

BRISCOE IVESTER & BAZEL LLP

155 SANSOME STREET  
SEVENTH FLOOR  
SAN FRANCISCO CALIFORNIA 94104  
(415) 402-2700  
FAX (415) 398-5630

*Lawrence S. Bazel*  
(415) 402-2711  
lbazel@briscoelaw.net

22 May 2016

*By E-Mail*

San Francisco Bay Regional Water Quality Control Board  
1515 Clay Street, Suite 1400  
Oakland, CA 94612  
Attn: Marnie Ajello  
marnie.ajello@waterboards.ca.gov

Subject: Point Buckler Club, LLC and John D. Sweeney  
ACL Complaint No. R2-2016-1008 and Proposed CAO  
**(Response requested by Tuesday 24 May 2016.)**

Dear Ms. Ajello:

I am counsel for Point Buckler Club, LLC (the “Club”) and John D. Sweeney in this matter. I have received, from the prosecution team in this matter, a document entitled “Hearing Procedure For Administrative Civil Liability Complaint No. R2-2016-1008 And Tentative Cleanup And Abatement Order”. That document identifies this Friday 27 May, as my deadline for responding to it, and I expect to respond. One request, however, will not wait that long: I request that the hearing date, now scheduled for 10 August, be taken off calendar so that we may discuss resolution with the prosecution team. If that request is denied, I request that the hearing be rescheduled for 14 December 2016 or a later date. For reasons explained below, I request a response, or at least a status report, by close of business Tuesday 24 May 2016.

Our preference is to take the hearing off calendar while we engage in settlement discussions, which is what the waiver form we received refers to as Option 3. A meeting with the prosecution team has already been scheduled for 9 June, and we will undoubtedly need more meetings to work things out. Because the parties in this case may need some time to cool down before substantial progress can be made, and because the concurrence of other agencies will also be needed, the best choice is to take the matter off calendar.<sup>1</sup>

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<sup>1</sup> The waiver form says that I “reserve the ability to request a hearing in the future”, and by choosing Option 3 I am not waiving the right of the club and Mr. Sweeney to a hearing, although I am waiving their right to have that hearing within 90 days.

If the request to take the hearing off calendar is denied, then I request that the hearing date be moved, which is Option 2 in the waiver form. I request the 14 December date for a hearing, or any date after that. I am not available on 14 September or 9 November because I will be out of town for longstanding family commitments. Although I can make a hearing on 12 October, that date would prevent the parties from agreeing to postpone their demurrer and motion (discussed below), and thereby force the parties to focus on their adversarial positions rather than on a possible resolution.

The current date of 10 August is inappropriate because, among other reasons, the club has a motion against Mr. Wolfe and the Regional Board that is now scheduled to be heard in Solano Superior Court on 23 August 2016. That motion argues that the Regional Board does not have authority to issue a cleanup and abatement order against the Club for the levee maintenance and repair work on Point Buckler Island. A copy is attached to this letter as Exhibit 1.

If I prevail on the motion, the Regional Board will not be able to issue the cleanup and abatement order proposed by the prosecution team. Plainly, the scope of the Regional Board's authority to issue an order should be decided before the Regional Board considers whether to issue the order.

If the 10 August date for the hearing before the Regional Board is not moved, I will have to ask the Court to move up the date of the hearing on my motion. Before my motion is heard, the Court will hear a demurrer filed by Mr. Wolfe and the Regional Board, which is now scheduled for 26 July. My current thinking is to ask the Court, this Thursday, to hear the demurrer in June and my motion in July. In order to make this request on Thursday, I have to give counsel for Mr. Wolfe and the Regional Board notice by Wednesday morning.

I therefore request that I be informed of the status of your consideration of my request by **close of business on Tuesday, 24 May**. If you need more time, please let me know. I may be able to postpone my trip to Court until next Tuesday, 31 May, in which case I would request that you make a decision on my request by close of business on Thursday 26 May.

I have signed the waiver forms for the club and Mr. Sweeney, and have attached them as Exhibit 2 and Exhibit 3 to this letter. I am authorized to sign on behalf of them.<sup>2</sup>

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<sup>2</sup> The form includes language in which I am speaking, and language in which someone else is speaking to me. I have crossed out the language in which someone else is speaking to me to avoid any suggestion that I am intentionally waiving anything other than the 90-day deadline.

The 10 August date is also inappropriate because it does not provide enough time for the club and Mr. Sweeney to evaluate the evidence against them and prepare a response. The prosecution team has sent us a 452-page technical report that is teeming with conclusions about many technical issues: about water elevations at the island, about the topography and land elevations of the island, about the local hydrology, about the vegetation on the island, about aquatic and terrestrial species on the island, about the history of the island, about the installation of a pump at the island as part of CEQA mitigation for the diversion of water from the Delta south, about the individual management plan certified by BCDC for the island, about other regulatory documents, and about legal effect of the Suisun Marsh Preservation Act and other applicable statutes. The Regional Board has not yet provided a staff report or other explanation for its proposals, and the current hearing schedule does not require a submission from the Regional Board until 1 July 2016.

The club and Mr. Sweeney need time to evaluate the claims and evidence against them and to prepare a technical and legal response. The current hearing schedule requires a submission from them by 11 July, and that is simply not enough time for them, their experts, and their lawyers to evaluate hundreds of pages of a technical report (plus the Regional Board's 1 July submission), identify the key issues, consider whether to collect additional data, collect that data, reach conclusions, research legal issues, and write up the conclusions and legal arguments. "Due process always requires, at a minimum, notice and an opportunity to respond." (*United States v. Raya-Vaca* (9th Cir. 2014) 771 F.3d 1195, 1204, citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542.) In *Raya-Vaca*, the court held that the federal government violated due process when it did not allow a person to review a sworn statement and respond it. Here, depriving the club and Mr. Sweeney of an adequate time to respond to the claims against them would violate due process.

Finally, no hearing is needed to protect human health. Although the parties strongly disagree about whether the work affected water quality at the island (the prosecution team insists that the work dried out the interior of the island; the club and Mr. Sweeney report that there was no drying out), the quickest way to resolve the prosecution team's concerns is likely to be through discussion rather than adversarial proceedings. As a result, the public interest will be served by taking the hearing off calendar.

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Sorry to ask for such a quick turnaround, and thanks for your speedy response. If you'd like to talk, please e-mail me and I'll set up a conference call with the prosecution team.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Bazel". The signature is fluid and cursive, with a large loop at the end.

Lawrence S. Bazel

cc: D. Whyte (be e-mail)  
L. Drabandt (by e-mail)  
T. Austin (by e-mail)  
B. Martin (by e-mail)  
M. Bullock (by e-mail)  
M. Goldman (by e-mail)