
03:30:56 5 figure out a method in which we could apply them to some
6 kind of a scheduled completion of this thing. But I am
7 trying to think of some way to do it, realizing that we
8 may still be here in 2019 talking about this.

9 MR. HISER: Mr. Chairman, it may be appropriate
03:31:18 10 if the Board wants to discuss what it would like to
11 achieve, counsel can take notes and we can try to come
12 up with a resolution that achieves what the Board
13 expresses that it wants to do. We can then continue
14 this hearing until, I think we picked the date on
03:31:34 15 July 1st, and then bring back that to see if we could
16 manage to achieve what you guys are thinking of doing.
17 It would be useful, though, for us to know basic
18 questions on law and fact, having heard the arguments of
19 the parties, whether you believe there is a violation;
03:31:49 20 if there is violation, if you think penalties should be
21 imposed and any thoughts you have on how those penalties
22 should be handled so we have something to work with.

23 CHAIRMAN SCHANER: Thank you. Well, then it
24 behooves a little further conversation.

03:32:06 25 From my point of view, I feel there is no

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1 argument that there is or is not a permit. There is not
2 an existing permit. The fact that there is not an
3 existing permit, in my mind, means the Flood Control
4 District has a sense and obligation to enforce, through
03:32:30 5 penalties, fines, whatever their rule set in accordance
6 with law some sort of a penalty for violation of
7 operating in a floodplain without an existing permit.

8 I would also like to see this thing come to an
9 end. And from what I heard today, it is a lot closer
03:32:59 10 than what I read in everything I have read before the
11 meeting today. And I thank both parties for that, the
12 fact that it is moving in the right direction.

13 MEMBER MONGER: So I think the discussion lead
14 us to believe, if you turn to the decision and order of
03:33:20 15 penalty, we were thinking that we would obviously concur
16 with period one not being imposed. However, we thought,
17 based on all the facts that we heard today under
18 discussion --

19 MR. HISER: You are thinking that you don't
03:33:34 20 want period one, no penalties for that?

21 MEMBER MONGER: Correct, concur.

22 MEMBER JUSTICE: Uh-huh.

23 MEMBER MONGER: And expanding on previous
24 discussion, we were thinking that lumping period two and
03:33:52 25 period three as a "non-Floodplain Use Permit in place"

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1 penalty should be imposed. That was our initial
2 reaction with those two periods.

3 And then, finally, because of the discussion
4 with trying to get this resolved, trying to get both
03:34:15 5 parties to agree upon a schedule and to get submittals
6 set forth in some period of time, whether it be 30, 60,
7 90 day, taking period four and essentially agreeing that
8 that, in fact, that number would be dropped from a
9 \$2,500 per day fine imposed down to \$1,000 per day, if
03:34:37 10 and only if the stipulations of meeting the FUP are met
11 and the FUP is administratively complete and a permit is
12 issued. So that would be effective as of today's date.

13 So that was our consideration.

14 MR. HISER: So you would allow -- so you would
03:34:56 15 basically follow the penalty outline, so I understand
16 what you are saying, so you would say follow the penalty
17 outline for periods one, two, and three in the Chief
18 Engineer's final order, but you would --

19 MEMBER MONGER: Correction, Eric. Period one
03:35:08 20 is none.

21 CHAIRMAN SCHANER: None.

22 MR. HISER: Two and three lumped together,
23 combined.

24 MR. PECK: Which way? As 5,000 or 500 a day?

03:35:21 25 MR. HISER: Or the combination of the two plus

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1 together.

2 MEMBER MONGER: Total combination 78,000, 5,000
3 plus 73,000.

4 MR. HISER: Okay. So that would be 78. And
03:35:30 5 then for the period four, you would propose to have that
6 be 2500 unless the FUP can be complete and permit issued
7 by a date certain, in which case the penalty would be
8 reduced to \$1,000 --

9 MEMBER MONGER: Correct.

03:35:46 10 MR. HISER: -- a day?

11 MEMBER MONGER: Correct, effective today's
12 date, in other words, December 21st, 2015 to current.

13 MR. HISER: Okay. And then no penalties from
14 now through when that permit issuance would be.

03:35:59 15 MEMBER MONGER: Correct.

16 CHAIRMAN SCHANER: In going forward from today,
17 so no penalty.

18 MEMBER MONGER: That's where I stopped my
19 discussion. So I wanted, I wanted to open that up.

03:36:23 20 CHAIRMAN SCHANER: Open that one up?

21 MEMBER MONGER: Yes.

22 CHAIRMAN SCHANER: So you are bringing us
23 forward to today's date by suggesting that the fine or
24 penalty under period number four would be \$1,000 a day
03:36:35 25 up until today's date?

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1 MEMBER JUSTICE: Yes.

2 MEMBER MONGER: Yeah. That's what we
3 discussed.

4 CHAIRMAN SCHANER: But you said if. 2500 or it
03:36:48 5 would be a thousand. I thought there was an if there.

6 MR. HISER: I have an if, too, that it is going
7 to be a thousand if they were able to get the permit
8 issued and completed by a date certain. Is that not
9 correct?

03:36:59 10 MEMBER MONGER: That is correct. That's what I
11 proposed.

12 CHAIRMAN SCHANER: All right.

13 MR. PECK: I just have one question, if I may
14 ask, because of the conversation. This, and I
03:37:09 15 understand you have reduced it to \$1,000 a day, but if
16 the time period is not met, and I will address that
17 separately, if I may, for the whole time it would go
18 from \$1,000 a day to \$2,500 a day, is that correct?

19 MR. HISER: Correct.

03:37:25 20 MEMBER MONGER: Correct.

21 MR. PECK: But what I wasn't sure I understood
22 is does that thousand a day run from December 23rd until
23 the day they get it permitted or does it cut off today.

24 CHAIRMAN SCHANER: We haven't got that far yet.

03:37:39 25 MR. PECK: Thank you very much. Just one thing

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1 on this date certain. No, never mind.

2 MEMBER JUSTICE: Anybody want to take a guess
3 on --

4 MR. PECK: On the date certain could you
03:37:57 5 provide the parties could mutually agree to extend the
6 date?

7 CHAIRMAN SCHANER: Yes.

8 MEMBER MONGER: Sure.

9 MR. PECK: That way, if there is a hangup that
03:38:06 10 just required more time, we can do that and not have a
11 fine automatically bump up.

12 CHAIRMAN SCHANER: Thank you, Mr. Peck. I
13 think that takes a little burden off our shoulders.

14 MS. GRABEL: Is doesn't take much off ABC's
03:38:16 15 shoulders if the time continues to toll during whatever
16 extension periods.

17 MR. PECK: But you can stop the fine.

18 MS. GRABEL: We can't stop the fine.

19 MR. PECK: Yes, you can.

03:38:23 20 MS. GRABEL: How?

21 MR. PECK: Stop operating.

22 MS. GRABEL: I am not going to argue. I just
23 didn't hear that yet.

24 Just for point of clarification, the District,
03:38:31 25 we did check, had used 59 of 90 days within its

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1 substantive review process. We agreed to extend it by
2 30 days when we submitted our amended application.

3 MR. HISER: Thanks. That's good to know.

4 CHAIRMAN SCHANER: So going forward from today,
03:38:47 5 I'm not hearing any recommendations other than I think
6 they can get their next submittal in within --

7 MS. GRABEL: I am hoping --

8 CHAIRMAN SCHANER: -- a couple weeks?

9 MS. GRABEL: Correct. But I need to talk to
03:38:58 10 our engineers.

11 CHAIRMAN SCHANER: You are not certain. And
12 that's getting the next submittal --

13 MEMBER JUSTICE: So say it is --

14 CHAIRMAN SCHANER: -- you know, two or three
03:39:05 15 months from now.

16 MEMBER JUSTICE: It could be 30 days for that
17 submittal.

18 CHAIRMAN SCHANER: And each one should be
19 getting shorter theoretically.

03:39:14 20 MEMBER JUSTICE: But then the District has
21 60 days by statute to look at it.

22 MR. PECK: We have 90 days total.

23 MS. GRABEL: They have another 31 under the
24 law.

03:39:21 25 MR. PECK: Right. We have 31 business days

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1 left to review any submittals they give us. At the
2 end -- if they give us a submittal and we run out of the
3 31 days, then our right under the statute is to deny the
4 application and make them start over again.

03:39:40 5 MR. HISER: Well, they could appeal that
6 denial. Then at that point, then, what the District has
7 done would all be subject to review by the Floodplain
8 Review Board as to appropriateness.

9 MR. PECK: I am not sure that's correct,
03:39:53 10 because the time periods are not just regulatory, they
11 are statutory. And I am not sure, but we don't have to
12 worry about that today.

13 MEMBER JUSTICE: So now, if they take two weeks
14 to get their submittal, then that only gives you guys
03:40:14 15 two weeks to --

16 MR. HISER: No. Their days don't count
17 while --

18 MEMBER JUSTICE: Their 31 days is after they
19 get --

03:40:21 20 MR. PECK: Correct.

21 MEMBER JUSTICE: -- the stuff back, and it is
22 31 working days, not calendar days.

23 MR. PECK: If theoretically we turned it around
24 the next day, we would still have 30 days left.

03:40:33 25 MS. GRABEL: Under the statute also, they may
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1 not also add new requirements. They may continue to
2 talk about the requirements they have already given us,
3 but they can't add additional substantive comments to
4 what they have already given us.

03:40:49 5 MEMBER JUSTICE: So if we agree to that, they
6 have got a couple weeks to get it in. And they have got
7 31 days to turn it around. If they drag their feet,
8 they will get it turned around until the end of the
9 31 days, then we can agree that they can agree to an
03:41:10 10 extension.

11 CHAIRMAN SCHANER: Yes. But let me ask a
12 question of the District.

13 Is a permit withheld until the final T is
14 crossed and I dotted, or is there a substantial
03:41:23 15 completion at which point you issue a permit?

16 MR. PECK: If we had a plan and it was at
17 substantial completion and dotting Is and crossing Ts, I
18 think that's when staff would go to the Chief Engineer
19 and recommend a permit of short duration to give them
03:41:40 20 the time to do it. We would know we have a plan that's
21 approvable, we just need to, to iron it out. That's
22 normally when a permit of short duration is -- normally
23 it is in a renewal process.

24 But given everything that's gone on here, if I
03:41:55 25 were asked, my recommendation would be, if you are that

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1 close and just running up against the time period that
2 you have put in, we either just agree to extend it or
3 give them a permit of short duration, because our goal
4 is and always has been to get this thing permitted.

03:42:11 5 MEMBER JUSTICE: Counselor, Eric --

6 MR. HISER: Okay.

7 MEMBER JUSTICE: -- have you gotten that
8 written down kind of?

9 MR. HISER: I have got this pretty much done.

03:42:21 10 The one question that is unclear to me is what
11 you want to do from today going forward, because, as
12 Ms. Grabel said, it is important to ABC to know are they
13 continuing to incur penalties each day going forward.
14 And I think the District would like to know that as
03:42:39 15 well.

16 CHAIRMAN SCHANER: My opinion on that is that,
17 if they can get it done in a reasonable time, that we
18 haven't yet discussed what that might be, that the
19 \$1,000 a day accumulates but would be waived back to
03:42:59 20 today's date. That portion would be waived if it is
21 done. Because, to me, that shows both parties intending
22 to commit to meet that time frame.

23 MEMBER JUSTICE: I am good with that.

24 MR. PECK: May I be heard? What you would be
03:43:14 25 doing, since you have just ruled that they don't have a

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1 permit and they are operating, is sanctioning them
2 breaking the law for 90 days with no penalty. And the
3 District would have a major problem with that.

4 CHAIRMAN SCHANER: I recommend we make that a
03:43:29 5 dollar a day.

6 MS. GRABEL: Penny a day?

7 MEMBER JUSTICE: I thought we already agreed
8 that it was that they are operating without a permit.

9 CHAIRMAN SCHANER: We have. So the fact that
03:43:51 10 they need a penalty --

11 MEMBER MONGER: Question for ABC.

12 MS. GRABEL: Yes, sir.

13 MEMBER MONGER: Today's date would you be
14 amenable to stopping your operation in that you are
03:44:00 15 operating without a Floodplain Use Permit, today --

16 MS. GRABEL: No, sir, we would not.

17 MEMBER MONGER: -- moving forward?

18 MS. GRABEL: We cannot. This is a family-owned
19 business. This is a serious fine right now, half
03:44:09 20 a million dollars.

21 MEMBER MONGER: I understand. Just asking a
22 question.

23 MS. GRABEL: I understand. But much of the
24 control, much of whether or not we are permitted is in
03:44:15 25 the control of the Flood Control District, and we feel

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1 between a rock and a hard place.

2 We have repeatedly asked for permit of short
3 duration, repeatedly.

4 MEMBER JUSTICE: Well, if you can't -- if I
03:44:34 5 understand, you can't get one if you don't have a
6 permit.

7 MS. GRABEL: That's not what the regulations
8 say, Mr. Justice.

9 MR. HISER: What we could do, since the
03:44:42 10 District, as suggested, we are between a rock and hard
11 place, is we could terminate the Director's order as of
12 today and say that we are not going to approve the
13 continued penalty. And then it becomes the Director's
14 decision whether to file another NOV and cease and
03:44:59 15 desist order for the next period of time. That is an
16 option, too. That means we have to come back but it is
17 a way of freeing yourself from having to do that.

18 MS. GRABEL: To that point, Mr. Hiser, there is
19 nothing in the record past November 30th that would
03:45:14 20 support any fine. In fact, much of this conversation is
21 based on something that is not in the record.

22 MR. HISER: Well, it is just that the record I
23 have right now is that there are no -- there is no
24 permit.

03:45:22 25 CHAIRMAN SCHANER: Right.

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1 MR. HISER: And so the question is what the
2 penalty is appropriate for that period. And you
3 presented arguments in litigation. The District has
4 presented arguments why we need to have penalties.

03:45:35 5 CHAIRMAN SCHANER: So what you are saying is --

6 MR. HISER: I'm struggling to come up with what
7 applicable resolutions between the two.

8 CHAIRMAN SCHANER: If we cancel the engineer's
9 final order relative to these penalties effective today,
03:45:46 10 he would have to, even though they are operating without
11 a permit and they are eligible for penalty, he would
12 have to come back to the Board with another notice of
13 hearing to establish that.

14 MR. HISER: Correct. And then we --

03:45:58 15 MR. PECK: First we would have to go to Hearing
16 Officer.

17 MR. HISER: You have to go to the Hearing
18 Officer, and then we could assess ultimately the
19 reasonableness of the penalties for the period between
03:46:06 20 now and when they are able to obtain the permit.

21 MEMBER JUSTICE: How long, how long is that
22 process again, Eric, of going through this?

23 MR. HISER: If they go through this process, it
24 would start with the issuance of the Chief Engineer of a
03:46:44 25 notice of violation and the cease and desist order. The

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1 District then, assuming that ABC would object to that,
2 which I am sure they would, they would appeal and it
3 would go to the Hearing Officer. The Hearing Officer
4 has a certain number of days to come up with the
03:48:57 5 hearing. And then typically it takes 60 days or so to
6 get the Hearing Officer's decision. That goes back to
7 the Chief Engineer who has to confirm it or change it.
8 And then he issues the order. Then there is a right to
9 appeal to us, and we have to schedule a hearing, and so
03:47:12 10 probably is a six-month process.

11 Does that seem fair? You guys have been
12 through it multiple times.

13 MR. PECK: Is it a fair process or is that the
14 time?

03:47:21 15 MR. HISER: Time.

16 MR. PECK: The time frame is very accurate,
17 yes.

18 MR. HISER: Okay. We could look at trying to
19 do -- we could go out on that limb, which would be that
03:47:34 20 we would decide what we have in front of us today but
21 maintain continuing jurisdiction. And then we could
22 have, you know, set a time where at certain stages we
23 would get back together, and some of the parties before
24 us, to report on where they were, and then whatever the
03:47:51 25 penalty assessment is and do it seriatim that way. That

1 does not provide us much certainty and is probably not
2 as consistent with how the process is designed to work.

3 CHAIRMAN SCHANER: My opinion is that just
4 involves more staff time and attorney time and does not
03:48:07 5 get to the point of the engineering time necessary to
6 get the permit. And then we don't need the time in the
7 time frame. Maybe continuing a penalty of \$1,000 a day
8 is enough incentive in and of itself, or set a different
9 number and have that just be --

03:48:35 10 MEMBER JUSTICE: That's a thought.

11 MR. HISER: Set a lower penalty for a
12 reasonable period of time or take it back up to the
13 higher number or even the Chief Engineer's initial 2500.

14 MS. GRABEL: Mr. Schaner, that is an incentive
03:48:47 15 on ABC. I don't see a corresponding incentive to the
16 District to expedite the time frame at all.

17 MR. PECK: We have a statutory requirement as
18 far as the time frame. The applicant does not.

19 MR. HISER: Yeah.

03:49:09 20 MS. GRABEL: May I be heard once more on the
21 permit of short duration?

22 MR. HISER: We can't do anything about that,
23 so...

24 MS. GRABEL: I understand, except we have heard
03:49:18 25 arguments about why this isn't appropriate for ABC to

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1 have had a permit of short duration and a lot of
2 examples given as to why that's the case.

3 Under the applicable regulations, there is only
4 one section, Section 403.3, and it mentions for
03:49:31 5 extraction of sand and gravel or other materials, the
6 floodplain administrator may issue a permit of short
7 duration for an applicant's participation in an ongoing
8 application process, which is what we are in. It
9 doesn't give any kind of suggestion that it is only for
03:49:43 10 specific technical issues.

11 And so I believe that because part of the Chief
12 Engineer's order in this case was to say ABC may not
13 have a permit of short duration at any time until it
14 pays fines to which it objects, that this was the proper
03:49:54 15 entity to overrule that and perhaps issue a permit of
16 short duration. If it is not, I would appreciate
17 guidance as to the proper board to bring that issue in
18 front of.

19 MR. PECK: The order does not say they will not
03:50:06 20 get a permit of short duration until they pay all the
21 fines. It says they won't get any permit until that
22 happens.

23 And I ask the question again: What plan is it
24 that the District is supposed to permit for a short
03:50:20 25 period of time? We don't have a plan that we know will

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1 not have an adverse impact on adjacent properties.
2 That's what keeps being given back and forth between the
3 engineers. So even if the Board were to suggest that we
4 give a permit of short duration and Mr. Wiley would say
03:50:39 5 okay, what plan is it he is going to permit?

6 MS. GRABEL: The regulations do not require a
7 plan. It says you may issue.

8 MR. PECK: Yes, they do. Because we can't
9 issue any Floodplain Use Permit unless you demonstrate
03:50:49 10 no adverse effect.

11 CHAIRMAN SCHANER: Our advice from our
12 attorneys is that we have no authority over directing
13 the District in any short-term use permit. We could
14 recommend but we have no authority.

03:51:02 15 Do you have any --

16 MR. HISER: The only suggestion that I would
17 have if this is a permitting dispute whether or not this
18 project is permissible is for you guys to say we stand on
19 our application, force the District to grant or deny,
03:51:16 20 and then you can put the District's permitting approach
21 and permitting interpretation in issue in front of the
22 Floodplain Review Board. And at that point, everything
23 about what the District has done, all its technical
24 judgments and everything about that, perfectly open for
03:51:31 25 game. And that Board does have the ability to issue

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1 authoritative interpretations of the regulations and can
2 answer those questions definitively. This Board only
3 has the authority to determine whether penalties are
4 warranted or not.

03:51:45 5 And so that might be the solution if this is a
6 permitting dispute that's not going to be resolved.
7 Because it doesn't do you guys any good to never get an
8 answer and it doesn't do you guys any good to keep
9 kicking the fact we are not going to get an answer down
03:52:01 10 the road if that's ultimately what the issue is.

11 So I guess that would be my one observation as
12 Board counsel, you know, for the parties to consider, is
13 this one where you say, okay, we are going to cut our
14 losses as of this date and we are going to fight those
03:52:13 15 issues out in front of the Floodplain Review Board.

16 MR. PECK: If that option is on the table, then
17 it is even more important to the District that severe
18 penalties continue to run during that period because
19 this Board has already ruled that ABC is illegally
03:52:29 20 operating.

21 CHAIRMAN SCHANER: Gentlemen, unless you have
22 some additional thoughts, I am still at the point where
23 we brought our recommendation up through today's date.

24 MEMBER MONGER: Could you recount, please.

03:52:48 25 MR. HISER: The current proposal before this is
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1 to impose no penalties -- first of all, as to find that
2 there is no permit and, therefore, penalties are
3 warranted; second, that in light of the mitigating
4 circumstances presented, that we would impose no
03:53:02 5 penalties for period one, that we would impose in light
6 of the circumstances the information from periods two
7 and three 78,000, which is basically what was
8 recommended by the Chief Engineer, and for period four,
9 we would leave that penalty at \$2,500 per day unless a
03:53:21 10 permit is achieved within a reasonable period of time,
11 in which case then, as of that date, that penalty would
12 be dropped to \$1,000 for that period, so roughly more
13 than 50 percent reduction, and that so far we have not
14 resolved penalties from the date of today's hearing
03:53:38 15 until a permit is issued.

16 CHAIRMAN SCHANER: The main drawback with that
17 as presented is the reasonable amount of time and who
18 decides that, but...

19 MEMBER JUSTICE: Well, that still leaves the
03:54:01 20 thing out there that they are operating without a
21 permit, which is against the law.

22 CHAIRMAN SCHANER: Right.

23 MEMBER JUSTICE: So where does that go? And
24 where do you guys go with that from here?

03:54:13 25 MS. GRABEL: I would be interested in the
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1 findings of fact or conclusions of law related to the
2 June 16th agreement in which we actually were told we
3 did not need a temporary permit and continued to mine,
4 which to my -- I would think that would mitigate any
03:54:27 5 finding of circumstances that this was essentially a de
6 facto authorization.

