FREDERICK, PERALES, ALLMON & ROCKWELL, P.C.
ATTORNEYS AT LAW
1206 San Antonio St.
Austin, Texas 78701
(512) 469-6000 (512) 482-9346 (facsimile)
Info@LF-LawFirm.com

Of Counsel:
Rick Lowerre

October 30, 2019

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

Lennar Homes of Texas Land and Construction, Ltd.
c/o C T Corporation System
1999 Bryan St., Ste 900
Dallas, TX 75201

Hon. Andrew Wheeler
U.S. Environmental Protection Agency
Office of the Administrator, MC-1101A
William Jefferson Clinton Building,
1200 Pennsylvania Avenue NW
Washington, D.C. 20004

Hon. Ken McQueen
Region 6 Administrator
U.S. Environmental Protection Agency
1201 Elm Street, Suite 500
Dallas, Texas 75270

Hon. William Barr
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Hon. Chairman Jon Niermann
Texas Commission on Environmental Quality
MC 100
P.O. Box 13087
Austin, Texas 78711-3087

Hon. Commissioner Emily Lindley
Texas Commission on Environmental Quality
MC 100

P.O. Box 13087
Austin, Texas 78711-3087

Hon. Commissioner Bobby Janecka
Texas Commission on Environmental Quality
MC 100
P.O. Box 13087
Austin, Texas 78711-3087

Mr. Toby Baker
Executive Director
Texas Commission on Environmental Quality
MC 109
P.O. Box 13087
Austin, Texas 78711-3087

RE: CITIZEN'S NOTICE OF INTENT TO SUE PURSUANT TO FEDERAL CLEAN WATER ACT

Dear Sirs and Madams:

By this letter, Greater Edwards Aquifer Alliance ("GEAA"), Bulverde Neighborhood Alliance ("BNA"), and Shawn and Eddie Langford (the "Langfords") (referred to herein collectively as "GEAA") notifies you of their intent to sue Lennar Homes of Texas Land and Construction, Ltd. ("Lennar"), who has allegedly violated the Clean Water Act ("CWA") 33 U.S.C. §§1251, *et. seq.*, specifically 33 U.S.C. § 1311.

GEAA gives the above-named parties this notice and hereby states its intent to file suit on or after December 29, 2019, pursuant to 33 U.S.C. § 1365 (a)-(b) (the citizen's suit provision of the CWA). GEAA hopes that litigation will not be necessary. As set out herein, however, it is GEAA's informed belief that Lennar is violating federal law.

LEGAL BACKGROUND

The Clean Water Act

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the Act prohibits "the discharge of any pollutant" into navigable waters, except as authorized by the CWA. 33 U.S.C. § 1311(a).

The CWA establishes the National Pollutant Discharge Elimination System ("NPDES") under which the Administrator of the EPA or an authorized State can issue NPDES permits, which allow the lawful discharge of pollutants subject to certain

conditions. 33 U.S.C. § 1342. In Texas, the TCEQ has the authority to issue NPDES permits through the TPDES permitting program.

TPDES permits impose limitations on the discharge of pollutants, and establish related monitoring and reporting requirements, in order to improve the cleanliness and safety of the Nation's waters. Each violation of a TPDES permit violates the CWA and is grounds for enforcement action. 33 U.S.C. §§ 1311(a), 1365(f).

The holder of a TPDES permit is subject to both federal and state enforcement action for failure to comply with the limitations imposed in the permit. 33 U.S.C. §§ 1319, 1342.

Clean Water Act § 402(p) (33 U.S.C. 1342(p)) requires permits for stormwater discharges from either industrial or municipal activities. The EPA has implemented this requirement by the promulgation of 40 Code of Federal Regulations (CFR) § 122.26. A storm water discharge associated with industrial activity is defined in these regulations, at 40 CFR § 122.26(b)(14)(x), to include construction activity disturbing more than five acres. The regulation explicitly provides that this includes clearing, grading and excavation activities. Application requirements for storm water discharges associated with industrial activity, including construction activities disturbing more than five acres, are established at 40 CFR § 122.26(c). The Clean Water Act at § 301(a) (33 U.S.C. 1311) establishes that no discharge of pollutants into a water of the United States is allowed except in compliance with the requirements of that Act, including the requirements of CWA § 402 (33 U.S.C. 1342).

