

Transmitted via electronic mail

June 15, 2016

Benjamin Martin
San Francisco Bay Regional Water Quality Control Board
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Email: Benjamin.Martin@waterboards.ca.gov

Re: Comments on the Notice of Pending Enforcement Action, John D. Sweeney and Point Buckler Club, LLC

Dear Mr. Martin:

On behalf of San Francisco Baykeeper (“Baykeeper”) and our over 5,000 members and supporters, I submit these comments in support of the pending enforcement action for the illegal activities occurring on Point Buckler Island. Baykeeper is a non-profit organization that works to protect and enhance the water quality and natural resources of San Francisco Bay, its tributaries, and other waters in the Bay Area, for the benefit of its ecosystems and communities.

The San Francisco Bay Regional Water Quality Control Board (“Regional Water Board”) has thoroughly documented the illegal actions of John D. Sweeney and the Point Buckler Club, LLC (“Dischargers”) on Point Buckler Island. As stated in the Tentative Order, Adoption of Cleanup and Abatement Order for Point Buckler Island (“Tentative CAO”) and the Administrative Civil Liability, Complaint No. R2-2016-1008 (“Complaint”), the Dischargers’ actions caused the loss of almost 30 acres of tidal marsh. This habitat was designated critical habitat for several fish species, including the Delta smelt, which is in imminent danger of extinction. Moreover, Point Buckler Island provided potential habitat for special status bird species, and threatened and endangered plants have been observed at the site. In short, the Dischargers’ unlawful actions resulted in the destruction of a key ecosystem in Suisun Bay.

Baykeeper applauds the Regional Water Board’s response to these violations and encourages the Regional Water Board to continue to diligently pursue the enforcement action so that the harm caused by these unlawful actions is mitigated in a timely fashion. The Tentative CAO requires the Dischargers to prepare the Point Buckler Restoration Plan by February 10, 2017. Although the Tentative CAO states that implementation of the plan must begin sixty (60) days after acceptance of that plan, the Tentative CAO does not include a deadline by which the Dischargers must complete the restoration work. Baykeeper encourages the Regional Water Board to require the Dischargers to apply for all necessary permits within three (3) months of the Regional Water Board’s acceptance of the Restoration Plan and to complete the restoration work within one (1) year after receiving all necessary permits. This strict timeline is reasonable and warranted since the unlawful activities began in 2012 and it appears as though no work has yet been done to remediate the harms caused. In no case should the Regional Water Board approve an extension of the deadlines in the Tentative CAO or in the implementation schedules of accepted plans.

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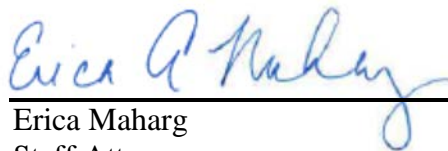
Further, Baykeeper supports requiring the Dischargers to submit a Mitigation and Monitoring Plan that will provide compensatory mitigation for temporary and permanent impacts. The Dischargers should be required to provide compensatory mitigation of no less than a 2:1 ratio. For the reasons stated in the Tentative CAO, the circumstances of this case warrant compensatory mitigation at this level.

Finally, the \$4.6 million fine imposed on the Dischargers for the violations at Point Buckler Island is reasonable and should not be reduced. The Regional Water Board has carefully documented the harm and other factors warranting this fine. The Dischargers were aware of the legal requirements and appeared to understand that they needed permits for the work they undertook on the island. It also appears that the Dischargers have not taken any steps to remediate the violations, but have, in fact, attempted to thwart the Regional Water Board's investigation of the violations. The Regional Water Board applied a factor of 1.1 for the Cleanup and Cooperation Factor. Baykeeper would encourage the Regional Water Board to apply a factor of 1.5 in light of the Dischargers' recalcitrance.

The Regional Water Board decreased the maximum administrative civil liability of \$39 million, and the base fine of \$11.3 million (calculated pursuant to the State Water Resources Control Board's Water Quality Enforcement Policy), to \$4.6 million. This reduction was proposed in consideration of the Dischargers' ability to pay and the amount of money likely required to mitigate the violations. However, the Regional Water Board noted the Dischargers' financial assets, and before a fine is reduced for ability to pay, the Dischargers should have to show economic hardship to the Regional Water Board. Therefore, at this time, the base fine should not be reduced for ability to pay. In addition, the duty to mitigate a violation should be a separate requirement from a fine imposed for a past violation. As such, Baykeeper questions whether it is appropriate for the Regional Water Board to reduce the Dischargers' fine because of the cost of mitigating the harm caused by the violation. At the very least, the Regional Water Board should not reduce the fine from its current level in response to arguments from the Dischargers.

In closing, Baykeeper supports the Regional Water Board's enforcement action. The importance of wetland and tidal marsh ecosystems cannot be overstated. It is imperative that regulatory agencies, such as the Regional Water Board, enforce the law to protect these habitats. We encourage the Regional Water Board to enforce the terms of the Tentative CAO and Complaint to ensure the timely remediation of the violations occurring on Point Buckler Island. Thank you for your work on this matter.

Sincerely,



Erica Maharg
Staff Attorney