7 Whether or not the authorities were allowed to
8 do that, that's, that's I guess up to -- maybe their
9 counsel should have counseled otherwise, but ABC
03:54:42 10 reasonably relied on that representation. So if you
11 disagree, I would like something in the record that
12 demonstrates why you disagree, because that probably
13 would be subject to appeal.

14 MR. HISER: So do we agree with the District's
03:54:56 15 finding of fact or do we want to argue -- or you could
16 ask counsel to circulate to you findings of fact on
17 those issues --

18 MR. PECK: May I be heard?

19 MR. HISER: --, if there is no objection.

03:55:06 20 MR. PECK: I would like to point out no notice
21 that was filed to this Board specifically raised that
22 question and asked the Board to decide the effect, if
23 anything, of an e-mail from a June 16th meeting, and,
24 therefore, that is not even properly before the Board.

03:55:21 25 MS. GRABEL: I would dispute that, if I may.

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1 MR. HISER: It is safe to say that the question
2 of mitigation of damages is before this Board based on
3 the conduct of this hearing.

4 So do we want to continue with a thousand? Do
03:55:46 5 you --

6 CHAIRMAN SCHANER: Personally I, at this point,
7 because we can't pick a future date certain, we know the
8 District has a certain limited days of review so when
9 something is submitted they can't just sit on it

03:56:03 10 forever, nor do I believe they would, they are operating
11 without a permit, fines are valid, I am still back to
12 taking period four, reducing it, let's say, to \$1,000 a
13 day until a permit, that could be a temporary permit
14 issues a substantial completion or a final permit, but
03:56:31 15 until a permit is issued. And my own feeling is, when
16 you get down to nothing but ticky-tacky corrections, it
17 should be, a permit of some sort should be issued.

18 MEMBER JUSTICE: I will make that motion with
19 the counsel preparing a document to that effect for our
03:56:55 20 review.

21 MR. HISER: And that continues until a permit
22 is issued.

23 MEMBER MONGER: I will second that.

24 CHAIRMAN SCHANER: It has been moved and
03:57:07 25 seconded.

1 MR. PECK: Mr. Chairman, could I just call
2 attention of the Board to page 11 of the decision of the
3 Chief Engineer, where in period four we -- he describes
4 when the fine would cease. And you may want to use that
03:57:27 5 language, because you are indicating that it would have
6 to be by permit. If ABC were at some point to decide to
7 cease operations, that would also cut off the fines. So
8 if you would use that language, I think it would allow
9 more flexibility. Our only concern is that they stop
03:57:46 10 operating without a permit. How they do that is up to
11 them. So I just call that to your attention.

12 MR. HISER: I assume as a legal matter there is
13 no objection, as a practical matter there is an intense
14 objection.

03:57:58 15 MS. GRABEL: That's precisely well said,
16 Mr. Hiser.

17 CHAIRMAN SCHANER: I have no --

18 MR. HISER: Is that okay with the Board?

19 CHAIRMAN SCHANER: So it has been moved and
03:58:10 20 seconded that we say period four reduce the fine amount
21 from 2500 to \$1,000 a day until such time as the permit
22 is issued and/or operations cease. Is that enough
23 direction? So moved.

24 So you will draft that all up?

03:58:38 25 MR. HISER: Yes.

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1 CHAIRMAN SCHANER: Come back here July 1st.

2 MR. HISER: Mr. Chairman, counsel will draft up
3 an order which we will circulate to the Board so that
4 you can see it. Currently we are talking about having
03:58:48 5 the next meeting of this Board, continue the hearing to
6 July 1st at 1:00. And at that point you could approve
7 that order from that to your satisfaction or make any
8 changes to it, and then that could be signed and issued.

9 MR. PECK: Do you plan to circulate to counsel
03:59:04 10 for any comment or not?

11 MR. HISER: Does the Board want me to circulate
12 the order to counsel for comment?

13 MR. PECK: Obviously after the board members
14 review it. It could save time at a hearing.

03:59:17 15 MR. HISER: That way the counsel could share
16 their views on the order.

17 MEMBER JUSTICE: That's fine.

18 CHAIRMAN SCHANER: No problem.

19 MR. HISER: We will circulate a draft and then
03:59:28 20 you guys can comment on that.

21 MS. GRABEL: Mr. Hiser, is there a point, is
22 there like a substantial completion point where we can
23 request a permit of short duration from the other board,
24 the Floodplain Review Board?

03:59:42 25 MR. HISER: The jurisdiction of the Floodplain
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1 Review Board is over -- I believe any party can go to
2 the Floodplain Review Board where there is a dispute
3 over an interpretation or to appeal denial of a permit.
4 And so either the denial or if you guys could work with
03:59:59 5 the District to frame what the issue in dispute is, then
6 that could be met and heard and resolved within some
7 period of time. The wheels of justice never go as fast
8 as we would like.

9 MS. GRABEL: Thank you.

04:00:16 10 MR. HISER: Does that comport to the counsel
11 for the District's understanding of the rule?

12 MR. PECK: They could file tomorrow alleging we
13 are misinterpreting the regulation on permit of short
14 duration. Although, I would have to look and see how
04:00:28 15 long we did that.

16 CHAIRMAN SCHANER: That ends this item.

17 MR. HISER: Is there any other business?

18 CHAIRMAN SCHANER: Is there any other business
19 and comments from the public?

04:00:40 20 MR. PECK: Thank you for your time. It was
21 substantial today. I don't think any of us expected it
22 to last two hours.

23 CHAIRMAN SCHANER: You missed your 4:00.

24 MR. HISER: Yeah. Oh, well.

04:00:56 25 All right. To continue until July 1st at 1:00.

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1 MR. PECK: Without further notice, correct?

2 MR. HISER: Without further notice.

3 MEMBER MONGER: So moved to July 1st without
4 further notice.

04:01:09 5 MEMBER JUSTICE: Second.

6 CHAIRMAN SCHANER: It has been moved and
7 seconded. So ordered.

8 (The proceeding concluded at 4:01 p.m.)

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1 STATE OF ARIZONA)
2 COUNTY OF MARICOPA)

3 BE IT KNOWN that the foregoing proceedings were
4 taken before me; that the foregoing pages are a full,
5 true, and accurate record of the proceedings all done to
6 the best of my skill and ability; that the proceedings
7 were taken down by me in shorthand and thereafter
8 reduced to print under my direction.

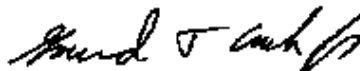
9 I CERTIFY that I am in no way related to any of
10 the parties hereto nor am I in any way interested in the
11 outcome hereof.

12 I CERTIFY that I have complied with the
13 ethical obligations set forth in ACJA 7-206(F)(3) and
14 ACJA 7-206 (J)(1)(g)(1) and (2). Dated at Phoenix,
15 Arizona, this 21st day of June, 2016.

16 

17 _____
18 COLETTE E. ROSS
19 Certified Reporter
20 Certificate No. 50658

21 I CERTIFY that Coash & Coash, Inc., has
22 complied with the ethical obligations set forth in ACJA
23 7-206 (J)(1)(g)(1) through (6).

24 

25 _____
COASH & COASH, INC.
Registered Reporting Firm
Arizona RRF No. R1036

Coash & Coash, Inc.

602-258-1440

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ABC SAND AND ROCK COMPANY
INC.,

Plaintiff,

vs.

FLOOD CONTROL DISTRICT OF
MARICOPA COUNTY,

Defendant.

No. LC2016-000324-001 DT
CV2016-014788
CV2016-010095

Phoenix, Arizona
August 28, 2017
9:18 a.m.

BEFORE THE HONORABLE KERSTIN LEMAIRE

TRANSCRIPT OF PROCEEDINGS

Evidentiary Hearing Day 1

Proceedings recorded by electronic sound recording; transcript
produced by AVTranz, an eScribers, LLC company.

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RENE KING
LISA FREEMAN
Transcriptionists



I N D E XAugust 28, 2017

<u>PLAINTIFF'S WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VD</u>
William Wiley	50	205	--	--	--

<u>DEFENDANT'S WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VD</u>
None					

M I S C E L L A N E O U S

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EXHIBITSPLAINTIFF'S EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
140	Letter	75	75
141	Letter	78	79
145, 147	Application and Engineering Reports	109	109
146	Short-term Permit	98	98
150	Emails	113	113
151	Email response	115	115
153	Email	122	123
154	Email chain	129	129
157	Email	121	121
162	Emails	134	134
177	Ruling	159	160
184	Letter	162	168
186	Letter	168	168
191	Letter	169	170
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DEFENDANT'S EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
22	Letter	219	219
86	Fuller Study	57	57
87	District Study	59	60



APPEARANCESAugust 28, 2017

Judge: Kerstin LeMaire

For the Plaintiff:

Colin F. Campbell

Jana L. Sutton

Meghan H. Grabel

Witnesses:

William Wiley

For the Defendant:

Stephen W. Tully

Bradley L. Dunn

Witnesses:

None

Also Present:

Charles E. Trullinger, Maricopa County

Attorney's Office



1 currently being sued." Did you give me those answers?

2 A And, counselor, I did give you those answers, but
3 subsequently there has been another --

4 Q My question was did you give me those answers, sir.

5 A I did at that time, but it's --

6 Q Okay. There's no --

7 A -- not correct --

8 Q -- other question.

9 A -- it's not correct now.

10 MR. CAMPBELL: Your Honor, can you instruct him just
11 to answer my questions. This is going to -- he's taking up
12 time.

13 THE COURT: Your counsel will certainly
14 (indiscernible) -- get you to where you need to be so, please
15 just --

16 THE WITNESS: Thank you.

17 THE COURT: -- answer Mr. Campbell's questions.

18 THE WITNESS: Yes.

19 BY MR. CAMPBELL:

20 Q Now, in this case you created a team to make all the
21 decisions starting as of January 2015, true?

22 A I did.

23 Q And that team included Mr. Ed Raleigh, right?

24 A Yes.

25 Q And Mr. Raleigh was around in 2011 and 2012 and knew



1 the history of the ABC mine, true?

2 A Correct.

3 Q Did he brief you on the history of the ABC mine and
4 its dealings with Flood Control?

5 A Your question is too vague so are you saying when?

6 Q Well, when you took to yourself the decision making
7 with respect to ABC did you ask Mr. Raleigh tell me the history
8 of ABC and the Flood Control District?

9 A I -- I involved counsel early on in this case and Mr.
10 Raleigh and Mr. Beuche, including counsel were -- were all
11 involved in making those decisions.

12 Q Okay. I didn't ask you about your conversations with
13 Mr. Tully. I asked you did you ask Mr. Raleigh --

14 MR. TULLY: Objection to form; assumes that I was the
15 counsel --

16 THE COURT: Sustained.

17 MR. TULLY: -- which is not correct.

18 MR. CAMPBELL: Okay.

19 BY MR. CAMPBELL:

20 Q Well, let me -- so with respect to all decision
21 making in the case, it was you, Mr. Beuche, and Mr. Raleigh and
22 you always had an attorney present?

23 A Almost always, yes.

24 Q And that would either be Mr. Peck, right?

25 A Mr. Peck or Mr. Tully.



1 Q Okay. So those were the two attorneys involved? Mr.
2 Peck was with the County, right?

3 A Correct -- correct.

4 Q So and then -- so all your substantive decision
5 making was made only with counsel present?

6 A Decision making? I think that is correct.

7 Q All right. Now, once you take decision making to
8 yourself you're the one who initiates the cease and desist
9 order in a fine proceeding, right?

10 A I did.

11 Q Right. And you're the one that decides whether a
12 permit is issued, right?

13 A I do.

14 Q And if a permit is not issued, then ABC is subject to
15 being fined for operating without a permit, true?

16 A If they continue operating.

17 Q If they don't have a permit from you, then they're
18 operating without a permit and you can move to cease and desist
19 them, right?

20 A Then -- if they're operating without a permit, that
21 is correct.

22 Q Okay. If you had issued a temporary permit in this
23 case to bridge them to a permanent five-year permit, we
24 wouldn't be here, true?

25 THE COURT: Mr. Tully?



1 ABC had an old plan of operation, right?

2 A You're talking plan of operation -- plan of
3 development or are you talking permit here, counselor?

4 Q It had a plan of operation, did it not, a mining plan
5 that was in place?

6 A That had a mining plan that was in place, but a
7 mining plan is a part of a permit of which the Board of Hearing
8 Review said they did not have. So it didn't have a plan of
9 operation, per the fact they didn't have a permit.

10 Q Okay. Did you understand they were trying to change
11 their plan -- their mining plan?

12 A Apparently they did because they submitted this,
13 which is completely different than what they had, had before.

14 Q All right. So you understand they were trying to
15 amend their mining plan and have a new mining plan, right?

16 A I did.

17 Q All right. If it had said engineering report for a
18 new permit, would you have taken it?

19 A I think when it was submitted -- and I'm going
20 forward, counselor, when it was submitted in May we ended up
21 taking it. When it became as a part of a new permit;
22 however --

23 Q Okay. So --

24 A -- we also sent comments on this seeing that this --

25 Q Did I ask you a further question --



1 A -- inadequate.

2 Q -- sir?

3 THE WITNESS: Your Honor, and counselor, I'm to tell
4 the truth, the whole truth, and nothing but the truth so I'm
5 telling --

6 MR. CAMPBELL: Your Honor, can you instruct him --

7 THE WITNESS: -- part of the whole truth.

8 MR. CAMPBELL: -- can you instruct -- you know, he's
9 an adverse witness, Your Honor. I'm trying to lead him.

10 THE COURT: I understand.

11 Your counsel will have ample opportunity, Mr. Wiley.

12 THE WITNESS: Okay.

13 BY MR. CAMPBELL:

14 Q If this report had said engineering report for a new
15 permit, would you have accepted it?

16 A Counselor, we likely would have, and -- and we did
17 later.

18 Q Okay. Why didn't you just say we're going to treat
19 this as an application for a new permit, Mr. Wiley, and we're
20 going to proceed as if it were a new permit?

21 A And, counselor, as I've already indicated, we were
22 following the requirement of the Board of Hearing Review, which
23 said we -- you needed to submit a new permit application. This
24 was not a new permit application and so this was saying it was
25 amended permit application; however, the technical document was



1 not even amending what ABC previously had so it was
2 inconsistent with even ABC's submittal.

3 Q Did I hear you correctly that if they had said the
4 word engineering report for a new permit, you would have
5 accepted it?

6 A If -- if the cover letter had indicated that it would
7 have been.

8 Q After you rejected it they filed it again in May --

9 A Yes, they did.

10 Q -- and simply said new permit, right?

11 A They did.

12 Q And you accepted it?

13 A We did after a while, yes.

14 Q And the hydrology of this February report was the
15 Fuller hydrology report that we talked about previously,
16 correct?

17 A There was a -- well, there were a lot of concerns
18 over this report; the Fuller hydrology being one of four major
19 concerns.

20 Q My only question was, sir --

21 A I answered your question.

22 Q -- the Fuller report was the hydrology in the
23 February 27th submission, correct?

24 A Was the Fuller for the Agua Fria?

25 Q Yes. And when they filed again in May the Fuller



1 report was also the hydrology for Agua Fria, true?

2 A That was submitted.

3 Q And you deemed that -- you accepted it and you
4 eventually deemed it administratively complete, true?

5 A The administrative portion of the application, yes.

6 Q And the engineering, with respect to the report, that
7 is whether we're going to take the Fuller study or require some
8 other study, that's going to happen in the substantive review
9 portion, correct?

10 A And it id.

11 Q Now, did you understand that -- just so -- I think in
12 this initial submission in February, did you understand that
13 ABC was seeking a new plan where it would mine down 85 feet?

14 A Only when they submitted this in February.

15 Q Okay. And in fact, the plan you ultimately approved
16 in August of this year -- just this month -- allows them to dig
17 down to 65 feet?

18 A And there's lots of other things too.

19 Q Right.

20 A Yes.

21 Q It allows them to dig down --

22 MR. TULLY: Objection, Your Honor.

23 BY MR. CAMPBELL:

24 Q -- to 65 feet, true?

25 MR. TULLY: Your Honor, objection to relevance. This



1 go, right?

2 A Yes.

3 Q Okay. So you knew that he wanted to go down 85 feet,
4 true?

5 A And that was submitted in the prior plan, yes.

6 Q Well, it was in the February plan you rejected,
7 right?

8 A Correct.

9 Q Now, let's go to Exhibit 363.

10 MR. CAMPBELL: I'd move in 363.

11 It's up on the screen there.

12 MR. TULLY: I believe my objection to this, Your
13 Honor, is that this is a line of questioning that was not
14 brought up in the appeal and therefore, we view as waived.

15 MR. CAMPBELL: Judge, they hid it from us. We got it
16 in discovery in the federal case. It's one of the reasons we
17 moved to supplement the record.

18 MR. TULLY: Your Honor, that's an offensive comment.
19 Nothing has been hid from ABC. They have every document --
20 every document through record requests and production. We
21 have -- that the District has on every sand and gravel op --
22 every document -- email -- everything -- on every sand and
23 gravel operation.

24 THE COURT: All right. I will allow it in, but I
25 don't wish that to, in any way, infer that I am agreeing that



1 any documentation was hidden.

2 MR. CAMPBELL: Thank you, Your Honor.

3 (Plaintiff's Exhibit 363 Received)

4 BY MR. CAMPBELL:

5 Q Okay. Exhibit number 363 let's blow up who it's
6 from. That's going to be Mr. Beuche, right? And he's emailing
7 Mr. Ed Raleigh; do you see that?

8 A Uh-huh. I do.

9 Q Yes? And Mr. Beuche and Mr. Raleigh are on your
10 team; you are the three deciding whether you're going to permit
11 ABC, right?

12 A They're -- they're on the team.

13 Q Right. Let's go down. And Mr. Beuche says, "All,
14 please find attached hereto for your review a draft PSD."
15 That's permit of short duration, right?

16 A I assume that's it. And -- and, counselor, I wasn't
17 party to this email so you're asking me to read a document that
18 I really don't know.

19 Q Okay. So you have no recollection of this at all,
20 sir?

21 A No, I knew -- I knew that they had draft a permit of
22 short duration based on their previously approved plans of
23 development from back in 2011. I hadn't seen this document
24 so --

25 Q Okay. Were you aware that the two people you were



1 working on, on your team in March of 2015 had actually drafted
2 a permit of short duration for ABC?

3 A I knew -- I -- I haven't seen this document. I knew
4 that they had worked on a permit of short duration based on the
5 2011 and earlier plans of development and that was even offered
6 to your counsel subsequent to this. It was would you be
7 willing to go that way.

8 Q Sir, you were making all permitting decisions, true?

9 A This wasn't a decision.

10 Q Did you instruct Mr. Beuche to prepare a permit of
11 short duration for ABC?

12 A No, I didn't.

13 Q Do you know if Mr. Raleigh instructed him to prepare
14 a permit of short duration?

15 A That I don't know. You'll have to ask him.

16 Q All right. So this is the first time you've seen
17 this today in court?

18 A Yeah. I've -- I've not seen this document before.

19 Q Okay. Well, Mr. Beuche writes Mr. Raleigh and he
20 says, "All" -- who is Mr. Riddle? Mr. Riddle is on this email
21 too.

22 A Yeah, Mr. Riddle (phonetic) is below Scott Vogel and
23 was Tony's direct manager at the time.

24 Q Okay. So, "Find attached for your review a draft
25 permit of short duration, duration limited to 30 days.



1 Development condition number 2, modify to include the verbiage
2 from the applicable mining plan." Do you see that?

3 A I'm -- I'm reading what's on the document.

4 Q Okay. That's all brand new to you? All are in
5 agreement that the permit of short duration will be issued only
6 upon receipt of an application for a new permit. Do you see
7 that?

8 A That's what I see.

9 Q Now, you told me you had rejected the plan and wanted
10 a new permit, right?

11 A Uh-huh.

12 Q Do you recall telling anyone in connection with that
13 new permit let's get ready a permit of short duration?

14 A I don't remember making that instruction to anyone.

15 MR. CAMPBELL: Let's turn to the next page. One
16 moment, let's see what's on the bottom of the page there. I'm
17 sorry.

18 BY MR. CAMPBELL:

19 Q So this is from Tony Beuche to Ed Raleigh, "A draft
20 of the permit of short duration for the ABC Agua Fria River
21 mines being circulated this morning for review by Jeff and
22 Scott. Please review the attached draft and respond with any
23 comments that you may have." And then it references the three
24 previously approved plans of development identified --

25 A Uh-huh.



1 Q -- in the last permit. You've never seen this
2 before?

3 A I don't remember seeing this. I knew a draft permit
4 was being developed, but I didn't see this document.

5 Q Are you aware -- now you're aware that there were
6 three mining plans of operation governing the property?

7 A From -- from --

8 Q From the past.

9 A -- from way -- way in the past. Yeah, in 2001 --

10 Q Okay.

11 A -- I think was the most current one and then there's
12 some that are even older than that.

13 Q All right.

14 MR. CAMPBELL: Let's turn the page. Let's look at
15 the actual permit.

16 BY MR. CAMPBELL:

17 Q So this is what a sand and gravel floodplain --

18 A Uh-huh.

19 Q -- use permit looks like for a permit of short
20 duration, right?

21 A Uh-huh.

22 Q Yes? And you'll see it's addressed to ABC Sand and
23 Rock, correct?

24 A That's what it says.

25 Q And there's certain -- a lot of these just have



1 A I think so. I'm CC'd on that upper part.

2 Q Okay. Let's go to the upper part.

3 A Yeah.

4 Q Well, of course, this is Mr. Trussell?

5 A Yeah.

6 Q There's a Mr. Hathaway and it's copied to you.

7 A Yes.

8 Q Who is Mr. Hathaway?

9 A Mr. Hathaway used to work for the Flood Control
10 District and I think he -- he may have been working as a
11 contractor for the Flood Control District back -- prior to my
12 time he had worked on a West Valley corridor water course
13 master plan associated with the Agua Fria.