Thus, the requirements of authorizations contained in a general permit are enforceable through a citizen suit under § 505 (33 USC § 1365) of the federal Clean Water Act.

The requirement that a permittee develop and implement a stormwater pollution prevention plan, set forth at Part III of TXR150000, is one of the federally enforceable terms of this general permit issued under TCEQ's delegated authority to implement CWA § 402(p). Among other requirements, this general permit requires that the permittee design, install, and maintain effective erosion controls and sediment controls to minimize the discharge of pollutants as the result of construction activities.[1] All protective measures in the SWPPP must be maintained in effective working condition.[2] To this end, the General Permit requires the development of a storm water pollution prevention plan (SWPPP), which must be implemented prior to commencing construction activities that result in soil disturbance.[3] For activities disturbing more than ten acres at a time, this Plan must include a sedimentation basin providing sufficient storage to contain the volume of runoff from a 2-year, 24-hour storm event from each disturbed acre drained.[4] Furthermore, controls must be developed to minimize the offsite transport of litter, construction debris, and construction materials.[5] Disturbed areas must be stabilized where earth disturbing activities have either ended, or temporarily ceased for more than 14 days.[6]

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[1] TXR150000, Condition III(G)(1).
[2] TXR150000, Condition III(F)(6)(a).
[3] TXR150000, Condition III(C).
[4] TXR150000, Condition III(F)(2)(c)(i)(A)(1).
[5] TXR150000, Condition III(F)(2)(a)(iii).
[6] TXR150000, Condition III(G)(2).

Citizen Enforcement

The CWA authorizes any citizen to file a civil action to enforce an effluent standard in an NPDES (or TPDES) permit, subject to certain limitations. 33 U.S.C. § 1365(a), (b). Subsection (a) of the citizen suit provision, entitled "Authorization; jurisdiction," instructs: "Except as provided in subsection (b) of this section..., any citizen may commence a civil action on his own behalf... against any person... who is alleged to be in violation of... an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a)(1).

The CWA defines the term "an effluent standard or limitation under this chapter" to mean, among other things, "a permit or condition thereof issued under, which is in effect under [section 402 of the CWA]." 33 U.S.C. § 1365(f).

CWA section 505, 33 U.S.C. § 1365, empowers citizens to seek remedies for unpermitted discharges violating Section 301 of the CWA, 33 U.S.C. § 1311, and for violations of NPDES permit conditions. This section also authorizes citizens to seek injunctive relief.

For violations occurring and assessed after January 15, 2019, each separate violation of the CWA subjects the violator to a penalty of up to $54,833 per day per violation, pursuant to sections 309(d) and 505(a) of the CWA. 33 U.S.C. §§ 1319(d), 1365(a), and 40 C.F.R. § 19.4 (2009) (Adjustment of Civil Monetary Penalties for Inflation).

FACTUAL BACKGROUND

The Greater Edwards Aquifer Alliance is a nonprofit membership association that promotes the protection and preservation of the Edwards Aquifer, as well as its springs, watersheds, and the Texas Hill Country that sustains it. Bulverde Neighborhood Alliance is an organization that seeks to protect the air, land, and water of the Bulverde area, as well as any areas impacted by its land development.

Lennar Homes of Texas Land and Construction, Ltd. ("Lennar") is participating in the development of "4S Ranch," which is comprised of approximately 775 acres of land proposed to be used for a combination of commercial and residential purposes (the "Development"). This property is immediately northwest of the City of Bulverde, Texas. Construction of this development commenced in or about March 19, 2018. Lewis Creek drains central portions of the Development, while certain Western portions of the Development drain into a tributary of Lewis Creek.

Shawn and Eddie Langford reside at 4385 High Noon Drive, Bulverde, Texas. They are the trustees of the Eddie and Shawn Langford Revocable Trust, which owns roughly 15 acres at that location upon which the Langfords reside (the "Langford Property"). Under both natural and developed conditions, certain western areas of the Development drain onto the Langford Property, thence to Lewis Creek.

Lennar holds Registration No. TXR15216K for construction at the site of the Development, under Texas Construction Activities General Permit TXR150000.

Immediately adjacent to the Langford Property, Lennar has constructed a detention pond that concentrates runoff from certain western portions of the Development (herein referenced as "Detention Basin D"). This basin now directs runoff from the Development onto the Langford Property. The contributing areas to that pond include areas where construction activities were occurring as of October 24, 2019, and continue to occur.