14 Q Okay. Well, Mr. Trussell is expressing I guess an
15 expression of surprise about what Mr. Waltemath is doing,
16 correct?

17 A I -- I don't know --

18 MR. TULLY: Objection to foundation.

19 WITNESS: -- I don't know what the wow means.

20 BY MR. CAMPBELL:

21 Q All right.

22 A (Indiscernible).

23 Q Well, did you read it when it --

24 THE COURT: Sustained.

25 BY MR. CAMPBELL:



1 Q -- came into your email on March 12th, 2015?

2 A Yes.

3 THE COURT: Let's lay a little more foundation for
4 this, counsel.

5 MR. CAMPBELL: A little more foundation in --

6 MR. TULLY: Yeah.

7 THE COURT: Yes, with regard to the email.

8 BY MR. CAMPBELL:

9 Q All right. You received this email on or about March
10 12th, 2015?

11 A Yes.

12 Q And it looks like it's date at 2:16 in the afternoon?

13 A Yes.

14 Q And -- and you read it when you got it, right?

15 A Yes.

16 Q And you became aware that Mr. Waltemath was
17 petitioning the legislature to vote no on a particular bill?

18 A Wasn't our bill so --

19 Q You became aware?

20 A I was aware of it.

21 Q Why did Mr. Trussell send it to you, if you know?

22 A I believe because John Hathaway, who was a Flood
23 Control employee, had some history on this in the past.

24 Q And so Flood Control District wanted to create a
25 taxing district for any of its master plans?



1 A Not since I was at Flood Control so --

2 Q Do you know whether --

3 A -- prior to that maybe. I don't know, but --

4 Q Okay.

5 A -- since I was there, no.

6 Q Let's move up just to the last one in the chain.

7 Okay. And this is from Mr. Hathaway to Mr. Raleigh saying, "I
8 already forwarded to Jen." Who is Jen?

9 A Let me think. My guess is that is Jen Percorski
10 (phonetic), who was a Flood Control employee -- a planner --

11 Q Okay. Well, why --

12 A -- Percorski --

13 Q -- would it be forwarded her?

14 MR. TULLY: Object to the foundation.

15 THE WITNESS: Don't know.

16 THE COURT: Overruled.

17 BY MR. CAMPBELL:

18 Q Okay. Going back to our -- the permit of short
19 duration that was drafted on March 10th, 2015, by Mr. Beuche
20 and discussed between Mr. Beuche and Mr. Raleigh; do you know
21 anything about what happened to it after March 10th?

22 A Can -- can -- can you restate that?

23 Q All right.

24 A That -- that -- that's a wide open question.

25 Q Mr. Beuche and Mr. Raleigh drafted a permit of short



1 duration --

2 A Uh-huh.

3 Q -- that they circulated among themselves and Mr.

4 Riddle --

5 A Uh-huh.

6 Q -- on March 10th of 2015, true?

7 A Yes.

8 Q Do you know what happened to that afterwards? Do you
9 know anything about it?

10 A I -- I -- you need to ask Mr. Beuche, or Mr. Raleigh
11 on what happened with that because I'm not aware. I know we
12 didn't issue it, but -- but I don't know the circumstances
13 behind that.

14 Q So to the best of your recollection, neither one ever
15 brought that permit to you?

16 A As far as I know, no.

17 MR. CAMPBELL: I want to turn to Exhibit number 146
18 and I'd move in Exhibit 146.

19 MR. TULLY: It's already in evidence.

20 THE COURT: Oh, okay.

21 MR. CAMPBELL: It's already in?

22 MR. TULLY: Yeah, a bunch of -- a couple of those
23 that you mentioned were already in --

24 MR. CAMPBELL: Okay.

25 MR. TULLY: -- actually, but yeah, that one is in the



1 record below.

2 MR. CAMPBELL: Judge, we're right up to noon. Do you
3 want to take the luncheon break?

4 THE CLERK: I don't have it in evidence.

5 THE COURT: You don't have it?

6 THE CLERK: 146.

7 MR. CAMPBELL: All right. Move 146 in then.

8 MR. TULLY: I'm sorry. When I say it's already in,
9 it's in the record below. It was submitted in the
10 underlying --

11 THE COURT: Underlying --

12 MR. TULLY: -- case so that's why --

13 THE COURT: Understand.

14 MR. TULLY: -- so it's already -- it's in the record
15 that you all have on appeal already.

16 THE COURT: Okay.

17 MR. TULLY: But I have no objection to it going in
18 here.

19 THE COURT: Going in for pursuant to this?

20 MR. TULLY: So -- as a --

21 THE COURT: All right.

22 MR. TULLY: -- cleaner second record.

23 (Plaintiff's Exhibit 146 Received)

24 THE COURT: Are you at a good breaking point?

25 MR. CAMPBELL: Yes, Judge.



1 that in consultation with Mr. Raleigh and Mr. Beuche.

2 A That's correct.

3 Q Didn't anyone say, why don't we just issue them a
4 permit of short duration?

5 A The permit of short duration has to be accepted by
6 the applicant; that I don't know if there was a discussion with
7 the applicant saying, yes, we will take this.

8 What I do know, is later on this year they were --
9 they were offered that same permit, and they said, no. And
10 we've got documentation to that effect.

11 So you're asking me something that I don't recall.

12 Q Okay. But I just --

13 A There may have been discussions, but I --

14 Q -- want to be clear. If Mr. Bouche had drafted a
15 permit of short duration, your testimony is it should have been
16 offered to ABC to see whether they should have taken it or not?

17 A And -- and I don't know if it was or not.

18 Q Your testimony is it should have been offered to
19 them?

20 A I didn't say that. I said, I don't know if it was.

21 Q If it was offered to them and they accepted it,
22 game's over, right?

23 MR. TULLY: Object to the form of the question. I
24 don't even know what that means.

25 THE COURT: Overruled. You can answer.



1 THE WITNESS: They would not be subject to the
2 penalties.

3 MR. CAMPBELL: All right. Turn to Exhibit 154.

4 And I move 154 in.

5 THE COURT: Any objection to 154?

6 MR. TULLY: No objection.

7 THE COURT: So admitted.

8 (Plaintiff's Exhibit 154 Received)

9 MR. CAMPBELL: Okay. So just sort of blow up the top
10 half. Bring it down a little further. Thanks. Go down
11 another paragraph, just so we can (indiscernible).

12 THE COURT: Yeah.

13 MR. CAMPBELL: Thanks, Your Honor.

14 BY MR. CAMPBELL:

15 Q Okay. So this is -- you'll see this is an email
16 chain. So you see Michelle's email on the bottom?

17 A Yes.

18 Q And she had asked Joy to confirm that she -- she'd
19 accurately summarized what had happened, right?

20 A Yes.

21 Q And Joy wrote back, "Sorry for the delayed response.
22 We agree that you have accurately summarized our meeting."

23 A That's what Joy said.

24 Q Right. And you admit you're bound by that?

25 A I am.



1 Q In fact, some of your staff talked to Joy Rich about
2 this, right?

3 A They were --

4 Q Were you aware of that?

5 A -- in the meeting. They were in the meeting.

6 Q They talked to them afterward.

7 A I -- you know, I don't remember.

8 Q You don't have any knowledge of that?

9 A I don't remember. They may have.

10 Q All right. So let's -- so this is the filing of the
11 administration of -- decision of appeal, and the Flood Control
12 District is going to impose a \$5,000 for operating without a
13 permit from January 28th to July 30th, 2015, right?

14 A Uh-huh. That was what the Board of -- I believe --
15 Hearing Review submitted.

16 Q Right.

17 A And after their decision -- all -- all of these
18 three.

19 Q And in January, you had offered -- you said, file an
20 application, and we'll give you a temporary permit if required,
21 right?

22 A And if it followed -- if it was required.

23 Q Fine. And we know that it's -- a permit of short
24 duration is based on the old plan, not the new plan, right?

25 A It could be.



1 Q In fact, your staff drafted a permit of short
2 duration in March of 2015, correct?

3 A Yeah.

4 Q You saw it today.

5 A I mean, what I saw. I haven't seen it so I -- I
6 mean, yes, I --

7 Q You don't know what happened to it?

8 A Nope.

9 Q And in June you all met with the county manager, and
10 it was agreed that a temporary permit was not necessary and
11 would not be pursued, true?

12 MR. TULLY: Object to the form. He did not meet with
13 anyone --

14 MR. CAMPBELL: Your --

15 MR. TULLY: -- at that meeting.

16 THE WITNESS: My staff was there.

17 BY MR. CAMPBELL:

18 Q People representing you, met with the county manager
19 and ABC and agreed that a temporary permit was not necessary
20 and would not be pursued?

21 A Well, that's the attorney from ABC's response to Joy
22 Rich, and she said she agreed with that, and she's my boss. So
23 I'll -- I can agree to that.

24 Q So the county manager, who is in charge of you and
25 your entire agency said, you don't need a temporary permit; it



1 won't be pursued.

2 A She was Deputy County Manager at that time.

3 Q Okay.

4 A Yeah.

5 Q Tom Manos, the county manager was there too, correct?

6 A Yes, he was.

7 Q And for that period of -- and then if we construe her
8 May 1st letter to you as a request for a permit of short
9 duration, and her follow-up letter, or email to Mr. Peck
10 saying -- you know -- we'd like a permit of short duration;
11 that was never acted on between this period of time either,
12 true?

13 A That I -- I don't know what meetings occurred then,
14 and so there may have been some discussion at that point in
15 time, so --

16 Q You -- you never issued a ruling to ABC before July
17 30th, 2015 that your application for a permit is granted or
18 denied, of short duration?

19 A I did not.

20 Q And if they had gotten a permit of short duration, on
21 any of those events, you couldn't fine them, true? Because
22 they'd have a permit to operate in the floodplain.

23 A If they had a permit, then the fees would stop.

24 Q Now, there are communications -- well, let's go to
25 the second period. The second period starts July 30th, 2015.



1 Are you with me?

2 It's starting the second period that fines are
3 imposed.

4 A Uh-huh.

5 Q July 30th, 2015 onward. Okay?

6 A Right.

7 Q So starting July 30th, ABC has been told a temporary
8 permit is not necessary and does not need to be pursued, right?

9 A That's what the -- the letter that I wasn't party to
10 said.

11 Q Okay. You were not a party to, but you read?

12 A Yes.

13 Q You're not trying to say you're not bound by it? Why
14 are you running from it?

15 A I -- I'm just saying that I wasn't there. You can
16 ask, you know, my staff who was there, but -- and I mean, it's
17 written by my boss, so the answer is, I'm bound by it.

18 Q So beginning the second period that fines are going
19 to be imposed --

20 A Uh-huh.

21 Q -- ABC doesn't know it needs to get a temporary
22 permit, true?

23 MR. TULLY: Your Honor, objection. How does he know
24 what ABC knows or thinks?

25 THE COURT: Sustained.



1 BY MR. CAMPBELL:

2 Q Mr. Beuche was in communication with Ms. De Blasi;
3 are you aware of that?

4 A I don't know.

5 Q When Mr. Beuche was on the team, did he advise you of
6 what was going on with the permit application process?

7 A Yeah, I -- I don't recall.

8 Q You don't --

9 A Perhaps, but I don't recall.

10 Q You don't recall anything?

11 Do you recall Mr. Beuche telling you that if they
12 sign a consolidated plan, the earliest he would expect a
13 response from ABC would be in October of 2013 (sic)?

14 A I don't recall.

15 Q All right. Let's go -- bring up Exhibit Number 162.

16 MR. TULLY: I'm sorry, what number?

17 MR. CAMPBELL: 162.

18 MR. TULLY: I've got no objection.

19 MR. CAMPBELL: No objection; did you just say?

20 MR. TULLY: I have no objection to 162, Your Honor.

21 MR. CAMPBELL: It's offered without objection, Your
22 Honor.

23 THE COURT: So admitted.

24 (Plaintiff's Exhibit 162 Received)

25 MR. CAMPBELL: I'm just looking to see if you were



1 was included in those discussions, I don't know. But I can't
2 presume that they were surprised because there had been ongoing
3 discussions, including with new counsel.

4 Q Sir, you don't have the slightest idea what those
5 discussions were about?

6 MR. TULLY: Object to the form of the question.

7 MR. CAMPBELL: Well, he's just -- now, you know,
8 Judge, when I ask him a question, he says he doesn't remember
9 what was said. Now, he's assuming something that he doesn't
10 know was said to answer the question. I'm entitled to press
11 him on that.

12 THE COURT: Of course you are.

13 BY MR. CAMPBELL:

14 Q You don't know what was said between staff --

15 A Well, I -- and -- and counsel, you just showed me
16 some of the things that were said, so obviously there was
17 discussions going on, so --

18 Q What I showed --

19 A -- it's presumptuous to say --

20 Q What I --

21 A -- I don't know.

22 Q What I showed you, Mr. Wiley, was your staff was
23 maybe not even expecting a response yet, at the time you filed
24 your cease and desist order.

25 Now, my question to you was -- sir, just -- you don't



1 think it would have been fair to the applicant to rule on a
2 request for a permit of short duration between November 2nd,
3 2015 and the end of the calendar year?

4 A And counselor, I believe my staff had discussions
5 with ABC related to even a permit of short duration and -- and
6 I think that's documented in some of the -- the information
7 that you have and -- and you probably should be asking that of
8 Tony Beuche or Ed Raleigh. But I don't think there was this
9 big period of nothing happening here. There was ongoing
10 discussions going on with two different sets of attorneys.

11 Q Sir, do you have personal knowledge of any
12 discussions between your staff and my client --

13 A Other than --

14 Q -- on a permit of short duration?

15 A -- what I was told. We were talking to them.

16 Q What were you told?

17 A We were talking to them.

18 Q Did any --

19 A We're talking to ABC.

20 Q -- of them say we're talking about a permit of short
21 duration --

22 MR. TULLY: You know, Your Honor, I am going to
23 object.

24 THE WITNESS: I don't recall.

25 MR. TULLY: This is attorney-client privilege. What



1 he talked to (sic) with me; what he talked to (sic) with Mr.
2 Peck are attorney-client privilege.

3 MR. CAMPBELL: I thought he was talking about
4 conversations with ABC?

5 BY MR. CAMPBELL:

6 Q You were telling me your staff had conversations with
7 ABC.

8 A My staff did.

9 Q Yeah. And you think they talked with -- behind -- my
10 client about a permit of short duration?

11 A They may have.

12 Q You don't know?

13 A No.

14 Q Did you ever go to Tony Beuche and ask him?

15 MR. TULLY: I'm sorry, I didn't hear that question.

16 BY MR. CAMPBELL:

17 Q Did you ever go to Tony Beuche before you issued this
18 cease and desist order and say, hey, have you talked to them
19 about a permit of short duration?

20 A You know, I don't recall.

21 Q So for this second period of time, which is a \$73,000
22 fine, you would agree with me that from July 30th, 2015 --

23 A Uh-huh.

24 Q -- until November 2nd, 2015, when you send your cease
25 and desist order, during that period of time, the Joy Rich



1 memorandum that you don't need to pursue a permit of short
2 duration -- it wasn't necessary -- that was in effect, true?

3 A No, I -- I don't agree with your interpretation.

4 Q During the period of time from July 30th to November
5 2nd, Michelle De Blasi's email to Joy Rich summarizing the
6 meeting that she agreed to -- Joy Rich agreed to -- was in
7 effect from July 30th until the time you sent out the cease and
8 desist letter on November 2nd?

9 MR. TULLY: Your Honor, object to the form of the
10 question. I don't even know what -- what does it mean, a
11 letter to be in effect? I mean, he's asking my client about a
12 letter that he didn't write and whether it's in effect.

13 MR. CAMPBELL: That it's binding on their department.
14 He admitted that.

15 MR. TULLY: I -- what does that mean, exactly?

16 THE COURT: I presume it means that --

17 MR. CAMPBELL: It means that they misled my client.

18 THE COURT: -- that they're going to comply with the
19 letter.

20 To the extent you can answer, sir, go ahead.

21 THE WITNESS: You know, I -- I can't answer that
22 question because in -- the implication of that is somebody can
23 continue to mine without a permit, illegally, in the floodplain
24 for as long as that period. And, you know, I don't think I
25 have that authority, and I'm not sure even the county manager



1 A They did say that.

2 Q Okay. Then you say there, "Your client had a
3 floodplain permit that expired in 2012 to operate a mine at the
4 same location. The plans and data in support of that permit
5 are substantially different than the plans and data that have
6 been submitted by your client for a new permit. District staff
7 has not yet determined through an in-depth review whether the
8 new data supports the assumptions and conclusions made by your
9 client's engineers in developing a new plan."

10 Did I read that correctly?

11 A That's what it says.

12 Q Okay. Well, the permit of short duration that was
13 drafted by Mr. Beuche in March of 2015 was not based on the new
14 plan; it was based on the old plan. True?

15 A Correct.

16 Q And it was based on being able to mine in the areas
17 under the old mine plan that had not been mined, correct?

18 A Again, I didn't review that, so I can't answer that.

19 Q Okay. You would agree with me that the new plan has
20 nothing to do with the permit of short duration using the old
21 plan?

22 A And again, I -- there are some missing pieces here
23 because the permit of short duration may have been asked on the
24 new plan, not based on the old plan.

25 Q Where do you get that missing piece at?



1 A Again, I believe that's discussion that will come out
2 with staff.

3 Q Did you ever offer my client a permit of short
4 duration in April of 2016 based on the permit of short duration
5 that Mr. Beuche had drafted back in March of 2015?

6 A I believe that staff had had discussion both with
7 previous counsel and current counsel over that option but that
8 the cli- -- your client was not willing to accept it.

9 Q And who told you that?

10 A At least that's the discussion that I remember.

11 Q With who?

12 A With, with my staff.

13 Q Who would your staff be?

14 A Well, that would be, again, attorney-client
15 privilege, but my key legal staff. But that's a question you
16 can ask them.

17 Q You don't know?

18 A I don't know. I mean, that's what I was told.

19 Q And then the next one, you say, "The permit of short
20 duration is issued when the floodplain administrator is
21 comfortable that an application has only minor corrections that
22 can be resolved during the pendency of the short-duration
23 permit or when there are compliance issues that are not
24 resolved before an existing permit expires. Your client does
25 not have an existing permit."



1 Do you see that?

2 A Yes.

3 Q Now, you understand that the Floodplain Review Board
4 said that to impose a requirement that my client have an
5 existing permit is not how they read the regulation, that it
6 was wrong for you to say that. Do you remember that?

7 A I don't remember that part. I remember them
8 overturning the penalties.

9 Q You don't remember arguing to the Floodplain Review
10 Board that you have to have a permit to get a temporary permit,
11 and they said, No, you can't do that?

12 A I believe there is a distinction between a plan of
13 development versus a permit and --

14 Q A permit is based on a plan of development, right?

15 A It is; it is.

16 Q And here, a temporary permit drafted by Mr. Beuche
17 was based on the old plan of development, true?

18 A That is correct.

19 Q And that old plan of development was still there,
20 right?

21 A But if the client didn't want to use that plan of
22 development, then what would you base a temporary permit on?

23 Q Did you ever -- sir, you keep saying my client turned
24 that down. Is that your testimony?

25 A Well, I -- you know, I don't know. That's -- I've



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/s/

JACQUELYN GOLDSMITH
CHRISTINA GMITERKO, CET-964
RENE KING
LISA FREEMAN
Transcribers

October 5, 2017



IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ABC SAND AND ROCK COMPANY
INC.,

Plaintiff,

vs.

FLOOD CONTROL DISTRICT OF
MARICOPA COUNTY,

Defendant.

No. LC2016-000324-001 DT
CV2016-014788
CV2016-010095

Phoenix, Arizona
August 29, 2017
10:09 a.m.

BEFORE THE HONORABLE KERSTIN LEMAIRE

TRANSCRIPT OF PROCEEDINGS

Evidentiary Hearing Day 2

Proceedings recorded by electronic sound recording; transcript
produced by AVTranz, an eScribers, LLC company.

CHRISTINA GMITERKO, CET-964
LISA FREEMAN
Transcriptionists



I N D E XAugust 29, 2017

<u>PLAINTIFF'S WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VD</u>
William Wiley	--	7	44	--	--
Michelle De Blasi	52	54	--	--	--
Anthony Beuche	58	--	--	--	--

<u>DEFENDANT'S WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VD</u>
None					



EXHIBITSPLAINTIFF'S EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
138	Order of Board of Review Hearing	5	6
142	May 1st Engineering Report	6	6
143	Amended Permit Rejection Letter	18	18
144	Letter to Mr. Berberian and Ms. Kishiyama	27	27
149	Cease and Desist Letter	6	6
152	Unidentified	56	56
156	Unidentified	56	57
161	Unidentified	57	57
205	Denial Letter	6	7
368	Emails	109	109
394	Unidentified	107	107
399	2001 Plan	65	65

DEFENDANT'S EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
20	Final Decision and Order on Remand	56	56
28	Email String #1	43	43
29	Email String #2	43	43
412, 414	Unidentified	57	57
415	Unidentified	--	58
419	Transmittal of Administrative Convergence	58	58



APPEARANCESAugust 29, 2017

Judge: Kerstin LeMaire

For the Plaintiff:

Colin F. Campbell

Jana L. Sutton

Meghan H. Grabel

Witnesses:

William Wiley

Michelle De Blasi (Via Video Deposition)

Anthony Beuche

For the Defendant:

Stephen W. Tully

Bradley L. Dunn

Witnesses:

None

Also Present:

Charles E. Trullinger, Maricopa County

Attorney's Office



1 Q In fact, you said you normally make them three or
2 four months, correct?

3 A Yes.

4 Q Okay. Let's go down to the standard conditions.
5 And, again, these are just the standard conditions in every one
6 of these permits?

7 A Yes.

8 Q Whether it's a five-year or a temporary?

9 A Yes.

10 Q Let's go to the next page. We have the top part just
11 has the same standard terms and conditions you have in ever
12 permit. Let's go down to the particular ones for this one. So
13 this says, "This is a permit of short duration issued by the
14 district to an applicant participating in an ongoing
15 application process, right?

16 A Yes.

17 Q And you're aware that ABC -- you were aware in March
18 of 2012 that ABC is trying to get an application
19 administratively completed with the Flood Control District?

20 A We we're anticipating that ABC would file for a new
21 permit by May 1st, 2015.

22 Q And you say it's for, "This is a permit of short
23 duration for sand and gravel operations," correct?

24 A Yes.

25 Q You say they're going to be in strict compliance with



1 the prior mining plan; do you see that?

2 A Yes.

3 Q And then you list all the same mining plans?

4 A Yes.

5 Q So this looks like it's pretty much taken from a 2014
6 short-term permit; would you agree?

7 A Yeah, I'm sure that I started with that 2014 draft.

8 Q Now, do you remember this permit of short duration?

9 A I do today.

10 Q All right. And you say you do today because when I
11 deposed you, you had absolutely no memory of this --

12 A I did not.

13 Q -- do you recall that?

14 A I did not.

15 MR. CAMPBELL: Let's bring up clip number -- the
16 first clip that starts on page 24 of his deposition, line 20
17 and play it to page 26, line 18.

18 MR. TULLY: I'm sorry, what page is it on?

19 MR. CAMPBELL: It's going to be on page 24 line 20,
20 to page 26 line 18. The clip. All right. Exhibit number 275
21 is an email which you've written to Mr. Raleigh, it's an email
22 chain. Do you recall this email?

23 A I don't remember it, no.

24 Q Do you remember in March of 2015, working on a
25 short-term permit for ABC?



1 A I don't.

2 Q Do you have any recollection of any instructions you
3 received from anyone, about working on a short-term permit for
4 ABC in March of 2015?

5 A I do not.

6 Q You have no recollection of either Mr. Wiley or Mr.
7 Raleigh, or any of your superiors telling you to draft up a
8 short-term permit for ABC, in March of 2015?

9 A No, I do not.

10 Q And this -- you -- this is your email, isn't it?

11 A Yes.

12 Q It was produced to us by the district. I take it you
13 haven't reviewed it before this particular moment right now?

14 A No, I have no recollection of this email. But it is
15 an email sent by me.

16 Q All right. And it's dated March 10th of 2015,
17 correct?

18 A Yes.

19 Q And actually, if you turn the page, you will see a
20 draft of a short-term agreement, correct?

21 A Yes.

22 Q And just like the permits we saw that you prepared in
23 2014 that you do have a recollection of, these are similar to
24 those with respect to using a template and putting in
25 particular conditions with respect to the mine?



1 A Yes, there are -- there are some changes, but it's
2 essentially -- appears to be essentially the same as the draft
3 2014 permit.

4 Q You have no recollection at all of talking with Mr.
5 Raleigh about this?

6 A I do not.

7 Q And no recollection at all about talking to Mr. Wiley
8 about it?

9 A I do not.

10 Q What happened with respect to this short-term permit?

11 A I -- I don't recall the circumstances or the outcome.

12 Q Well, fair to say that the district, in March of
13 2015, must have been considering granting the short-term permit
14 to ABC Sand and Rock?

15 MR. TULLY: Object to foundation.

16 A It would -- it would appear to be the case.

17 BY MR. CAMPBELL:

18 Q All right. I'd like to play one more clip. This is
19 going to be at page 39, line 16 to page 40, line 21. All
20 right. Let's go back to -- what was I on? 275 was it? 275,
21 do you have 275 in front of you?

22 A Yes.

23 Q And what's the date of Exhibit 275?

24 A You're asking me what --

25 Q Yes, 275 is your email to Mr. Raleigh, and it's dated



1 Q And you had as much time as you wanted to read the
2 email and to read the permit, you looked at them, and you had
3 absolutely no recollection of it?

4 A I did not. I was drawing a complete blank on that.

5 Q All right. But now, you say you did have a
6 recollection of it?

7 A Actually, that very day I recalled the circumstances
8 under which I prepared that draft.

9 Q Later on in your deposition, you announced that you
10 have now a memory of it, right?

11 A That's correct.

12 Q And it was what two or three more hours into the
13 deposition?

14 A Something like that.

15 Q And Mr. Raleigh was at the deposition, wasn't he?

16 A Yes, he was.

17 Q And during breaks did you speak with Mr. Raleigh?

18 A I did.

19 Q And did Mr. Raleigh talk to you about this permit?

20 A He did.

21 Q And Mr. Raleigh talking you about the permit suddenly
22 refreshed your recollection that wasn't refreshed when you
23 looked at your email and the permit itself?

24 A That's correct. Mr. Raleigh reminded me that he had
25 asked me to prepare that draft so that we had a document on



1 hand should an application be filed and should the chief
2 consider issuing a permit of short duration.

3 Q Did you notice that your email said, "We all agree
4 upon the filing of a new application, this should issue"?

5 A That is not what it said.

6 Q Let's go back to your email.

7 MR. CAMPBELL: 363, Rob. Let me see. Yep. Hold
8 that one.

9 BY MR. CAMPBELL:

10 Q My eyes are getting bad as I age, but will you read
11 what Mr. Franks (phonetic) has highlighted in yellow?

12 A "All are in agreement that the PSD will be issued
13 only upon receipt of an application for a new permit. Also, I
14 am aware that the photo on page 2 has crept onto page 3."

15 Q Well, now with your new memory, who are the "all"
16 that are in agreement?

17 A Well, it would be the recipients of the email.

18 Q So Mr. Raleigh was in agreement?

19 A Mr. Raleigh, Mr. Vogel, and Mr. Riddle.

20 Q So -- okay, so we have this -- these are all the
21 people involved in permitting, right? Mr. Vogel heads up the
22 permitting branch?

23 A What this statement is doing --

24 Q Listen to my --

25 A -- is reminding the recipients --



1 Q -- listen to my question.

2 A -- is reminding the recipients that this is a
3 condition upon which the chief engineer may, at his discretion,
4 issue a permit of short duration.

5 Q Sir, my question was Mr. Vogel is the head of the
6 permitting branch, right?

7 A Mr. Vogel is the manager of the engineering and
8 permitting division.

9 Q All right. He's your boss?

10 A He is the manager of the division, of which I am a
11 part.

12 Q You report to him?

13 A Not directly.

14 Q Okay. But you're in his division?

15 A Yes.

16 Q Okay. So to the extent your memory is refreshed is
17 because Mr. Raleigh told you during a break in the deposition,
18 Tony, don't you remember, I asked you to do this? Is that what
19 happened?

20 A That was the conversation, yes.

21 Q All right. So you now remember you did it because
22 Mr. Raleigh asked you to do it?

23 A Yes.

24 Q Did you bring it to Mr. Wiley and show it to him?

25 A I did not. He had not requested it.



1 Q Did Mr. Raleigh take it to Mr. Wiley?

2 A I do not know. I doubt it.

3 Q Did Mr. Vogel take it to Mr. Wiley?

4 A No, as I stated earlier, this was a draft prepared so
5 that we were prepared to provide a document to the chief
6 engineer for review, should he reach the point where he's
7 considering issuance of a permit of short duration.

8 Q Okay. So you're telling me that Mr. Vogel, Mr.
9 Riddle, you, and Mr. Raleigh are all in agreement this should
10 be issued?

11 A No, I'm not saying that at all.

12 Q What do you mean when you say, "All are in agreement
13 that the PSD will be issued only upon the receipt of an
14 application for a new permit"?

15 A It means that they understand that it is a regulatory
16 requirement that an applicant be engaged in an ongoing
17 application process to be eligible for a permit of short
18 duration.

19 Q Sir, you and Mr. Raleigh and Mr. Wiley are making all
20 decisions with respect to permitting, true?

21 A No, not at all.

22 Q I thought you said there was a team -- Mr. Wiley said
23 there was a team that you were on and Mr. Raleigh was on and
24 that the attorneys sat in on that made decisions -- major
25 decisions with respect to permitting for this mine?



1 A For this what?

2 Q For this mine?

3 A Yes.

4 Q All right.

5 A Yeah.

6 Q So you mean to tell me that in your meetings with Mr.
7 Wiley, you never showed him a permit of short duration that you
8 prepared on March 10th, 2015?

9 A I don't believe that I did, no.

10 Q Now, you were here when Mr. Wiley testified
11 yesterday?

12 A Uh-huh. Yes.

13 Q And he told me to ask his subordinates about what
14 happened with the permits of short duration. Do you remember
15 him saying that?

16 A I recall a statement to that effect.

17 Q All right. And you know Mr. Waltemath?

18 A I do.

19 Q Did you ever go to Mr. Waltemath and offer him the
20 permit of short duration that you drafted on March 10th, 2015?

21 A No.

22 Q At any time, did you go to Mr. Waltemath and offer
23 him a permit of short duration between February of 2015 and the
24 time the final five-year permit was issued in August of 2017?

25 A Mr. Campbell, I'm a member of staff. I'm not the



1 chief engineer or the general manager. I have no authority to
2 issue any or offer a permit to anyone.

3 Q I'm only asking you because Mr. Wiley said I had to
4 ask you.

5 A Okay. The answer is no.

6 Q Okay.

7 A Yeah.

8 Q So at no time, in the two and a half years this
9 application was being processed, did you contact ABC and offer
10 them a permit of short duration; is that true?

11 A I was prohibited from contacting ABC.

12 Q Oh, who prohibited you from contacting ABC?

13 A Mr. Waltemath in the letter that he sent to Mr. Wiley
14 on February 27th, 2015.

15 Q Did you, at any time, go to the lawyers for ABC or
16 anyone representing ABC in the two and a half years that their
17 application was pending for a five-year permit and say I'm
18 going to offer you this March 10th, 2015 permit of short
19 duration?

20 A No, I had no authority to offer permits.

21 Q Did you ever offer to ABC in that two and a half
22 years that their application was pending, any permit of short
23 duration through their representatives?

24 A No, that decision has to be made -- excuse me --
25 through the chief engineer or his delegate, which would be



1 Scott Vogel. Any offer of a permit to any party has to be
2 approved by -- by them.

3 Q By who?

4 A I cannot -- I cannot offer a permit. As a member of
5 staff, I cannot offer a permit, short duration or otherwise,
6 without the authorization of either the chief or his delegate,
7 Scott Vogel.

8 Q And in this case, Mr. Wiley had taken everything onto
9 himself, right?

10 MR. TULLY: I object to the form.

11 A Not everything, no. I mean, I was still managing the
12 application process and the technical issues.

13 BY MR. CAMPBELL:

14 Q In terms of offering a permit of short duration on
15 this mine, only one person could issue it and that was Mr.
16 Wiley, true?

17 A In the case of every mine and every permit of short
18 duration that decision rests with the chief engineer.

19 Q All right. You heard his testimony --

20 A Ultimately --

21 Q -- in court yesterday that he normally delegated
22 those things to Mr. Vogel, right?

23 A That's correct.

24 Q And this is the only case you've ever been involved
25 in with a sand and gravel mine where this decision-making



1 process was utilized with the three of you and the lawyers,
2 true?

3 A I believe so, yes.

4 Q All right. Let's switch topics. I lost the -- there
5 it is. This is a piece of property with a plan of
6 development -- a mining plan of development, okay?

7 A Okay.

8 Q And the miner wants to expand his mine and mine on
9 new property. To do that, he needs a plan of development,
10 true?

11 A Yes.

12 Q And you have given temporary permits that you call
13 at-risk permits, right?

14 A We have issued one permit with a duration of 30 days
15 that was issued at risk.

16 Q Okay. And by at-risk, it means that you gave
17 permission to do sand and gravel operations on the property, in
18 a temporary permit, even though there was no plan of
19 development approved for that piece of property, true?

20 A No, that's not correct.

21 Q Well, you believe a temporary permit all by itself is
22 an approved plan of development?

23 A Would you like me to explain the --

24 Q No, answer my question.

25 A Which was?



1 Q You believe a temporary permit all by itself is an
2 approved plan of development that allows the miner to start a
3 sand and gravel?

4 A No, a floodplain use permit and a plan of development
5 are two separate things.

6 Q A temporary permit is a floodplain use permit?

7 A That is correct.

8 Q So you can give a floodplain use permit with a
9 temporary permit without there being any underlying prior plan
10 of development or underlying five-year permit, right?

11 A No, every floodplain use permit short duration or
12 otherwise, must issue with an approved plan of development.

13 Q Okay. I think we're playing semantical (sic) games.

14 A Well, it's clearly stated in the regulations.

15 Q In this case, I'm talking about Lafarge. Do you
16 remember Lafarge?

17 A Yes.

18 Q They had a plan of development and a permit on this
19 property, right?

20 A Correct.

21 Q And they wanted to expand their operations?

22 A Correct.

23 Q So at the time you issued the temporary permit, in
24 the expanded area of operation, there was no prior plan of
25 development approved for this property?



1 March 10th, 2015?

2 A Correct.

3 Q Okay. Can you explain to me why on March 10, 2015,
4 after you have determined the application is no good, you are
5 preparing a permit of short-duration?

6 A No, as I indicated earlier, I -- I don't even recall
7 this.

8 Q No question you were doing it, right?

9 A No.

10 Q And you wouldn't have done it on your own, true?

11 A It's unlikely that I would do so.

12 MR. CAMPBELL: Is that in? Okay.

13 BY MR. CAMPBELL:

14 Q Do you know why -- well, you had no recollection of
15 the permit of short duration, so it'd be fair to say you don't
16 know what happened to it after you sent this to Mr. Raleigh?

17 A I know that it was not issued.

18 Q Well, you know that because it was never issued?

19 A Correct.

20 Q But you have no recollection of anyone talking to you
21 about it or what happened to it?

22 A No, I don't.

23 Q All right. Now, you remember you gave me that
24 testimony under oath, sir?

25 A I do.



1 Q And, in fact, that's what happened? They eventually
2 did come up with a plan that you approved that cures this
3 out-of-compliance problem?

4 A Well, the -- the distinction is fine, but the absence
5 of compliance with the previously approved plan was not
6 something that had to be remedied with this new plan that was
7 approved. It stands on its own.

8 Q Sir, when you drafted the March 10th, 2015 permit of
9 short duration for ABC, are you aware of another mine that your
10 district had ever denied a short-term permit on?

11 A I'm not aware of any denial of a request for a permit
12 of short duration.

13 Q Ever, right?

14 A I am not, no.

15 Q This was going to be the very first time in the
16 history of the district that a mine was not given a permit of
17 short duration to bridge to a new permit, right?

18 A No, in the history of Tony Beuche with the Flood
19 Control District and this program, which goes back to August of
20 2013. I can't speak for 40 years of permitting.

21 Q Okay. I'd have to talk to Mr. Riley (sic) about
22 that -- or Raleigh. Raleigh was there 24 years as head of
23 engineering, right?

24 A Maybe 37 years.

25 Q Okay. In your history with the department, this is



1 the only instance you're aware of where a permit of short
2 duration was not issued, true?

3 A Oh, I'm quite sure that it's the only time because
4 I've been involved in processing every permit of short duration
5 for the last four years.

6 Q Well, if it was the only time, was there any
7 discussion between you, Mr. Raleigh, and Mr. Wiley whether ABC
8 was being treated the same way that every other mine had been
9 treated in Maricopa County?

10 A Oh, yeah, we were always very, very cognizant of the
11 need to be treating ABC equally to every other permittee.

12 Q Okay. Where were those discussions?

13 A Various locations at the district --

14 Q Are they within this attorney-client privilege I've
15 been hearing about?

16 A Some --

17 Q Did you have discussions outside --

18 A -- some may have been, some may not have been.

19 Q -- I want to know the ones that were not subject to
20 the attorney-client privilege. Can you give me a foundation
21 who was present and where it took place?

22 A Mr. Campbell, I'd love to do so, but I can't recall a
23 specific meeting and whether or not an attorney was or was not
24 in attendance, but I can tell you --

25 Q So you cannot tell me any conversation that is not



1 privileged where the participants talked about whether ABC was
2 being treated the same way as others?

3 A I -- I believe that I can. I can't say with any
4 certainty that it was a discussion that included Mr. Raleigh,
5 Mr. Wiley, and myself. But I can tell you with certainty that
6 we have discussed that.

7 THE COURT: I think Mr. Tully would like to
8 interject.

9 MR. TULLY: Right. I object to the scope of the
10 question. Beyond -- you know, for the reasons I've stated
11 before. First of all, it's not limited by time. Secondly,
12 it's not, you know, relevant to the appeal.

13 THE COURT: Thank you. Noted. Overruled.

14 MR. CAMPBELL: I'm going to move on, Judge.

15 THE COURT: Thank you.

16 BY MR. CAMPBELL:

17 Q Let's go to Exhibit number 146. All right. So let's
18 go up to the top of it in the first paragraph of two. This is
19 a letter Ms. Michelle De Blasi wrote to Mr. Wiley. And I want
20 to know whether or not you saw this on or about May 1st, 2015?

21 A Yes, I've seen this.

22 Q All right. And you saw it when it came in?

23 A Probably, or shortly thereafter.

24 Q Okay.

25 MR. CAMPBELL: Let's go to the section that deals



1 with permit of short duration. It's going to be the third
2 paragraph. Next one up. Thanks.

3 BY MR. CAMPBELL:

4 Q All right. So you're aware that Mr. Wiley had a
5 meeting with Ms. De Blasi?

6 A I am. I met Ms. De Blasi in the lobby at the
7 district that morning when she dropped in to speak to Mr.
8 Wiley.

9 Q Oh, you did?

10 A I did.

11 Q What did you say to each other?

12 A I think she -- I'm -- I was trying to recall that,
13 and I don't recall exactly what transpired, but I did bump into
14 her in the lobby. We introduced ourselves. There were a
15 number of other people there. There had been a meeting
16 scheduled and there were a few folks there. And she indicated
17 that she would like to talk to Mr. Wiley if he was available.

18 Q Did you help facilitate the meeting?

19 A I did.

20 Q Did you go into Mr. Wiley and say, Ms. De Blasi would
21 like to see you?

22 A Actually, I escorted Ms. De Blasi to the mezzanine
23 where Mr. Wiley's office is located and he was outside his
24 office in the mezzanine area.

25 Q Okay. Did you sit in on the meeting?



1 were -- the notes were accepted without revision.

2 Q Well, why didn't you write the notes were accepted
3 without revision?

4 A I -- I don't know.

5 Q All right.

6 A I think what I was --

7 Q Go ahead.

8 A -- I think what I was probably trying to convey is
9 that acknowledging that both Bill and Joy had received the
10 notes and had accepted the notes.

11 Q Maybe I can short circuit the rest of this. You
12 didn't plan any substantive role with respect to denials of a
13 short-term permit until the final permit was given, the
14 five-year permit was given in August of 2017?

15 A I guess you'd have to explain to me what you mean by
16 substantive role.

17 Q All right. What role did you have in denying permits
18 of short durations for ABC from June 16th of 2015 until the new
19 five-year permit was granted in this month, August 2017?

20 MR. TULLY: Your Honor, I just want to renew the same
21 objection I made regarding timing and relevance.

22 THE COURT: I will. You may answer, if you know.

23 THE WITNESS: I did not deny or approve any permits.
24 I'm staff. I process applications and I submit drafts for
25 review and approval and recommend issuance. But I don't deny



1 permits.

2 BY MR. CAMPBELL:

3 Q So with, you know, with respect to a permit of short
4 duration from June 16th, 2015 till August 2017, were you
5 involved in any discussions about whether it should be granted
6 or denied? And you can answer that just yes or no.

7 A Yes.

8 Q Were all those discussions in the context of an
9 attorney-client meeting?

10 A Probably not.

11 Q Okay. Which ones do you recall that were outside the
12 context of an attorney-client meeting?

13 A So very difficult. I mean there's so many
14 discussions, impromptu conversations, unscheduled meetings, I
15 couldn't point to any specific instance.

16 Q Okay. So you can't tell me any non-privileged
17 discussion you had between June 16th, 2015 and August 2017
18 involving the granting or denial of a permit of short duration?

19 A Well, I think I can.

20 Q Well, tell me.

21 A Okay. But I can't point at any one specific
22 conversation, but I can --

23 Q Well, I need to --

24 A -- describe the content.

25 Q -- can you give me where it took place, who was



1 present, and what was the time?

2 A Not with that specificity, no.

3 Q Is your memory about these discussions better than
4 your memory as to the March 10th, 2015 permit?

5 A I would hope so.

6 Q Okay. Because you can give me no foundation, who you
7 talked to, or when it took place?

8 A Oh, I can tell you who I spoke with. I just can't
9 tell you exactly when.

10 Q And you can't tell me with respect to any particular
11 conversation, whether it was said that day or some other day?

12 A Mr. Campbell, the staff at the district has been
13 dealing with permitting issues with ABC for years. And I -- I
14 have no idea how many discussions took place. Many. And I
15 don't maintain a log of discussions. I don't make note of
16 which discussions are privileged, which are not. I simply
17 can't point at any one date and say I spoke with these two
18 people, the attorney was not present, and this is exactly what
19 we said. I just -- I do not have total recall. I can't do
20 that for you.

21 Q Between June 16th, 2015 and August 2017, none of your
22 superiors ever instructed you to prepare a permit of short
23 duration for ABC?

24 A Between what dates?

25 Q June 16th, 2015, that's the Joy Rich meeting, and



1 August 2017, this month, the month you granted the five-year
2 permit, you were never authorized by anyone to prepare and
3 issue a permit of short duration to ABC, true?