On May 8, 2019, a rainfall event occurred which resulted in the runoff of storm water from the Development in Lewis Creek. This storm water escaping the Development contained significant quantities of suspended solids.

More recently, on October 24, 2019, a precipitation event occurred at the Development. As a result of this event, approximately 4.1 inches of rain fell within the span of less than six hours. Based upon the National Oceanic and Atmospheric Administration ("NOAA") Atlas 14, this rainfall event was roughly equivalent to the magnitude of the 2-year, 24-hour storm event for this location.[7]

As a result of this rainfall event, significant quantities of storm water runoff, containing a large amount of sediment, escaped the Development. Much of this escaping sediment consequently contaminated water features on the Langford Property, and was deposited upon broad areas of the Langford Property, as illustrated in the photographs below.

Additionally, in violation of the applicable permit, disturbed soils in significant areas of the Development have not been stabilized despite the cessation of soil disturbance in those areas for more than 14 days. Likewise, construction debris and litter has been deposited upon the Langford property as a result of construction activities at the Development, and runoff from the Development.

[7] https://hdsc.nws.noaa.gov/hdsc/pfds/pfds_map_cont.html?bkmrk=ne, at 29.765555° N, 98.391944° W.

Figure 1
October 25, 2019 photograph of storm water containing sediment exiting Detention Basin D on Development Property

Figure 2
October 25, 2019 photograph of storm water flowing across property line from Development onto Langford Property (taken by Eddie Langford on October 25, 2019

Figure 3
October 25, 2019 photograph of storm water flowing across Langford Property, downstream of property line.

Figure 4
October 25, 2019 photograph showing sediment from 4S Ranch deposited in fish pond

ALLEGED LEGAL VIOLATIONS OF THE CLEAN WATER ACT

A. Lennar Is Allegedly in Violation of CWA § 301.

Lennar has violated CWA § 301 by discharging pollutants in violation of General Permit TXR150000, and continues to be in violation of that section. Violations include:

Provision of TXR150000	Violation	Dates of Violation
Condition III	Lennar failed to develop a SWPPP prior to the commencement of construction that minimizes to the extent practicable the discharge of pollutants in stormwater associated with construction activity and non-stormwater discharges.	March 19, 2018 to present.
Condition III(C)	Lennar commenced construction activities resulting in soil disturbance prior to implementation of SWPPP.	March 19, 2018 to present.
Condition III(F)(2)(c)(i)(A)(1)	Lennar failed to adequately contain rainfall on site resulting from a 2-year, 24-hour storm event.	May 8, October 24, and October 25, 2019, with likely recurrence upon subsequent rainfall events.
Condition III(F)(2)(a)(iii)	Lennar failed to implement measures to sufficiently prevent the offsite transport of litter, construction debris, and construction materials.	May 8, October 24, and October 25, 2019, with likely recurrence upon subsequent rainfall events.
Condition III(F)(6)(a)	Lennar failed to maintain control measures at the Development in effective working condition.	October 23, 2019 to present.
Condition III(G)(1)	Lennar discharged pollutants including suspended solids, thereby failing to minimize the discharge of pollutants.	May 8, October 24, and October 25, 2019, with likely recurrence upon subsequent rainfall events.
Condition III(G)(2)	Lennar has failed to stabilize soils in areas where soil disturbance has ceased for more than 14 days.	March 19, 2018 to present.

As identified above, each of these violations is either ongoing, or is anticipated to recur upon subsequent rainfall events. If maximum penalties were imposed, this would result in penalties well in excess of $1,000,000.

CONCLUSION

As noted above, GEAA, BNA, and the Langfords would prefer to resolve this matter without the need for litigation. Please feel free to contact Eric Allmon at (512) 469-6000 to discuss how these issues may be addressed.

Sincerely,

Eric Allmon
FREDERICK, PERALES, ALLMON &
ROCKWELL, P.C.
1206 San Antonio Street
Austin, Texas 78701
(512) 469-6000
(512) 482-9346 Fax
eallmon@lf-lawfirm.com

Counsel for GEAA, BNA, and Eddie and Shawn Langford

cc:
Hon. Bill Krawietz, Mayor, City of Bulverde
Herman Randow, Legal Counsel for Lennar
Richard Mott