4 A No.

5 Q No, it's not true?

6 A No, I did not prepare a draft permit of short
7 duration during that time frame.

8 Q And you were never instructed by Mr. Wiley to do
9 that -- to issue a permit of short duration?

10 A No.

11 Q And you never went to Mr. Wiley and told him, I
12 prepared the permit of short duration in March 2015, do you
13 want me to issue it?

14 A No.

15 Q All your conversations with ABC representatives had
16 to do with a new five-year permit, true?

17 MR. TULLY: Objecting to form. What time frame?

18 BY MR. CAMPBELL:

19 Q From June 16th, 2015, the Joy Rich meeting, until the
20 time a five-year permit was granted in August, this month, all
21 your conversations with ABC representatives were about a
22 five-year permit?

23 A There may have been conversations with Ms. Grabel.
24 Other than that, I don't think so, no.

25 Q Were these conversations -- well, when did you have



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/s/

CHRISTINA GMITERKO, CET-964
LISA FREEMAN
Transcribers

October 4, 2017



IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ABC SAND AND ROCK COMPANY
INC.,

Plaintiff,

vs.

FLOOD CONTROL DISTRICT OF
MARICOPA COUNTY,

Defendant.

No. LC2016-000324-001 DT
CV2016-014788
CV2016-010095

Phoenix, Arizona
August 30, 2017
9:16 a.m.

BEFORE THE HONORABLE KERSTIN LEMAIRE

TRANSCRIPT OF PROCEEDINGS

Evidentiary Hearing Day 3

Proceedings recorded by electronic sound recording; transcript
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Transcriptionists



I N D E X

August 30, 2017

<u>PLAINTIFF'S WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VD</u>
Timothy LaSota	7	31	52	--	--
Anthony Beuche	--	59	118	--	--
Edward Raleigh	170	--	--	--	--

<u>DEFENDANT'S WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VD</u>
None					



EXHIBITSPLAINTIFF'S EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
100	2006 Floodplain Regulations	115	116
101	Letter	198	198
102	Application	200	200
103	Inspection Report	200	201
104	Email	202	202
105	2011 Letter	14	14
107	Cease and Desist Order	212	212
118	Letter	206	207
121	2011 Floodplain Regulations	116	116
122	11/2012 Meeting Memo	26	26
123	Board of Hearing Review Minutes 1/25/12	19	19
124	Meeting Transcript	20	23
126	Permit of Short Duration	210	211
129	Order	217	217
130	Letter	218	218
136	Pleading	53	--
137	Ninth Circuit Briefing	56	--
155	September 2nd Document	114	115
167	Partial Response to Engineering Comments	104	104
168	Letter to Mr. Beuche	108	108
207	2/2011 Letter to Guzman	180	180



208	Short Duration Permit 2/10/11	181	181
210	Short Duration Permit 5/19/11	184	184
223	Email from Jones to Wergen	174	174
224	Letter to Flood Control District from Madder	177	178
225	9/7/11 Correspondence	186	176
244	Hanson Mine Communication	185	185
246	3/8/11 Short-Term Permit	186	186
282	Inspection Report	193	194
283	Letter from Flood Control District 1/19/11	187	187
284	Letter to Raleigh 3/1/11	189	190
306	Email	195	195
359	Email	222	222
360	ABC Final Order	224	224
361	Email	222	222
377	September 2015 Email	6	6

DEFENDANT'S EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
9	Permit of Short Duration	38	39
11	Permit of Short Duration	41	41
31	Notice of Violation	102	103
90	Cross-plane Map	115	115
420	2014 Floodplain Regulations	--	--



APPEARANCESAugust 30, 2017

Judge: Kerstin LeMaire

For the Plaintiff:

Colin F. Campbell

Jana L. Sutton

Meghan H. Grabel

Witnesses:

Timothy LaSota

Anthony Beuche

Edward Raleigh

For the Defendant:

Stephen W. Tully

Bradley L. Dunn

Witnesses:

None

Also Present:

Charles E. Trullinger, Maricopa County

Attorney's Office



1 Q And is that because the depth of the hole determines
2 the amount of potential head cut and tail cut?

3 A It's more on the basis of volume. So the larger the
4 volume of the mine, the longer it can take to fill. The longer
5 the water is flowing over the lip of the mine, the greater the
6 potential for erosion to extend.

7 Q So there's an extraordinarily large hole and small
8 setbacks?

9 A Yes.

10 Q All right. And what other -- any other deficiencies
11 that you noticed at that time?

12 A Those were the issues that were immediately apparent.

13 Q How about with the hydro and -- I want to call it
14 hydrology or hydraulics or H&H or both assumptions upon which
15 the plan of development was based?

16 A As we delved into the engineering report that was
17 submitted, we found that there was no examination of flows from
18 New River entering the mine, only the Agua Fria River.

19 Q All right. So there's no analysis at all showing
20 whether or not New River entered the mine?

21 A It wasn't even mentioned.

22 Q Wasn't even mentioned?

23 A No.

24 Q All right. And you would expect to have water from
25 the New River dealt with in some way on the plan of



1 development?

2 A Yes. The confluence of those two major rivers is all
3 floodway. It's all removable riverbed and all subject to
4 erosion. So, yeah, there was really no question that New River
5 could flow into that mine.

6 Q And was there any basis for the lack of -- I forget
7 what you call them -- boundary here, the lack of setback for
8 the Agua Fria River?

9 A Well, as I recall, there was an attempt to
10 demonstrate that -- and I don't recall what level of analysis
11 the engineer provided. But there's an attempt to demonstrate
12 that the flow that would enter the mine would not cause an
13 adverse impact outside of the boundary of the property.

14 Q All right. And was that based on something called
15 the Fuller study?

16 A That's correct. The engineer analysis didn't account
17 for the FEMA effective flow rate in the Agua Fria or rather
18 referenced a preliminary feasibility study prepared by Fuller.

19 Q All right. And I want to show you -- I believe it's
20 in the --

21 MR. TULLY: Exhibit 142.

22 THE COURT: 142?

23 MR. TULLY: Yes. Is that in evidence? That's in
24 evidence, I think.

25 THE CLERK: It is.



1 BY MR. TULLY:

2 Q And is that the right exhibit? Is this the plan that
3 you reviewed?

4 A It is.

5 Q And I can do that --

6 MR. TULLY: Your Honor, if I might.

7 THE COURT: Of course.

8 BY MR. TULLY:

9 Q All right. Do you have a pen? I'm not going to go
10 through it --

11 A Thank you.

12 Q -- page by page. I'll save everybody that. Okay.

13 So, but I do want to ask you some questions about it. The
14 document looks to be fairly large, doesn't it?

15 A Correct. It appears to be.

16 Q Okay. Appears to be, right. There's a first page.

17 A I'm sorry. I'm sorry, counselor, that was a
18 question. It appears to be what?

19 Q Fairly thick, right?

20 A Yes.

21 Q All right. There's a cover page and then there's a
22 table of contents, do you see that?

23 A Yes.

24 Q All right. And then you get to the actual -- there
25 was an actual list of appendices, do you see that?



1 A Yes.

2 Q All right. And the appendices contain some mining
3 sheets, do you see that?

4 A Yes.

5 Q Scope of work letter?

6 A Yes.

7 Q And then if you go to the actual document, there's
8 actually about four, five pages of a report, correct?

9 A Correct. Five pages.

10 Q All right. And the references make up most of the
11 last page?

12 A Yes.

13 Q And there's a chart in the middle, takes up most of
14 the page -- table in page 2, do you see that?

15 A I do.

16 Q All right. And then, you know, a significant portion
17 of the filings actually just leases under -- over which the
18 mine continues to operate; is that right?

19 A Yes. Under Appendix C, Order Acknowledgements, we
20 have one or two common variety mineral leases from the Arizona
21 State Land Department.

22 Q All right. And there's actually an owner
23 acknowledgement -- or a scope of work letter in there, page 15.
24 Do you see that?

25 A I do.



1 Q All right. And that's a letter dated July 1, 2014?

2 A Yes.

3 Q Do you see that?

4 A Yes.

5 Q And it's a letter from Mr. Waltemath to Pedro Calza,
6 do you see that?

7 A Yes.

8 Q And in that letter, ABC is requesting Mr. Calza use
9 the Fuller study, do you see that?

10 A Yes.

11 Q And in that letter, ABC is also requesting that
12 Mr. Calza use the 25-foot setbacks; is that correct?

13 A Yes.

14 Q All right. It does say "with the exception that some
15 of the property may need more than 25-foot setbacks"; do you
16 see that?

17 A Yes.

18 Q Okay. And ABC's requesting that the plan consist of
19 three and one sloping, correct?

20 A At reclamation, yes.

21 Q Reclamation plan consistency, okay. So ABC says, we
22 want 25 -- we want 25-foot boundaries and I want you to use the
23 Fuller study. And that's what Mr. Calza produces?

24 A Yes.

25 Q All right. We looked at a lot of plans of



1 development?

2 A Yes, I have.

3 Q Does this represent, in your estimation, a lot of
4 engineering work?

5 A No.

6 Q When you and Bing looked at this submission, you knew
7 that it could not be approved, the plan of development,
8 correct?

9 A I did.

10 Q And why did you know at that point just on a cursory
11 review that it was not subject to being approved?

12 A Because it was readily apparent that there would be
13 adverse impact to surrounding properties and structures.

14 Q Are you able to approve plans based on hydrology
15 that's not been -- hydrological assumptions that are not
16 approved by FEMA?

17 A There are occasions when that's possible. We can
18 when the -- regulatory floodplain, which appears on FEMA
19 mapping, is updated, which they are periodically. When that
20 analysis is completed and reviewed and approved by the chief
21 engineer and general manager of the floodplain district, that
22 is then known as the FCD pending floodplain. It is approved by
23 the district.

24 MR. CAMPBELL: I'm sorry, Judge. I couldn't hear
25 what he last said. Could you just repeat it?



1 THE COURT: Could you repeat that?

2 THE WITNESS: What -- how --

3 BY MR. TULLY:

4 Q Could you actually start at the beginning. I don't
5 know if that's all right.

6 A I'm sorry, I don't wish to complicate this. But
7 there are circumstances under which an FCD pending floodplain
8 delineation approved by the chief engineer and general manager
9 of the Flood Control District serves as a basis for our review
10 of applications. That FCD pending floodplain delineation is
11 under review by FEMA and --

12 Q Okay. Let me -- because I don't want to go down a
13 technical area that's not --

14 A Okay.

15 Q -- relevant.

16 MR. CAMPBELL: Object to that, Your Honor.

17 THE COURT: I think it's actually Mr. Tully who
18 doesn't want to go into irrelevant area.

19 MR. CAMPBELL: If you want to ask him about it, you
20 can ask him about it.

21 BY MR. TULLY:

22 Q In ABC's, in their submission, okay, the hydraulic
23 analysis was supported by reference to a Fuller study, study by
24 JD Fuller, correct?

25 A Correct.



1 Q All right. And that study was a -- you understood at
2 that time was a preliminary study, correct?

3 A Well, yes. It was a preliminary feasibility study.

4 Q Feasibility study?

5 A Yeah.

6 Q As an engineer, you knew that that study did not
7 determine the actual rates of flow in the floodplain with any
8 degree of confidence such that one could submit plans based
9 on -- on those hydrological estimates?

10 MR. CAMPBELL: Objection. Leading.

11 THE COURT: Overruled.

12 A I was very familiar with the study. Mr. Fuller had
13 met with me as he was preparing to perform this study and I
14 provided him with information regarding existing mines in the
15 Agua Fria River within his study area. So yeah, I was very
16 familiar with the study.

17 The purpose of the study, which was not to develop new
18 hydrology, new flow rates for the river, but rather it was to
19 examine the feasibility of utilizing one or more existing mines
20 in the Agua Fria as a storage facility. Essentially a large
21 regional retention basin and direct flow in the river or a
22 portion of the flow in the river into one of our mines to store
23 it and then subsequently release it at a lower rate. That
24 would attenuate the peak flow in the river. And that was the
25 sole purpose of the study, is this feasible, should this be



1 further explored.

2 Q And you assisted him in that analysis?

3 A I provided him with information that he utilized in
4 that analysis.

5 Q And you were not averse to that analysis?

6 A Oh, not at all. I thought it was a good idea to
7 examine this.

8 Q All right. And if it turned out that that analysis
9 had merit and could have been justified, you wouldn't have had
10 any problem approving plans based upon changed hydrological
11 assumptions?

12 A I wouldn't characterize it that way. I would respond
13 like this, counselor: The results of the -- of that
14 preliminary feasibility study did have merit. What it
15 determined was that further study was necessary. And
16 subsequently the district funding the phase 2 Fuller study
17 which was a much more robust analysis and delved into some of
18 the questions raised in the phase 1 feasibility study.

19 In terms of the second part of your question, in terms
20 of --

21 Q I'm sorry. Go ahead.

22 A Utilizing either of the phase 1 or phase 2 Fuller
23 studies for review of applications for permits, neither one of
24 those studies was accepted for that purpose. Neither one of
25 them were intended to be submitted to the district to modify



1 the hydrology, approved by the district and then sent to FEMA
2 for review and approval by FEMA. Neither one of them were
3 intended for that purpose.

4 Q All right. What was your understanding was their
5 intention or purpose?

6 A Well, again, to determine whether or not --

7 MR. CAMPBELL: Judge, can we have some foundation? I
8 just want to know whether this is his opinion or it's something
9 he talked to Fuller about and Fuller told him, in which case
10 it's hearsay.

11 BY MR. TULLY:

12 Q Well, the second --

13 THE COURT: Let's have a little foundation on it.

14 THE WITNESS: I beg your pardon?

15 THE COURT: Counsel will ask you some questions --

16 THE WITNESS: Sure.

17 THE COURT: -- to lay some foundation.

18 BY MR. TULLY:

19 Q The second Fuller study, which is in evidence, was
20 paid for by the Flood Control District, do you understand that?

21 A That is correct.

22 Q All right. And did you have any involvement with
23 Mr. Fuller with regard to the -- this completion of the second
24 Fuller study?

25 A I did not.



1 So he -- Mr. Calza is filing this and FEMA has got a flow
2 rate here of 30,000 cubic feet per second at this location on
3 its approved flow rate for the river, correct?

4 A Yes.

5 Q All right. And what Mr. Calza submitted assumed only
6 7,000 cubic feet there?

7 A Correct.

8 Q All right. And he based that on the assumption that
9 the water might be stored in the mines north of the -- north of
10 ABC?

11 A Correct.

12 Q All right. Now, even if it turned out later on that
13 ABC -- that the Fuller study goes through the various phases
14 and that would take some time, correct?

15 A Yes.

16 Q Couple years maybe?

17 A Oh, more.

18 Q More. And then it would have to get approved by FEMA
19 at some point, correct?

20 A Yes.

21 Q Okay. Even assuming that were to -- to have panned
22 out, right, that that -- that the hope the water could be
23 effectively stored in these pits and panned out -- which we now
24 know didn't pan out, correct? It wasn't economically feasible?

25 A It was not economically feasible.



1 A There is an application process to obtain a
2 floodplain use permit, yes.

3 Q And if you are an applicant in an ongoing process to
4 get a five-year permit you can then get a permit of short
5 duration, true?

6 A No. What the regulation states is that the
7 floodplain administrator, the chief engineer may issue a permit
8 of short duration to an applicant engaged in -- in ongoing
9 application process, not necessarily for a new permit or
10 renewal or amendment. Just an ongoing application process.

11 Q Sir, I'm just -- my question is simple and I don't
12 mean to confuse you. If the application ABC had filed had been
13 put into administrative review and they were seeking a five-
14 year permit, then if they had -- you had drafted a permit of
15 short duration on March 10th, 2015 that could have been
16 extended to ABC as their permit of short duration to bridge
17 them while the application process was ongoing?

18 A No. There was no approved plan of development on
19 which to issue a permit of short duration or otherwise.

20 Q Sir, I thought we went this on your direct
21 examination. When you drafted your permit of short duration on
22 March 10th, 2015 you based it on the plan of development that
23 had already been in place for the mine, didn't you?

24 A What are you asking me?

25 Q You don't know what I'm asking you, sir?



1 A Well, I don't understand what this exhibit has to do
2 with a question about a permit of short duration. I'm missing
3 something.

4 Q Do you remember drafting a permit of short duration,
5 sir?

6 A Yes, I do.

7 Q Do you remember basing it on the plans of development
8 on which this area is being mined?

9 A It was based on a previously approved plan of
10 development.

11 Q Yes.

12 A Yes.

13 Q And you drafted it in March 10th, 2015, correct?

14 A March of 2015, yes.

15 Q Maybe I'm -- I don't mean to confuse you. Looking to
16 the future, ABC is looking for a five-year permit, right? Are
17 you with me? When they file their application on March 2nd,
18 2015 their intention is to get a five-year permit that goes
19 into the future, true?

20 A Presumably.

21 Q And when they want a permit of short duration -- they
22 want a permit of short duration to continue mining under their
23 old plans of development, true?

24 MR. TULLY: You know, Your Honor, I object to
25 foundation. There's no request for a permit of short duration.



1 He's asking about a mythical application for permit of short
2 duration that did not occur in March of 2015.

3 MR. CAMPBELL: You know, Judge, Mr. Wiley says
4 there's no written application. He says there is no such thing
5 as a written application for a short term like that. So he
6 drafted one. Mr. Wiley said they were going to give them one.
7 I'm entitled to question upon this.

8 THE COURT: A few more questions, counsel, all right.

9 MR. TULLY: Well, the question doesn't assume facts
10 that are not in evidence.

11 THE COURT: You can answer.

12 THE WITNESS: I'm trying to remember the question.

13 BY MR. CAMPBELL:

14 Q My only question is that the short-term permit you
15 drafted, sir -- remember this is a short-term permit you had no
16 memory of and then Mr. Wiley talked to you and now you remember
17 it, right?

18 A I do recall that permit, yes.

19 Q Okay. Have you remembered anything more about it
20 since I questioned you yesterday?

21 A I don't believe so.

22 Q Okay. That permit, short-term permit was based on
23 the old plans of development so they continued to mine in the
24 green areas where they'd been mining, true?

25 A As we discussed yesterday, the final form of that



1 A Engineering, civil.

2 Q Okay. Any post-graduate degrees?

3 A No.

4 Q And I understand you've worked at the Flood Control
5 District for a very long time?

6 A I have. Since 1980.

7 Q All right. And for 24 years you were the head of
8 engineering at the Flood Control District, correct?

9 A Yes.

10 Q And then Mr. Wiley came in as the chief engineer, Mr.
11 Wiley brought you in to be sort of his aide, correct?

12 A It's called senior engineering adviser. I sit in a
13 office near Mr. Wiley to help provide technical advice to him.

14 Q Just two doors away, if I recall.

15 A Two doors away, yes.

16 Q And that's because he doesn't have the floodplain
17 hydrological experience you do, correct?

18 A It's a different type of experience than what I have
19 had.

20 Q All right. And I understand with respect to the ABC
21 mine starting in January of 2015 Mr. Wiley put together a team
22 consisting of himself, you, and Mr. Beuche that was going to
23 discuss permitting decision with respect to the ABC mine, true?

24 A Not completely.

25 Q Not completely in what sense?



1 A Scott Vogel is the -- in charge of the permitting
2 function and he's also involved.

3 Q Okay. So from time to time --

4 A So that's the main thing.

5 Q -- he would sit with the team?

6 A He's -- he's part of this whole process with all the
7 permitting, including with ABC.

8 Q And I understand this team includes attorneys, right?

9 A There's an attorney involved with this particular
10 case, yes.

11 Q All right. Well, as I understand it, most all the
12 discussions with respect to permitting have taken place with
13 attorneys present?

14 A Discussions that Mr. Wiley has been involved with
15 probably for the most part.

16 Q And you have been involved with the ABC mine going
17 back to 2010, 2011?

18 A Yes, approximately 20 -- approximately 2011.

19 Q And you were responsible for permitting sand and
20 gravel mines -- permitting them under the Flood Control
21 District since 2008?

22 A Approximately 2008, yes.

23 Q And in your 34 years with the Flood Control
24 department has a permit of short duration ever been denied to
25 an applicant in an ongoing application process for a permit?



1 A Yes.

2 Q ABC?

3 A Yes, ABC.

4 Q Anyone else?

5 A Only one case where it was only issued -- or maybe a
6 few for processing only and not for mining.

7 Q All right. But in terms of applications for a new
8 five-year permit the only time a permit of short duration was
9 denied is ABC?

10 A Yes, and that's only since late 2010 or 2011, not for
11 the 35 or 36 years. Permits of short duration or short permits
12 didn't come into being until a circumstance came up in
13 approximately 2010 or 2011. So it was only since then.

14 Q All right. Well let's talk about this period of
15 time, 2010, 2011. So you recognize this map, don't you, sir?

16 A Yes, I do.

17 Q And the ABC mine is surrounded by with the Gravel
18 Resources mine, correct?

19 A Yes.

20 Q The Tanner (phonetic) mine?

21 A Yes.

22 Q The Hanson (phonetic) mine?

23 A Yes.

24 Q And Cemex (phonetic) is right to the south, correct?

25 A Yes.



1 Q Let's talk first about Tanner.

2 MR. TRULLINGER: Your Honor, just to make an
3 objection. It sounds like we're going to be talking a lot
4 about 2011, '12 timeframe before January 28th, 2015. So just
5 like before I'd like, if I can, make a standing objection that
6 nothing that occurred before January 28th, 2015 other than the
7 flood permit of short duration expired July 12th, 2012 is
8 relevant to this particular hearing. If I can have that
9 standing objection, I'd appreciate it.

10 THE COURT: Absolutely. Of course you may.

11 MR. CAMPBELL: Exhibit 223, please. And move in 223.

12 THE COURT: Any objection? Hearing none, it's
13 admitted.

14 (Plaintiff's Exhibit 223 Received)

15 MR. TULLY: He moved it in.

16 MR. TRULLINGER: Objection for relevance, Your Honor.

17 THE COURT: Oh, okay.

18 MR. TRULLINGER: This is even 2010.

19 MR. CAMPBELL: Well, actually we're going to -- we're
20 just going to show they mined without a permit for seven years
21 from 2003 to 2010 and there was never any enforcement action
22 for (indiscernible) filed against them.

23 MR. TRULLINGER: It's not relevant for a couple of
24 reasons. It's not relevant because it's not related to the
25 same time frame. It's also not relevant because what happened



1 with other mines is not relevant to what -- whether or not ABC
2 had a mining permit in 2015.

3 THE COURT: I'll allow it and give it the weight I
4 think appropriate.

5 BY MR. CAMPBELL:

6 Q All right. Exhibit 223 is an email from Michael
7 Jones to Thomas Wergen (phonetic). Michael Jones is an
8 inspector at the Flood Control District back then?

9 A No, he's not.

10 Q What was he?

11 A Michael Jones as a civil engineer that was managing
12 the permitting process.

13 Q Okay. But this is an email in March of 2010, right?

14 A Yes.

15 Q And you're aware that Tanner mined in the floodplain
16 without a permit from 2003 until 2010?

17 A I became aware in 2010 that they had been found to be
18 mining without a current permit, yes.

19 Q All right. There was no enforcement action for fines
20 ever initiated against Tanner, correct?

21 A No. They were notified that they did not have a
22 permit on file with us and to stop operating and to rectify
23 that and that's what they did. And so no enforcement action
24 was initiated because they came in right away and -- and worked
25 on remedying the situation.



1 Q Okay. Let's say this is 2010. In 2011 you're going
2 to initiate a enforcement action against ABC for operating
3 without a permit for a few months. Do you recall that?

4 A Yes. We initiated a -- a -- an action in 2011
5 against ABC for operating without a permit. I do recall.

6 Q Okay. Let's bring up --

7 A And I think it was just a few weeks after their
8 permit had expired.

9 Q Let's bring up Exhibit 225. Now this is going to be
10 an email -- or excuse me. Let me move in 225.

11 MR. TRULLINGER: Objection. Relevance, Your Honor.

12 THE COURT: I'll allow it. Again, give it what the
13 weight I think it deserves.

14 (Plaintiff's Exhibit 225 Received)

15 BY MR. CAMPBELL:

16 Q All right. This is Mr. Dorense (phonetic) to Mr.
17 Jones on September 7th, 2011, right?

18 A Yes.

19 Q Now September 7th, 2011 is after the time -- well,
20 let me strike that. ABC didn't have a permit from May of 2011
21 until, I believe, November of 2011. Does that ring a bell?

22 A That's -- it does ring a bell, yes.

23 Q All right. So this email with respect to Tanner is
24 at the exact same period of time that ABC doesn't have a
25 permit, correct?



1 A Yes. That is true.

2 Q And this is an email that just says they're
3 requesting a process permit for the Glendale site. They'll
4 continue the repairs of their compliance issues and mining
5 outside of the floodplain. Give -- give me a call if you have
6 questions. So this is the exact same period of time that
7 you're dealing with ABC. They've operated without a permit for
8 seven years and you initiate no enforcement action against them
9 for (indiscernible), true?

10 A It is true that we did not initiate an enforcement
11 action at the time. This email correspondence they either
12 currently had a short permit -- I can't recall or they were
13 asking to get one to continue their processing.

14 Q It looks like you gave them one, two, three short-
15 term approvals, right?

16 A That's what it says in handwriting for a short term
17 2/11, second 5/13, third 9/15. And this looks like, yeah, they
18 were continuing.

19 Q Okay. Let's go to Exhibit 224. I don't know if 224
20 (indiscernible).

21 THE COURT: Similar to the same objection, I presume,
22 counsel? It's a 2010 document it looks like.

23 MR. TRULLINGER: 224? Yeah, same objection, Your
24 Honor. Relevance.

25 THE COURT: All right.



1 MR. CAMPBELL: Okay. Let's turn to the second.

2 THE COURT: I will admit it into evidence.

3 (Plaintiff's Exhibit 224 Received)

4 BY MR. CAMPBELL:

5 Q Turn to the second page of this. Third page. Blow
6 up that last paragraph. Actually (indiscernible). You know
7 who Robert Madder (phonetic) is?

8 A Do I? I have met, I believe, once or twice. I think
9 he's an engineer. I believe he used to work for -- well, I
10 can't remember which firm. CNG or somebody like that. I can't
11 remember, but he's a -- he's an engineer that -- that was a
12 consultant, I believe.

13 Q Okay. When you see in this paragraph he's writing to
14 the Flood Control District and he's telling them what they do
15 and so you see he indicates we're going to get new topographic
16 mapping. As soon as it's received and I assume they're going
17 to make adjustments to their mining plan.

18 And then he says as you know we've been working with
19 the District for over four years now in an effort to define an
20 economically viable and acceptable engineering approach to the
21 bank protection design. The District's development and
22 adoption of current creek level specifications was critical to
23 reaching this goal, a provision that took many months to
24 complete. During this time Murray Tanner was also closely
25 involved and has been a supporter of the mining district, the



1 mechanism proposed by the District upon channelization of the
2 Agua Fria River. It remains committed to this goal. What's
3 the mining district?

4 A As I understand it, he's talking about I think some
5 state legislation that allowed that mining district could be
6 created. I think that's what he's talking about.

7 Q Did it have anything to do with master plans? They
8 want to channelization of the Agua Fria River?

9 A There was some state legislation that allowed for I
10 think mining companies to -- to work together to form a -- a
11 mining district.

12 Q Okay.

13 A Right. That's what I know about it.

14 Q But he's telling you that he's been very involved and
15 a supporter of this, correct?

16 A That's what this says, yes.

17 Q And it's something proposed by the District, right?

18 A I don't know if it was proposed by the District.

19 Q It says the mechanism proposed by the District to
20 fund channelization of the Agua Fria River.

21 A I don't know the full background of how the state
22 legislation came to be or even exactly when.

23 Q Let's turn to Gravel Resources. So Gravel Resources
24 is the mine right across the dry river bed, right, from ABC?

25 A Yes.



1 Q Let's turn to Exhibit Number 207. So let's blow that
2 up. So this is a letter to Mr. Guzman. Do you see that?

3 A Yes.

4 Q It's dated January 2011.

5 A Yes.

6 Q And this is ABC is going to file for its renewal of
7 its permit in February of 2011. Do you recall that?

8 MR. TRULLINGER: Just real quick, Colin. Before you
9 read from this, are you offering this?

10 MR. CAMPBELL: Oh, yes. I'm sorry. 207.

11 MR. TRULLINGER: Thank you. I object on the basis of
12 relevance, Your Honor.

13 THE COURT: It's admitted subject to objection.

14 (Plaintiff's Exhibit 207 Received)

15 BY MR. CAMPBELL:

16 Q All right. So you're saying that this is a letter
17 from Mr. Bendor (phonetic) of Gravel Resources to Mr. Guzman
18 who's the mine inspector at FCD. And he's saying that our
19 current permit expired in July of 2010. Do you see that?

20 A I see it, yes.

21 Q And it looks like they're working on an amendment to
22 the permit, correct?

23 A Yes.

24 Q And they're going to concentrate on the renewal of
25 the application, right?



1 A Yes.

2 Q And they send you in an authorization to mine and a
3 check in the amount of \$6400, correct?

4 A Yes.

5 Q All right. So his permit had lapsed. It had
6 expired, true?

7 A Yes.

8 Q And as the head of the engineering department you
9 would allow mine operators to apply for renewals after their
10 permit had expired, true?

11 A Yes.

12 Q And that's a fact you've told Mr. Wiley?

13 A I believe at some point back in time I let him know
14 that there was a time when we had special circumstance that we
15 did allow that and then we no longer allow it.

16 Q But you wanted to let him know how you had treated
17 mines in the past, right?

18 A I wanted him to know that this had occurred at some
19 time in the past.

20 Q And let's go to Exhibit 208. So I move in 208.

21 THE COURT: Same objection, obviously?

22 MR. TRULLINGER: Objection, relevance, Your Honor.

23 THE COURT: Admitted.

24 (Plaintiff's Exhibit 208 Received)

25 BY MR. CAMPBELL:



1 Q So let's blow that up. So they let -- Gravel
2 Resources, their permit expires. And we just saw the letter in
3 January where they sent in a check. They haven't even filed a
4 renewal yet. And this is a permit of short duration that you
5 signed on February 10th, 2011, right?

6 A Yes.

7 Q And it says here the floodplain use permit shall
8 expire to allow you time to complete the permit renewal
9 process, true?

10 A Yes, true.

11 Q So they're -- their permits expire. They're in an
12 ongoing application process and you grant a short-term permit
13 to bridge them to the new permit, right?

14 A Yes, so that they can finish the -- the work that
15 they need to do to get the new permit.

16 Q All right. And this is --

17 A They'll have time.

18 Q This is February 2011 which is going to be the same
19 year that ABC applies to renew its permit, correct?

20 A Yes, it is.

21 Q And with respect to a new permit or a new renewal
22 permit, you can bring yourself back into compliance with a plan
23 of development within the new permit, right?

24 A You can do that, yes. You can have engineering
25 within the plan of how you're going to bring it back into



1 compliance including putting things back you may have over
2 excavated, things like that, yes.

3 Q And mines are able to mine while working on a new
4 permit which would get them back into compliance, correct?

5 A In some cases, yes.

6 Q Now it's not uncommon to give one, two, three or more
7 permits of short duration while the renewal process is taking
8 place, true?

9 A At that time in 2011 it was not uncommon to have more
10 than one permit short duration or short permit.

11 Q And you remember the Gravel Resources was out of
12 compliance with their old plan of development, correct?

13 A Yes, and that they had some issues related to their
14 previously pre-plan, yes.

15 Q And you worked with them to get them into compliance,
16 correct?

17 A My staff did. I personally did not.

18 Q All right. You didn't try to shut them down, true?

19 A They came in and cooperated to try to remedy the
20 situation and so we cooperated with the permitting process to
21 let them finish it up.

22 Q Would you treat someone differently if you viewed
23 them as uncooperative?

24 A If they won't come in and file the necessary
25 paperwork then we can't work with them if they won't bring the



1 work to us to -- to file the -- the information. If they won't
2 submit the engineering or allow us to speak their engineer or
3 sign short-term permits, those kinds of things, those have
4 caused us to not be able to, you know, issue permits if the
5 applicant won't do the -- the work or assign them..

6 Q What if there's a good faith dispute about what
7 you're asking for. Would you consider that uncooperative?

8 A I'm not sure what you mean by good faith dispute.

9 Q We'll get to it.

10 A Okay. All right.

11 Q Exhibit 210. Move Exhibit 210 in.

12 MR. TRULLINGER: Objection. Relevance, Your Honor.

13 THE COURT: It's admitted. It's over objection.

14 (Plaintiff's Exhibit 210 Received)

15 BY MR. CAMPBELL:

16 Q Blow it up. So this is a second short-term permit to
17 Gravel Resources. It's dated May 19th, 2011 and you signed it,
18 correct?

19 A Yes.

20 Q This is going to be -- in May 2011 is when ABC's
21 permit is expiring, true?

22 A Yes.

23 Q And you give them a second permit of short duration
24 to allow them time to complete the permit renewal process,
25 right?



1 A Yes.

2 Q And it looks like it's still in engineering
3 revisions, correct? Let's see, it was sent back to CMG
4 drainage for the revisions on April 14th, 2011.

5 A Yes.

6 Q Let's look at the Hanson mine, okay. Over here. So
7 Exhibit 244. Actually we're going to -- I move in 244.

8 THE COURT: Same objection?

9 MR. TRULLINGER: Yeah, this is even further back.
10 This looks like -- it's 2008 and then there's a yellow piece of
11 paper that I don't think is original on there.

12 MR. CAMPBELL: Actually this is how it was produced
13 to us by the District. What happens in this particular case,
14 Judge, is they are permitted -- their permit expired and it's
15 on the sticky notes in March of 2009. No renewal app was
16 filed. In 2010 a mine plan was received and they gave them a
17 short-term permit on March 8th, 2011, but during the time they
18 were coming after us.

19 THE COURT: Okay. I'll admit it over objection.

20 (Plaintiff's Exhibit 244 Received)

21 BY MR. CAMPBELL:

22 Q Could you blow up the sticky note for me? You see if
23 you look down the note it says the permit expired on March
24 14th, 2009. Do you see that?

25 A I do see that, yes.



1 Q And then it says renewal app, no app received. Mine
2 plan submitted January 8th, 2010.

3 A Yes.

4 Q And then let's go to Exhibit 246. Now there was no
5 enforcement action against Hanson for operating without a
6 permit, was there?

7 A No, there hasn't been.

8 Q Okay. And then let's blow this up. I would just --
9 yeah, there you go. Thanks. So this is March 8th, 2011 and
10 you give a short-term flood use permit. This short-term permit
11 shall expire on July 8th, 2011. This is to allow Hanson River
12 Ranch plant to complete the permit renewal process. Do you see
13 that?

14 MR. TRULLINGER: Just a second. Colin, did you offer
15 this? I'm sorry. I missed it.

16 MR. CAMPBELL: Oh, I'm sorry. I offer 225.

17 MR. TRULLINGER: Objection. Relevance, Your Honor.

18 THE COURT: Admitted. What was the number? 225?

19 MR. CAMPBELL: 246.

20 (Plaintiff's Exhibit 246 Received)

21 THE WITNESS: Yes, I see that.

22 BY MR. CAMPBELL:

23 Q Okay. And those are your signature -- that's your
24 initials on the bottom? You signed this?

25 A I signed that memorandum or initialed that



1 memorandum.

2 Q Okay. So in 2011 your practice permits would
3 expires. You'd allow them to file renewal permits and you'd
4 give short-term permits to short duration to get them under
5 permitting, right?

6 A Yes, when we discovered that we were methodically
7 going through all of the files at that time period looking for
8 these kinds of case and getting them cleaned up.

9 Q Were there even more?

10 A The ones that you've exhibited here, I think, you've
11 shown me three now. We were cleaning these up, yes.

12 Q Okay. I'm going to show you another one. Let's go
13 to Sunland (phonetic). Let's go to Exhibit 283.

14 MR. CAMPBELL: Move in 283.

15 MR. TRULLINGER: Objection. Relevance.

16 THE COURT: Over objection, admitted.

17 (Plaintiff's Exhibit 283 Received)

18 BY MR. CAMPBELL:

19 Q So let's blow this up. So this is a letter from the
20 Flood Control District and you see the subject is permit
21 renewal. And it says according to our records the sand and
22 gravel floodplain use permit for the mine site, this is at
23 seven (phonetic) in Salt River expired on December 18th, 2008.
24 It seems the permit renewal process was started but not
25 completed. Review comments were sent out on February 12th,



1 2010 and there was no response. So this is a permit that at
2 least looks like as of the end of 2010 they've been out of
3 permit for two years, right? This letter's January 19th, 2011.

4 A So December 18th, 2008 to 2009 -- a year and two
5 months, maybe, yes.

6 Q Actually this letter is January 19th, 2011.

7 A Oh, I'm looking at the date of 2010.

8 Q And the permit expired on December 2008. So they've
9 been out of compliance for two years, a little more than two
10 years.

11 A Oh, okay. I see. I was looking where they started
12 the permit process in 2010.

13 Q Yeah.

14 A But as of 2011 -- yes, two years.

15 Q Is this in January 2011. This is the same year that
16 ABC's permit is going to expire and according to this letter
17 from your department it says our records show no response was
18 received from Sunland Materials. Do you see that?

19 A Yes.

20 Q All right. So they were --

21 A I see it.

22 Q -- uncooperative, correct?

23 MR. TRULLINGER: Objection. Foundation and
24 speculation.

25 BY MR. CAMPBELL:



1 Q Well would you say the failure to respond is
2 uncooperative, sir?

3 A I'm not sure if they're talking about not responding
4 to review comments at that time. I don't know what it means.

5 Q Well, sir, it says review comments were sent out on
6 Friday, February 12th from Paul Roygun (phonetic), Flood
7 Control District's previous mine inspector enforcement officer.
8 Our records show no response was received from Sunland
9 Materials.

10 A So they started -- yes, I see it. So they started
11 the process to renew their permit. They received review
12 comments and as of January 19, 2011 they hadn't responded to
13 the review comments.

14 Q Okay. But I thought if someone was uncooperative in
15 a permit that expired that would be a situation you would
16 initiate an enforcement action to cease and desist and
17 compliance.

18 A Well, when this was discovered on January 19th, 2011
19 at some point thereafter we probably contacted Sunland
20 Materials about this situation to get it remedied.

21 Q It looks like you contacted on January 19th, 2011.
22 You told them to cease and desist, right?

23 A Yes. Yes, that's what this says.

24 Q Okay. Go to Exhibit 284.

25 MR. CAMPBELL: Move 284 into evidence.



1 MR. TRULLINGER: Objection. Relevance, Your Honor.

2 THE COURT: Overruled. Admitted.

3 (Plaintiff's Exhibit 284 Received)

4 BY MR. CAMPBELL:

5 Q So Exhibit Number 284, this is from you dated March
6 1, 2011, right?

7 A Did you say from me or to me?

8 Q Oh, to you. I'm sorry.

9 A It's to me, yes.

10 Q And you initialed it at the bottom? That's your
11 signature?

12 A It's a memo that I initialed, yes.

13 Q Okay. So this is a mine who's permit had expired
14 over two years ago, right?

15 A Yes.

16 Q They were unresponsive in the renewal process for a
17 period of time, true?

18 A They did not respond to our review comments and we
19 discovered that, yes.

20 Q And you issue a short-term flood use permit on the
21 Salt River and it's to allow them time to complete the permit
22 renewal process, true?

23 A Yes, yes.

24 Q And that was your policy, right?

25 A Yes, it was. Well, but the operators that were in



1 that condition was to get them under a short permit. Prior to
2 that time we didn't have such a thing as short permits that we
3 were issuing.

4 Q Actually do you recall how many permits of short
5 duration you gave this mine?

6 A This one? I know it came up in the deposition and I
7 can't recall the exact number. I don't know. Was it five,
8 something like that? Six?

9 Q Do you recall that you gave over 23 months of short-
10 term renewal permits?

11 A Approximately 23 months while they worked on the
12 CLOMR, I believe and then -- then we gave them the balance of
13 their five year permit after that.

14 Q And they worked on a CLOMR, right?

15 A Yes, they did.

16 Q Why don't you explain to the judge what a CLOMR is?

17 A Well, that's an acronym that stands for conditional
18 letter of map revision. In this case they wanted to move the
19 floodway, the FEMA floodway line over on the Salt River. And
20 so they had to file a special reports and forms that had to be
21 sent to the federal government for review and approval before
22 those -- that floodway line could be moved.

23 THE COURT: All right.

24 BY MR. CAMPBELL:

25 Q Okay. So Sunland was trying to review the floodplain



1 requirements with respect to its property, true?

2 A Not the floodplain requirements. They were trying to
3 modify the location of the floodway boundary.

4 Q Okay. Well they were -- they had property I assume
5 that was in the floodway boundary and they wanted to see if
6 they could get it outside the floodway boundary? Is that it?

7 A They have a lot of property that was in the
8 floodplain and there was a floodway as well and they wanted to
9 move the location of where the floodway boundary was within the
10 property.

11 Q And that would have made it easier for them to mine?
12 If they're outside the floodway they don't have to comply with
13 FEMA stuff?

14 A No, that's not correct.

15 Q Now what were they trying to do? Why was it
16 beneficial for them to move the boundary?

17 A If they moved the boundary then they potentially
18 could armor at that boundary along the floodway line and then
19 once doing that they can mine more behind that in the -- in the
20 fringe area of the floodplain.

21 Q So there was -- there was a benefit to them to
22 petition FEMA to change whatever the flood requirements were as
23 it affected their property?

24 A Potentially there could be. At least they saw it as
25 a benefit to do that.



1 Q All right. But if you filed the then current FEMA
2 they couldn't do that?

3 A Where the floodway line was, no. They couldn't
4 pursue a plan to encroach past that floodway line with some of
5 the work that they were proposing without moving the floodway
6 line.

7 Q So you gave them 23 months of short-term permits so
8 they could try and change the FEMA requirements before getting
9 a full five-year permit, right?

10 A We did. We allowed them to continue to operate under
11 their current land that had previously been approved for those
12 23 months. When the 23 months were up we thought that we'd
13 waited long enough so we issued a permit for three years, the
14 balance of the five years still based on the previous plans.
15 So they were never -- did complete getting it based on moving
16 the floodway line over. They abandoned that at that point and
17 had accepted a permit from us just to -- based on the previous
18 permit that they had with us.

19 Q Let's turn to Exhibit Number 282. And Exhibit Number
20 282 --

21 MR. CAMPBELL: Move to 282 in.

22 MR. TRULLINGER: Objection. Relevance, Your Honor.

23 THE COURT: All right.

24 MR. CAMPBELL: All right. So let's --

25 THE COURT: Admitted, subject to objection.



1 (Plaintiff's Exhibit 282 Received)

2 BY MR. CAMPBELL:

3 Q Let's blow up the top. This just tells us what the
4 document is. This is an inspection report?

5 A Yes, it is.

6 Q So you have inspectors that go out to property and
7 they inspect how the plan's being run for mines and compliance?

8 A Yes.

9 Q And this is Mr. Guzman?

10 A Yes, it is.

11 Q Okay. Let's go down to comment Number 8.

12 So here the operator has mined outside of the
13 permitted limits, right?

14 A Yes.

15 Q And it says that "A compliance plan to resolve the
16 decision needs to be prepared and approved by FCD."

17 Do you see that?

18 A Uh-huh. It does say that, yes.

19 Q And this was while they were under a short-term
20 permit, correct?

21 A Yes, I believe so, yes.

22 Q All right. You didn't terminate them because they
23 were out of compliance, did you?

24 A No.

25 Q You allowed them to come up with a plan to come in to



1 compliance, correct?

2 A Yes.

3 Q And you continued to give them short-term permits
4 if -- or short-term permits --

5 A Yes, we did.

6 Q -- correct?

7 A Yes.

8 Q Actually, let's turn to -- I'm going to jump ahead.
9 Let's turn to Exhibit 306.

10 MR. TRULLINGER: Did you say 306?

11 MR. CAMPBELL: 306.

12 It's actually -- so this is going to be -- I'm going
13 to move in 306.

14 MR. TULLY: Objection. Relevance, Your Honor. And
15 this one's on the other side of the relevant time period in
16 2016.

17 THE COURT: All right. I'll give Mr. Campbell a
18 little leeway. So is moved.

19 (Plaintiff's Exhibit 306 Received)

20 BY MR. CAMPBELL:

21 Q Okay. So this is going to be an email from
22 Mr. Beuche, and this has to do -- actually, we're going to jump
23 ahead here to March of 2016, and it's an application for a
24 renewal of their permit. Do you see that?

25 A It's a message that forwards something about an



1 application for renewal from Tony Beuche, yes.

2 Q Okay. Well, you see that Mr. -- let's go down to the
3 first paragraph. You see Mr. Beuche is giving a permit of
4 short duration so that they can determine whether the
5 floodplain is substantially unchanged, and this will allow for
6 the application -- or the approval of an application for
7 renewal, right?

8 A I'm not familiar with this particular --

9 Q Okay.

10 A -- other than I can just read what it says. I'm not
11 familiar with it.

12 Q Well, I think I asked you this in your deposition --

13 A Perhaps, then, at that time I think I likely read
14 what it said when you asked me a question. Did it say
15 something and I agreed with you? I'm -- that's just my guess
16 because it's --

17 Q Let me see if I can find it here. Well, I got the
18 wrong page over here. Let me come back to that.

19 All right. Let's move to -- so in any event, fair to
20 say that in the year 2011, you would allow renewal permits for
21 people whose permits had been expired, and you would give
22 short-term permits of short duration to bridge them to a new
23 permit, right?

24 A Yes, I would.

25 Q And you didn't seek any enforcement actions against



1 them?

2 A Well, we actually, as you saw in one of those
3 previous letters that you put up there, told the operators that
4 we would seek an enforcement action if they didn't come in and
5 deal with the, the problem.

6 Q All right.

7 A So, but, but we didn't in those cases because they
8 came in and, and dealt with the problem.

9 Q Well, but we have one mine that was unresponsive and
10 didn't come in and fix the problem for another year later, and
11 you didn't do anything against them, true?

12 A That actually -- they just didn't respond to review
13 comments, and I think our staff didn't follow up on that at
14 that point until a year later that there were some review
15 comments out there. So at the time they followed up then was
16 when we had a program in place that we weren't going to allow
17 mines, while they were in this renewal process, just to
18 continue operating until they got done. We were going to start
19 this process of issuing the short permit to bridge it.

20 So when we found those cases like that, like that was
21 the first time we had found that, that, that a year had gone
22 by, you know, we told them about it, and they came in and did
23 something about it.

24 Q Okay. So let's go to ABC of 2011, which is going to
25 be the first time you're going to not issue a permit of short



1 duration and go after funds on an operator, ABC, true?

2 A We tried to issue a permit of short duration. Even
3 in the violation letter we told them that we wanted to get them
4 under a permit of short duration. And it is true then when
5 they defaulted on that and would not do that, that we issued a
6 notice of violation. That is true.

7 Q Let's, let's go through the facts.

8 A Right. Right.

9 MR. CAMPBELL: Exhibit 101. I'd offer 101.

10 MR. TRULLINGER: Objection. Relevance.

11 MR. CAMPBELL: This is going to be ABC's application
12 to mine.

13 THE COURT: Overruled. Admitted.

14 (Plaintiff's Exhibit 101 Received)

15 BY MR. CAMPBELL:

16 Q And so Exhibit 101 is going to be a letter from
17 Mr. Waltemath to Mr. Jones. Have you seen this before?

18 A Yes, I have.

19 Q Let's blow it up.

20 So you see he's following up on a meeting he had with
21 Mr. Jones, and you see he's somewhat critical about the
22 regulatory regime at the Flood Control District. Do you see
23 that?

24 A Where exactly?

25 Q Well, look at the first paragraph in the middle where



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/s/

DEBRA PRICE
LUCI CLARK
RENE KING
Transcribers

October 4, 2017



IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ABC SAND AND ROCK COMPANY
INC.,

Plaintiff,

vs.

FLOOD CONTROL DISTRICT OF
MARICOPA COUNTY,

Defendant.

No. LC2016-000324-001 DT
CV2016-014788
CV2016-010095

Phoenix, Arizona
August 31, 2017
9:17 a.m.

BEFORE THE HONORABLE KERSTIN LEMAIRE

TRANSCRIPT OF PROCEEDINGS

Evidentiary Hearing Day 4

Proceedings recorded by electronic sound recording; transcript
produced by AVTranz, an eScribers, LLC company.

CHRIS HWANG
Transcriptionist



I N D E X

August 31, 2017

<u>PLAINTIFF'S WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VD</u>
David Williams	33	70	105	--	--
Edward Raleigh	15,109	153	213	--	--

<u>DEFENDANT'S WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VD</u>
None					



EXHIBITSPLAINTIFF'S EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
131-135	Unidentified	--	9
163-166, 169, 170	Unidentified	10	10
174	Document	222	222
178, 180, 181	Emails/letters	63	65
184, 327, 398, 403	Plans of Development	66	66
196	Emails	66	67
341	Email	16	16
346	Permit of short duration	18	18
351	Emails	10	11
365	Letter	130	130
366	Email	140	140
367	Letter	141	141
369	Email	143	143
370	Emails	151	151
401, 409	Meeting Notes	66	68
405, 408	Unidentified	14	14
411	Permit	69	69
423	Waltemath testimony	223	223



DEFENDANT'S EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
3	Review comments	159	159
9	Permit of short duration	166	166
10	Document	163	163
15	Chronology Log	154	154
416	Document	221	222
417	Document	207	207
420	Document	--	75



APPEARANCESAugust 31, 2017

Judge: Kerstin LeMaire

For the Plaintiff:

Colin F. Campbell

Jana L. Sutton

Meghan H. Grabel

Witnesses:

Ed Raleigh

David Williams

For the Defendant:

Stephen W. Tully

Bradley L. Dunn

Witnesses:

None

Also Present:

Charles E. Trullinger, Maricopa County

Attorney's Office



1 to be an email -- this is an email chain between you and
2 Michael Jones. And I want you to blow out the top half of it.
3 Bring it down through the text. There you go. Thanks.

4 BY MR. CAMPBELL:

5 Q And you'll see one of the things you're talking about
6 with respect to the ABC permit, this is in May of 2012, and
7 this is an email from you to Michael Jones saying, "One more
8 thing. Add a sentence, we will not issue another permit of
9 short duration due to no progress with the engineering effort
10 to address the deficiencies." Do you see that?

11 A Yes.

12 Q So one of the things, if you're concerned about
13 diligence, these permits of short duration only go for three or
14 four months, right?

15 A Yes, generally, yes.

16 Q And when you were dealing with ABC back in 2012, you
17 at least thought with respect to that third permit, maybe we
18 should put something in here that says, you know, after this
19 one, unless there's significant process, that's going to have
20 to be the end of the road, right?

21 A Yes.

22 Q Was there any discussion in 2015 around March 10th
23 about issuing a permit of short duration? And if you were
24 concerned about diligence, you would simply monitor it through
25 the permitting process that way?



1 A I don't recall a specific conversation like that.

2 Q Okay. That's something the District could have done,
3 true?

4 A Potentially we could have, yes.

5 Q All right.

6 A Yes.

7 Q All right, let's go now, and these are already in, I
8 want to get Exhibit 142. So Exhibit Number 142 is actually
9 going to be the application documents that ABC made. This is
10 dated February 27, 2015. There's a cover letter that goes with
11 this. That's Exhibit 141 that the District received on March
12 2nd. Did you review the application that was made by ABC that
13 you -- your District received on March 2nd, 2015?

14 A I read it.

15 Q Okay.

16 A I read the letter at that time and I looked at these
17 documents that were attached.

18 Q Right. It was clear to you that ABC was applying for
19 a floodplain use permit?

20 A It was only clear to me they were applying for an
21 amendment to a permit.

22 Q All right. They wanted permission to do mining
23 operations in the floodplain, they were asking for that, true?

24 A They were asking for that, true, yes.

25 Q All right.



1 hired upon by them for a litigation regarding a mining permit,
2 but I was defending the -- well, I was representing the Flood
3 Control District.

4 Q Around when were you doing work for the flood
5 control?

6 A I think it's about 20 years ago that I was doing that
7 for them, yes.

8 Q So a lot of the people that are there now may not be
9 people you know?

10 A Probably a lot of them are retired, yes.

11 Q Now you met Mr. Raleigh, right?

12 A Yes, I know Mr. Raleigh, yes.

13 Q And do you know Bing Zhao?

14 A I know Dr. Zhao, yes.

15 Q How do you know him?

16 A I know them through my affiliation with working with
17 the Flood Control District whenever I had a private engineering
18 firm that did a lot of work that had an office here in Arizona.
19 And so, they were the main water resources entity to work with.
20 So I visited frequently and got to know them fairly well as a
21 result of working for them.

22 Q When did you start working for ABC Sand and Rock?

23 A I started in I believe on January or February of
24 2016.

25 Q And what were you retained to do?



1 A I was asked to help and assist in developing a plan
2 of development, we call it a POD, plan of development for the
3 mining activity.

4 Q And you've done that type of work before?

5 A I've done -- it's not my main area, but I've done
6 about once before in relationship to getting a permit, yes.

7 Q At the point you were brought in, were you aware that
8 ABC was already in the middle of the permit application
9 process?

10 A Yes, I knew that and that was part of the
11 introduction of my involvement was I was told that there was
12 previous submittals for the permit, yes.

13 Q So when you were brought in, how did you get up to
14 speed with what had happened?

15 A What I did is I looked at the latest sort of
16 submittal by Mr. Pedro Calza, who was the record -- engineer of
17 record. And then I looked at all the requests for corrections
18 that were I think from the 2015 submittal. And so, then I
19 talked to Mr. Calza, found out what the issues were, read those
20 requests for corrections, look at his models that he had
21 submitted as part of it, and then looked at that, the actual
22 submittal that he had submitted to the Flood Control District.

23 Q So to be clear, you didn't replace Mr. Calza,
24 correct? You supplemented his role?

25 A Yes, he was going to be the engineer of record on



1 A Yes.

2 Q Submit plans and then get comments back?

3 A Yes, because it's expeditious to be able to call the
4 engineer that's responsible for that phenomenon and just hash
5 it out and says, okay, I propose to do this way. I think
6 that's a good way or could you just modify it that way.
7 Instead of waiting till you have a submittal, wait several
8 months or so before you get a response. So it's very
9 expeditious to be able to call each other.

10 Q And you worked on this plan of development for
11 roughly 18 months before the final permit was issued?

12 A Yes, up to now. Yes.

13 Q Okay. How many plans of development did you submit
14 on behalf of ABC?

15 A My --

16 MR. TULLY: Objection. Your Honor, I object.
17 Foundation. He didn't submit any plan to development.
18 BY MS. SUTTON:

19 Q How many plans of development did you work on that
20 was submitted on behalf of ABC?

21 A I believe I was involved in five submittals total.

22 Q All right. So what I'd kind of like to do now with
23 the Court's permission in order to kind of explain the
24 progression from Pedro Calza's plan of development initial one
25 before you came on board to the final permit, if I could have



1 THE COURT: I was going to say.

2 MR. TULLY: Right here.

3 THE COURT: So be our court reporter of the day.

4 BY MS. SUTTON:

5 Q ABC is actually this green one that's labelled,
6 right?

7 A Yes, that's correct.

8 Q Now you see it's kind of a big rectangle on the top
9 and then there's these two kind of parcel -- I guess they're
10 40-acre parcels down on the bottom, right?

11 A Yes, correct.

12 Q And you didn't have any involvement in those two at
13 the bottom, right?

14 A No, that's -- the actual permit was related to this
15 area right here.

16 Q Right. No mining has occurred down there --

17 A No.

18 Q -- at this point, right?

19 A No.

20 Q Okay. One of the first things that you had to agree
21 on when working on this plan of development is how much water
22 was going to flow onto the property, correct?

23 A That's correct.

24 Q Okay. And there's two rivers here, right?

25 A Yes. There's the Agua Fria that comes down this way.



1 And here's the confluence where they meet. And New River comes
2 this way.

3 Q All right. Let's start with the north side of the
4 mine and the Agua Fria. When you first met with the District
5 engineer early in the process, did you believe you reached an
6 agreement about how much water would come down from that north
7 side?

8 A Yes. That's the -- I think it was the March 3rd
9 meeting that we had with the Flood Control District to get an
10 idea of what are the parameters for different for design. We
11 had to come up with -- you can see that the property bounded
12 right here. And you can see the Agua Fria comes in through
13 here. But the orange area I believe is the flood wake, which
14 is -- it's a regulatory term related to they want to reserve a
15 certain portion of the river, so you don't develop it. So it
16 may cause an increase in water elevation. So you won't -- you
17 want to keep away from that as much as possible.

18 And so, you can see though that the water actually -- some
19 of the water of Agua Fria for the linear discharge can actually
20 go beyond and outside. You can see that these two lines over
21 the side. Water is going away from the other side of the pit
22 itself. Some of it this way, but most of it this way.

23 And so we said, well, is it reasonable to assume that the
24 30,000 CFS, which was the FEMA discharge, should all go into
25 the pit or should some of it go outside? Because the more



1 higher the discharge that you have to work with, the harder the
2 protection has to be and it costs more to protect it.

3 So the 30,000, we had -- I mean, we thought we had an
4 agreement with flood control that what we would do is if we
5 look at that portion that's right up here out of the total
6 discharge, what portion of that river would get into here? And
7 so, the other part would go over here.

8 And so, I thought we had an agreement and it was
9 memorialized in the meeting minutes. I think was the 14th of
10 or about two weeks afterwards. So I probably memorialized it,
11 saying that we would take a section upstream which was kind of
12 a constriction area, saying, okay, well that's helping launch
13 the flow of the water into the pit. So if I take that cross
14 section in my hydraulic model, determine a discharge there,
15 that will be the discharge that would go into the pit. The
16 rest would go out here.

17 Q About how much, based on that calculation, how much
18 water did you think was going to go in --

19 A The total of 30,000 CFS or cubic feet per second.
20 Out of that, about 12,000 to my calculations. I have all
21 calculations that went into the pit itself.

22 Q Is that the number you ultimately ended up using on
23 the north side of the mine?

24 A For that face, for that first submittal. Subsequent
25 submittals of flood control says that we don't want you to do



1 what we had agreed upon. We want you to just go back and use
2 the whole 30,000. Assume that the whole river all the way
3 across to here is now going right there. That's -- so that's
4 the assumption we want you to do.

5 Q All right. And now, let's talk about the east side
6 of the mine. You believed also that you had reached some type
7 of agreement about how much water was going to flow on to the
8 property from the New River?

9 A Well, what we had proposed was that a methodology to
10 come up with 100-year discharge for the New River itself. And
11 we agreed that we would look at the -- some hydraulic models,
12 look at the discharge from here, look at the discharge from
13 here. The difference of the two would be located from the New
14 River. And that was agreed upon based upon a model. And they
15 actually gave us a link to the model, so we could look at the
16 hydrology and find out if you'd take this, subtract it from
17 there, and you get this. So he came up with 24,000 cubic feet
18 per second for the New River discharge.

19 And we had a hydraulic model there because we had
20 accommodated the topographic information. It ran 24,000 cubic
21 feet per second. We found out that if you look at the cross
22 section, know that the water was high enough to go into the
23 pit. So we were confident that there was no water going into
24 the pit at that point in time. However, after the change in
25 the discharge, the discharge went from 24,000 to 39,000.



1 Q You say it went from 24,000 to 39,000. What changed?

2 A Because they say that the -- the methodology that we
3 had agreed upon, forget you're going to use the FEMA required
4 from -- and they cited a report. And so, there was 39,000. So
5 about a 50 percent increase in discharge.

6 So when you run that 39,000 through our hydraulic model,
7 water got high enough they could possibly go into the pit. So
8 that means if the water could possibly go into the pit, we had
9 to protect that side of the pit from eroding, because we don't
10 want to cause adverse impact. That is what we call a head cut.
11 Water goes in and the ground progresses to sway and it could
12 possibly endanger some of the infrastructure.

13 Q So they told you to use a higher number. And so you
14 did?

15 A We did.

16 Q And that it would take some time?

17 A And we also used the higher number for here, 30,000.

18 Q And the higher number showed, according to your
19 models, that some water entered the pit. About how far up that
20 east side of the pit did the water enter --

21 A Well --

22 Q -- according to your model?

23 A Yeah. The point is that it's fairly flat and it's
24 fairly irregular. So if you put a cross section in one
25 location, it shows as contained. If you move it this way or



1 that way, it shows us that something could go in. We had our
2 cross sections and showed that it would be -- stay to the side.
3 But field control did point out, well, if you look at the
4 topography, you can see the water could possibly take this
5 tortuous route and eventually get in.

6 And while our -- a one-dimensional model, which is the
7 HEC-RAS model, it's a hydraulic model that we used, can't
8 determine those meandering little patterns that the water could
9 go into the pit. If it only -- assume that it kind of such
10 goes downstream. So it doesn't do lateral movement.

11 And so, subsequently what we did is, well, I say this, you
12 say that. And I say it's going to stay contained, either that
13 or they'd also said, well, if it does go into the pit, we want
14 the 39,000, all of it goes into the pit. Even though you can
15 see some of the pit is upstream to the confluence, they say
16 come on in. And make sure it goes right in there. And they
17 have to design for 39,000 CFS for protection along that area.

18 Q Right.

19 A So the contention was where does it enter the pit if
20 it does?

21 Q Okay, before we get too far ahead, we're kind of
22 skipping a couple plans of development --

23 A Yeah.

24 Q -- and I just want just kind of move through a little
25 bit more.



1 A Sure.

2 Q When you added the 39,000, some water got into the
3 pit. According to your 2-D model, how much protection did you
4 need along that bottom corner of the pit?

5 A Well, may I -- one, before the pit, the 2-D models.
6 We had proposed a methodology determining how the water would
7 get into the pit. So what we did is we essentially looked at
8 the pit here and on the river. The river goes and takes a turn
9 and goes down like this. So what we did is, well, what -- as
10 it turns before it turns down like this, what if you projected
11 straight like this?

12 Q And you can see that based on the fall way, correct?

13 A Right. And you can see the fall way right here takes
14 a turn to here. But we say well, what if we just kind of
15 project it this way and see what the intersect is? And so,
16 okay, that came up about 420 feet upstream of the downstream
17 point of the thing. So it's okay. That's probably -- if it's
18 going to happen, it's where it's going to happen. Then I added
19 50 feet upstream. It's at 470 feet upstream from there is
20 where you have to protect.

21 Q And what type of protection did you propose for that
22 area?

23 A So what we had proposed initially was
24 constant -- called launching riprap to protect it.

25 Q And what is launching riprap?



1 A Launching --

2 Q Drawing pictures, maybe that --

3 A I need to draw a picture of that one. So the
4 traditional method, to protect these slopes, the
5 (indiscernible) water going in or out is the traditional
6 method. And here's where you normally would protect it.

7 So what launching riprap says is that, well, what if you
8 can't get down here to put the riprap? So what we'll do is
9 we'll put the -- we'll put a big bunch of rock right here. And
10 here's how you come up with it. You say, okay, how much -- if
11 I traditionally protected this slope, how much volume would it
12 take of rock?

13 All right, what I'm going to do is say put it on there.
14 I'm going to put it right here. And so if the flow comes,
15 erodes out this part here, and it launches. See? The rock
16 that's here launches and then the increase of volume that's
17 required for by 50 percent just because it's not going to
18 launch, you know, for (indiscernible) it's going to do
19 (indiscernible).

20 So then we have enough rock up here, so it covers all the
21 way down to here. So the whole concept is if the water goes
22 over here from this side, it comes over here. This is
23 unprotected and erodes this area. Gravity will cause this rock
24 to fall in. More erode, more rock until it gets all the way to
25 the bottom.



1 And so, then you, hopefully (sic) that this rock, if it's
2 been eroded out, looks just like that. And to make sure, we
3 increase that volume by 50 percent just in case that there's
4 irregularities.

5 So that's a concept of launching. Riprap's been around
6 for a long time. The contention of the Flood Control District,
7 and this is where we had a little disagreement on the
8 topability (phonetic) is that traditionally, the river would go
9 like this into the picture or (indiscernible) up the side and
10 would launch. I said, well, the same concept would be if the
11 water came in this way.

12 So what we're saying is -- put this in -- the water goes
13 into here. And then my launching riprap is there to prevent it
14 from cutting -- head cutting or eroding this direction, we put
15 that in there so it launches into the slope. And it's a
16 formality.

17 So I said, well, that's the same phenomenon. You
18 either -- you know, you got this bunch of rock eroding this
19 side of it. It falls in and looks as if it's eroding.
20 It's -- and that concept has been around for a long time. I
21 just said, well, what makes you think that if the launch came
22 from the other direction instead of laterally, it came this
23 way. The same concept. Erodes out the undertow. Rock falls
24 and protects the slope.

25 So Flood Control says, no, we don't have any instances nor



1 any papers that says this is a good thing to do. I said, well,
2 but there's no instances of where it says it doesn't work.

3 Q And backing up a little, when you did the plan that
4 had 470 feet of riprap along that corner, did the Flood Control
5 District object to the type of protection that you were using
6 at that time?

7 A No, I think it was the second iteration or the second
8 submittal that I was involved in that we just -- we said, well,
9 you know, it probably does -- water does probably come under
10 here. Right? And we came up with the 420 feet, added 50 feet.
11 So we proposed to do launching riprap for the protection of
12 that, as well as for the upstream area in here.

13 And so, they did -- Flood Control never mentioned anything
14 about checking to that kind of a protection using launching
15 riprap at that time.

16 Q At that time. And then you talked about the
17 limitations of the 2-D model and not -- having no real way to
18 see how the water meanders up north. So how did you address
19 that issue?

20 A So and I think our third meeting, I think it was a
21 September 12th, 2016 meeting, that he said, well, you know, you
22 can argue this. You can argue that. I said how about this,
23 Flood Control. What if I do a two-dimensional model that can
24 do water laterally? It's a little bit more sophisticated model
25 than the one-dimensional model. And said, well, you didn't



1 abide by the results of that, and so instead of forcing us to
2 do 39,000 cubic feet per second over into the pit or do you
3 want the two-dimensional model to come up with so much here, so
4 much here, and so much here, and use that for design of the
5 riprap to protect it.

6 And they said yes. All right, so then we came up -- found
7 out that indeed, they were right. The extent of it was a
8 little bit further upstream than, but the discharge was less,
9 not 39,000. In fact, the total discharge going into the pit
10 was only about 10 percent of that 39,000. And so, we said,
11 okay, what we'll do is we'll take the worse part, the worst
12 segment and then design the whole length with that worst
13 segment in terms of the discharge.

14 And so then, we designed our launching riprap for that
15 extra length. And then we got a letter back. Well, Flood
16 Control, of course, says they don't approve of launching riprap
17 concept.

18 Q Okay, so then you learned that you needed to use a
19 different protection mechanism. And what did you propose?

20 A So the different protection mechanism was what's
21 called a rock chute method.

22 Q Okay.

23 A And it's essentially the same thing as this, this
24 part in green. So what we would do is as a client would
25 excavate out, and go on down to the -- out to the thing, we



1 would actually make a chute. In fact a chute actually goes out
2 to prevent from undermining the thing. So we actually
3 create -- according into the National Resource Conservation
4 Service methodology, which is a federal agency, they have a
5 methodology for doing what's called rock chute.

6 And it -- so we make a rock chute then out of riprap,
7 which essentially which -- and then, you know, do some
8 protection and then some energy dissipation down here. And so,
9 we did the whole length based upon that method. So because
10 again, they didn't like the launching riprap, which I still
11 object to that it would still work. And so, we did that for
12 both the Agua Fria in the north part and then also water coming
13 in from the side from the New River.

14 Q And that's ultimately what was accepted?

15 A Ultimately, they accepted that concept, yes, that we
16 would use the rock riprap. We had some little minor
17 adjustments, because there were things like a little extra
18 technicity (phonetic), because what we had proposed instead of
19 using like standard riprap, we would use what's called concrete
20 rubble, which is you know, from a highway being renovated, they
21 would crack, you know, crunch up the excess concrete. And you
22 could use that for that.

23 So there were some of the slight adjustments. But yes,
24 they -- after we came up with this proposal, they accepted that
25 for both the Agua Fria and the New River part.



1 Q Right. I think that's all I have on explaining --

2 A Okay.

3 Q -- graphically how this all worked. Let's get
4 comfortable again. It's expensive to build this type of
5 protection, right?

6 A Yes, it is. We're talking riprap thicknesses of
7 three to four feet thick for maybe 100 feet down. It depends
8 on what location you're at.

9 Q So it's worthwhile to have an engineering
10 conversation trying to decide what the most cost-effective way
11 to protect a location is?

12 A Yes, it's cost sensitive, yes, it is, the design
13 itself.

14 Q And would you say that all of these discussions you
15 had back and forth with the engineers were within the realm of
16 reasonable engineer disagreement?

17 A Well, there's a caveat to that because the free flow
18 of information was not available. So we only have -- the only
19 time that we can actually talk to the engineers were
20 essentially in formal discussions at a meeting. Some of the
21 meetings involved like 15 people. Well, normally, something
22 like this, you do have two or three people in it. When you
23 have 15 people, it's not exactly conducive to a free flow of
24 information exchange of ideas.

25 So that was a hindrance in itself. And then we only had



1 really three formal meetings with them. We were not allowed to
2 call the engineers responsible for that portion of design
3 directly that we normally would do.

4 Normally, I would be able to say, well, I wonder how I
5 should do this. Well, instead of submitting it and get it
6 rejected and then taking all that time, I'll just call them up
7 to say, hey, I got this protection here as a phenomenon. Here,
8 that's kind of unusual. I propose doing this. What do you
9 think? They said, oh, well, if you go to the manual. Well
10 there's a methodology there, but yeah, yours is unusual. So
11 let's do that modification.

12 So we didn't have that opportunity at all. And that would
13 have really expedited things if we had that opportunity to be
14 able to directly talk to the engineers.

15 Q But when it comes to the actual disagreements that
16 you were having, those were all within the realm of reasonable
17 disagreements?

18 A Well, there were many things that the Flood Control
19 requested for us to do, you know, which I had a theoretical
20 disagreement with or didn't think that it was appropriate or
21 that it doesn't really improve the design or the safety or
22 anything of that sort.

23 But in most cases to expedite the permit process in itself
24 and that we said, okay, don't agree with it. But we'll go
25 ahead and do it. And it's -- and a lot of these things cost



1 extra money.

2 Q So all in all, you attend this case for about 18
3 months. Would you say you were always diligent when you worked
4 on this case?

5 A Well, obviously, I have other projects that I have to
6 work on, but yes, that was one of my four front projects to
7 work on. So I -- as I said earlier, it takes three to four
8 months to do an application. But also, that's making the
9 assumption that the review process that when you hand it in,
10 they bring it back within, you know, within a reasonable amount
11 of time. So if they take a month, well, then that three months
12 is not four months.

13 So we'll have to -- I felt that I was very diligent in
14 making the schedule. I would get a text from the client
15 every -- so wonder and what's the status of this? And I would
16 say, well, I'm working on it, I'm working on it.

17 And every imposed deadline that was either self-imposed or
18 imposed or agreed upon by the Flood Control District with us,
19 we met.

20 Q And some of the work done, when -- for the 3-D model,
21 did you have a third party assist with developing that model?

22 A 2-D model.

23 Q The 2-D model, sorry. That would make it really
24 complicated.

25 A Yes, I had a -- see, what it is to do a two-



1 dimensional model, you have to have a very good geographic
2 information -- geographical information system setup. That's
3 GIS.

4 Q Uh-huh.

5 A And so, I'm not a -- in my part of the career, we
6 didn't even know what GIS was when I started doing this stuff.
7 And so, I didn't get into that portion. And so, that was back
8 only the last 10, 20 years that GIS became the important in
9 water resource engineering. So I didn't have the capability,
10 or you know, or the fortitude to want to learn GIS.

11 And so, I had, if someone helped me put the -- get the
12 GIS, put my model together, keep my grid system together, and
13 get it functioning, at which time it was given over to me for
14 tweaking to make sure that it's working right stability wise,
15 parameters are correct and things of that sort.

16 Q So that took some time?

17 A Yes, it took some time, yes.

18 Q But the end, it was worth it because you had a more
19 realistic picture of what was going on at the mines?

20 A Right. And we -- and I had to, you know, to give it
21 to Flood Control that they were right that there is some water
22 going into the pit from the New River, but it was not the
23 magnitude that they expected. And so, it was very beneficial
24 for my client that we did the 2-D modelling.

25 Q And you also worked with Pedro, who then had to have



1 these really big maps printed out for each submission, correct?

2 A Yes. Every submittal, we had to redo those things,
3 redo these what's called finds in the plans and specifications
4 essentially. And that there were about 10 of -- for 10 of them
5 for every submittal. So they each take several hours to do.
6 So yes, that takes time. And then also, Mr. Calza didn't do
7 them himself. He had a person that helped him that was
8 familiar with the doing AutoCAD. Yes.

9 Q So there were a lot of moving parts --

10 A Yes.

11 Q -- into getting each POD actually out the door?

12 A Yes.

13 Q All the effort you contributed to these plans of
14 development, which were actually submitted by Pedro, was your
15 analysis based on your professional training?

16 A Well, there were two basics -- basic models that we
17 had to use. One was a sediment transport model. And for each
18 iteration, we actually did two sets of transport models.
19 Because to determine the adverse impact of a mining operation,
20 you have to have a base condition that are proposed conditions.
21 And the two are the ones that you make comparison between the
22 two to determine the adverse impact.

23 And so, we had what's called a 2009 sediment transport
24 model and a 2016 sediment model, which is based upon the plan
25 of development or POD.



1 So every time we had to do an iteration, we had to do a
2 sediment transport model times two. And then we had to do the
3 possible -- redo the two-dimensional model coming in for the
4 New River.

5 And so, it was very complicated. And let me tell you,
6 these sediment transport models are very finnick. You turn
7 one and it just blows up on you. During that, you go on site.
8 So you spend a lot of time trying to tame that model is what I
9 used to say.

10 I used to teach a 3-D sediment transport model in short
11 course of which about half the time, it was on how to settle,
12 make this darn thing behave. And so, each one is a little
13 artsy thing, turn and tweaking that. Then you may get the
14 results or a stabilized model, but it may not be the right
15 answer. Or you know that just ridiculous answer. So you'd
16 have to tweak it again. So every time we had to do that.

17 And so, I mean, hydraulic model, we use HEC-RAS one-
18 dimensional of which I also teach a three-day short course on
19 how to do that. And each time there can be some sort of
20 unstable -- instability with those two as you change some
21 parameters. But HEC-RAS, the hydraulic model is not as
22 finnick as the sediment transport of which we had to do two
23 every time.

24 Q Would you say you worked for these 18 months in good
25 faith on this project?



1 A Very much so.

2 Q And you worked diligently?

3 A Yes.

4 Q Did you ever have any doubt that you could come up
5 with a reasonable engineering solution for mining on this
6 property?

7 A I've never failed in completing a project over my 40
8 years of experience in terms of completing it to the
9 satisfaction of my client. So keeping that in mind, I am very
10 optimistic that we eventually find a solution.

11 Q And you believe that there was one; I guess, whether
12 or not the District agreed with you was a separate issue?

13 A Well, I didn't think of it in terms of that way,
14 because I -- you know, you got to keep the eyes on the prize.
15 And the prize was getting the permit. And so, I tried to look
16 out for the interests of my client, because if there are kind
17 of ridiculous requests for changes, that's going to really
18 cause a huge amount of money for my client, I would really
19 fight that part. But if -- it's took just a little tweaking of
20 that to satisfy them, and still not going to compromise my
21 engineering, I was willing to do that.

22 Q At the end of the day, you were successful in getting
23 the permit?

24 A Yes.

25 MS. SUTTON: So I would like to admit some exhibits,



1 So I -- again, it just depends upon the complexity of that
2 submittal, if it was a -- if it's a judicial time to do all
3 that review for us.

4 Q That's everything.

5 THE COURT: All right, thank you very much. You may
6 step down, sir.

7 THE WITNESS: All right, thank you, ma'am.

8 MR. CAMPBELL: And we'd like to recall Mr. Raleigh.

9 THE COURT: All right.

10 (Pause)

11 MR. CAMPBELL: It's like we have a jury of engineers.

12 THE COURT: I know, which is going to be a problem
13 because you know they're always the foreperson, right?

14 MR. CAMPBELL: Right.

15 MS. SUTTON: They are.

16 THE COURT: I know some days, Mr. Raleigh, I'm sorry.
17 Now we have easels and everything else for you to work around.

18 DIRECT EXAMINATION CONTINUED

19 BY MR. CAMPBELL:

20 Q Mr. Raleigh, welcome back. On the screen in front of
21 you here is Exhibit Number 363, which is in evidence. It's
22 dated 5 September 2015. It's an email from Mr. Beuche to you.
23 And it's with respect to the permit of short duration. And
24 then you see mine. Do you see that?

25 A Yes.



1 Q All right. And you were at Mr. Beuche's deposition;
2 were you not?

3 A Yes, I was.

4 Q And you were present when Mr. Beuche said he
5 absolutely had no memory of this email at all, correct?

6 A I recall that he said he -- yeah, he had -- couldn't
7 remember or something like that. I don't know if he said
8 absolutely. I remember he had been something that he couldn't
9 remember.

10 Q At some time during a break in the deposition, did
11 you talk to Mr. Beuche about this email and this permit?

12 A I believe I did, yes.

13 Q And what did you tell Mr. Beuche?

14 A I mentioned to Mr. Beuche that I believe he was
15 working on that around the time of the letter that had gone out
16 in February. He mentioned that a permit of short duration
17 might be or would be issued if needed, something like that and
18 that he had worked on it to have it ready to go.

19 Q All right. And then you were present when Mr. Beuche
20 came back into the deposition and said suddenly, he had a
21 refreshed recollection of the email?

22 A Yes, he said that that's part something, I believe.
23 He had a recollection of it.

24 Q But if you refresh your recollection, it was simply
25 what you had told him during the break?



1 A I don't recall if it was the same or if he had, you
2 know, sparked that he remembered additional.

3 Q Do you remember him remembering anything other than
4 what you had told him?

5 A I don't recall.

6 Q So March -- in March 10th of 2015, someone told Mr.
7 Beuche to put together a permit of short duration, true?

8 A Either they told him to or he did it on his own. I'm
9 not sure.

10 Q Who told him to?

11 A I'm not sure who told him to.

12 Q You didn't tell him to?

13 A I don't remember if I was part of that conversation
14 to tell him to or not. I don't recall.

15 Q All right. And he's going to put together a permit
16 of short duration based on three previously approved plans of
17 development, right?

18 A Previously approved plans of -- identified -- yes.

19 Q All right. Let's go to the top of it. Actually, I
20 should ask you, do you remember getting this permit and having
21 any comments to make on it?

22 A I don't specifically recall making comments on it.

23 Q Okay. And this is the top part of the email. And
24 again, it's from Mr. Beuche. It's to you and Mr. Vogel. It
25 says, "Please find attached for your review a draft PSD revised



1 as follows and a set of revisions." And then it says, "All are
2 in agreement that the PSD will be issued only upon receipt of
3 an application for a new permit."

4 Now do you have any recollection of Mr. Raleigh, Mr.
5 Vogel, and Mr. Beuche, the three of you being in agreement that
6 the PSD will be issued?

7 A No, not really, other than what the email says, I
8 don't know.

9 Q Okay. And it says, "It will be issued upon receipt
10 of an application for a new permit." At this time, I guess the
11 decision had been made to reject the application and require a
12 new application?

13 A Um --

14 Q Do you remember that? It was going to be issued only
15 upon the receipt of a new permit?

16 A Yeah, and I don't recall if the response back to the
17 application had already gone out or not, you know, as of the
18 date of this. So I don't know if it was before or after the
19 response went out.

20 Q Okay. Let's go to the permit, which is attached
21 here. So this is the first page of the permit. Do you have
22 any recollection of it at all?

23 A It's familiar to me, because I see these kind of
24 permits in the past in the floodplain.

25 Q What I want to know is on or about the date of these



1 emails, do you have a recollection of looking at a permit of
2 short duration involving the ABC Sand and Rock?

3 A I can see that I did, but I don't have specific
4 recollection about it.

5 Q Okay. Do you recall if you brought this to Mr.
6 Wiley?

7 A I don't believe I can recall that I brought it to Mr.
8 Wiley. I don't know.

9 Q Did you ever offer this permit of short duration to
10 the ABC mine?

11 A No, this wasn't offered to the ABC mine, this permit,
12 no, I don't believe.

13 Q Do you have some recollection of any discussion
14 between you in Mr. Beuche with Mr. Wiley on or about March of
15 2015 about issuing this permit of short duration to the ABC
16 mine?

17 A At least in February, if not in March, there was a
18 discussion when the letter went out originally from Mr. Wiley
19 that a permit of short duration could issue. So we'd had that
20 discussion about it. I can't recall that we had a subsequent
21 discussion with Mr. Wiley about that.

22 Q So again, let's back up. So in February, Mr. Raleigh
23 sends out a letter to Mr. Waltemath saying filed an application
24 and if necessary, a permit of short duration. Is that the
25 letter you're talking about?



1 A Yes.

2 Q So you had a conversation with Mr. Wiley about that
3 letter?

4 A Yes, I was in conversations and with legal counsel as
5 well about sending a letter out to -- which that was a letter
6 that went out.

7 Q Okay. I understand when I have legal counsel I have
8 a black hole. Is there any discussion apart from legal counsel
9 about issuing a permit of short duration in February 2015?

10 A This discussion probably had occurred between Tony
11 Beuche and me, you know, after that, that you're showing me the
12 emails. And Mr. Raleigh wasn't involved with these, but at
13 least Tony and I were and Scott Vogel --

14 Q That --

15 A -- and Jeffrey Little, it looks like.

16 Q All right, but with respect to the emails, all you
17 remember is the email itself?

18 A Yes, I don't -- yeah, I believe it was just preparing
19 this and getting ready for their submittal to be ready, you
20 know, if it came in.

21 Q All right. And at this time, and actually, at any
22 time thereafter, you were never instructed to offer a permit of
23 short duration to the ABC model, true?

24 A I was not instructed to do that, true. I was not.

25 Q All right. Let's go to Exhibit Number 364 off the



1 bottom of it. Okay, so now this is going to be an email on
2 March 12th, 2015. This is two days after Mr. Beuche prepares a
3 permit of short duration. And this is an email that Mr.
4 Waltemath sent to members of the Arizona legislature, asking
5 them to vote no on a House bill 255 (indiscernible). Have you
6 seen this email before?

7 A Can I see the whole email?

8 Q Independent recollection. Have you seen this email
9 before?

10 A I've seen this --

11 MR. TULLY: Your Honor, he's asked to see the email.
12 He's entitled to see it.

13 MR. CAMPBELL: Well, I think I'm trying to ask him if
14 he has an independent recollection here before I show him the
15 rest of the email.

16 THE COURT: Yeah, sometimes --

17 MR. CAMPBELL: But I don't know.

18 THE COURT: -- I was going to say if we have it
19 all --

20 MR. CAMPBELL: I'll scroll it up. I'll scroll --

21 THE COURT: I was going to say sometimes for me, I
22 need to see the whole formatting in order to do this.

23 MR. CAMPBELL: Blow up, it's not part of it and with
24 the -- we captured just part of the lower part.

25 MR. TRULLINGER: Well, we've got the actual emails



1 right of in front of us, too. Just pull the exhibit.

2 MR. CAMPBELL: Just pull it, pull it down.

3 THE COURT: Want to grab it?

4 MR. CAMPBELL: Give it (indiscernible).

5 MR. TRULLINGER: What number is it?

6 THE COURT: 364.

7 BY MR. CAMPBELL:

8 Q So this is the top part of the email. Do you know
9 who Russell Bowers is?

10 A Yes, I do.

11 THE COURT: Thank you.

12 THE WITNESS: Thank you.

13 BY MR. CAMPBELL:

14 Q And who is Russell Bowers?

15 A Right now, I last seen him related to being in the
16 state legislature, I believe.

17 Q Okay. And then it's sent to Mr. Trussell. Do you
18 remember that Mr. Trussell at this time is involved in Arizona
19 Rock Products Association?

20 A Yes.

21 Q And you'll see that Mr. Trussell then forwarded to
22 John Hathaway (phonetic) and William Wiley. Do you see that?

23 A Yes, I do.

24 Q And who's Mr. Hathaway?

25 A John Hathaway is an engineer that worked at our



1 office.

2 Q All right. And what was Mr. Hathaway's involvement
3 with this House bill if you know?

4 A I don't know the specifics about his involvement with
5 the House bill.

6 Q Did Mr. Hathaway sometimes work with the legislature?

7 A I believe he did have some coordination with the
8 legislature at times perhaps. Yeah, I don't know a lot of the
9 details about this.

10 Q But he sometimes lobbied for the Flood Control
11 District with the legislature?

12 A Not to my knowledge.

13 Q All right. And then you'll see Mr. Hathaway forwards
14 it to you. Do you see that?

15 A Yes.

16 Q And he tells you that he's already forwarded it to
17 Jen. Who is Jen?

18 A I believe he may be referring to Jennifer Corski
19 (phonetic).

20 Q Now after this email of March 12th, did you ever have
21 a conversation with Mr. Wiley about issuing a permit of short
22 duration to ABC?

23 A I don't recall if I did.

24 Q After this email, do you recall ever forwarding the
25 permit you got from Mr. Beuche to anyone else, the March 10th,



1 2012 -- 2015 permit that Mr. Beuche had drafted up?

2 A Did I forward to anyone else?

3 Q Yes.

4 A I don't recall that I did.

5 MS. SUTTON: And Mr. Campbell, just so you know, it's
6 now --

7 MR. CAMPBELL: Oh. Judge, this a good time to break?

8 THE COURT: Is it?

9 MR. CAMPBELL: And Judge --

10 THE COURT: I know you have a meeting with Water
11 Master?

12 MR. CAMPBELL: Yes. It's just right over here in the
13 central court building. It's scheduled for 1:30. There's
14 just -- some other matters have been vacated and reset. So we
15 just have two procedural matters. And I'm hoping we can be
16 back at 2.

17 THE COURT: 2 o'clock. That works for me. This
18 worked out well.

19 MR. TRULLINGER: I know we're coming back at 2
20 o'clock.

21 THE COURT: Yes.

22 MR. TRULLINGER: We still have to call Dr. Zhao. I
23 have to examine Mr. Raleigh.

24 THE COURT: Yes.

25 MR. TRULLINGER: Can we set some sort of time limit



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/s/

CHRIS HWANG
Transcriber

October 4, 2017

