

Response to Public Comments on Tentative Cleanup and Abatement Order
Point Buckler Island, Solano County

Comment Letter	Comment	Response to Comment
1. Sierra Club	1.1 “The Sierra Club supports the Regional Water Board’s efforts to correct the serious wetlands and water quality violations at Point Buckler Island. The Sierra Club is concerned, however, that despite such efforts the Discharger’s recalcitrance will significantly delay, or even avoid, meaningful wetlands restoration.”	Comment noted. The tentative CAO is intended to expeditiously result in site restoration to minimize further harm to beneficial uses.
	1.2 “The Sierra Club therefore supports the May 17, 2016 Tentative Cleanup and Abatement Order issued by the Regional Water Board as long as the Order is revised and reinforced as suggested below, and the Water Board is successful in securing the Discharger’s acceptance of, and compliance with, the Order as revised. We suggest the Order be revised to include: (1) a requirement within Provision No. 2 on page 15 of the Order, that the Restoration Plan to be submitted to the Water Board on or before February 17, 2017 include fully prepared draft permit and approval applications for all necessary permits and approvals, and (2) an implementation time schedule which shall include a deadline of April 17, 2017 for the submission of all necessary permits and approvals to all applicable agencies, and (3) a restoration construction completion date of no more than six months after the issuance of all necessary permits.”	<p>We agree that a deadline for submittal of permit applications is warranted. We recommend that the tentative CAO be revised to require all necessary permit applications be submitted within three months of receiving Water Board approval of the Point Buckler Restoration Plan.</p> <p>We agree that a deadline for completion of habitat restoration is reasonable. We recommend that the tentative CAO be revised to include a deadline for completion of restoration construction within one year of receiving all necessary permits.</p>
	1.3 “Sierra Club also supports the Regional Water Board’s administrative penalty assessment ... We also request that the Regional Water Board instigate a strong incentive for prompt restoration of the damaged wetlands by additionally assessing and obtaining a \$10,000 per day penalty against the	Comments concerning the Administrative Civil Liability Complaint will be addressed as part of the separate ACL hearing process, currently scheduled for December 2016.

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	Discharger for each and every day after August 10, 2016 that the damaged wetlands remain unrestored.”	
2. Save the Bay	2.1 “We appreciate the detailed documentation by the San Francisco Bay Regional Water Quality Control Board of the illegal actions of John D. Sweeney and the Point Buckler Club, LLC on Point Buckler Island [in the Cleanup and Abatement Order and Administrative Civil Liability Complaint] indicating that they caused the loss of nearly 30 acres of tidal marsh that is designated critical habitat for the endangered Delta smelt and other fish species. Threatened and endangered plants have been documented on the island, which offers habitat for special status bird species.”	Comment noted.
	2.2 “We note that the unlawful activities documented by the Board began in 2012 and apparently have continued to the present day. In fact, Mr. Sweeney’s intransigence suggests that no work to remediate harm caused will be initiated or completed without strict requirements and expeditious timelines imposed and enforced by the Board. Therefore, we request that the Board should strengthen the Tentative CAO by adding a deadline for completion of mandated habitat restoration on Point Buckler Island, and by requiring Mr. Sweeney to submit a Mitigation and Monitoring Plan that will provide compensatory mitigation for temporary and permanent impacts at no less than a 2:1 ratio. The documented circumstances of this case include such egregious violations that this high level of compensatory mitigation is clearly warranted.”	<p>Please see responses to comment 1.1 and 1.2.</p> <p>The tentative CAO requires that compensatory mitigation comply with the State’s No Net Loss Policy and further notes that a minimum 2:1 ratio typically would be required for mitigation constructed at the same time as impacts occur (which is not the case here; it has been four years since unauthorized activities began the destruction of tidal wetlands). The CAO discusses factors to consider in determining how much additional mitigation is necessary to address temporal losses and delays in construction/restoration. Given the temporal losses and critical tidal wetland habitat destroyed, and assuming a mitigation site is in</p>

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		<p>close proximity and of a similar wetland type, we would expect to see a proposal for mitigation of not less than six acres for each acre of tidal wetland filled or otherwise lost (either temporarily or permanently). The final determination will depend upon the type and amount of restoration that takes place on the Island, the location and type of proposed mitigation, and other factors described in the CAO.</p>
	<p>2.3 “[T]he documented severity of these violations warrants the imposition of \$4.6 million in fines – this amount is reasonable and should not be reduced. Not only was Mr. Sweeney aware of the legal requirements for the work on the island, he failed to take any steps to remediate the violations, and has actively sought to interfere with the Board’s investigation of violations. In light of Mr. Sweeneys’ intransigence, the Board’s applied factor for Cleanup and Cooperation is inadequate and should be increased to 1.5. In fact, the Board’s decision to decrease the maximum administrative civil liability of \$39 million and the base fine of \$11.3 million was premature. Mr. Sweeney should have to show economic hardship or inability to pay before any reduction by the Board.”</p>	<p>Comments concerning the Administrative Civil Liability Complaint will be addressed as part of the separate ACL hearing process, currently scheduled for December 2016.</p>
	<p>2.4 “The Board’s enforcement action is crucial to protect the critically endangered wetlands habitats of the San Francisco Bay, Suisun Marsh, and Sacramento-San Joaquin Delta. The people of California require regulatory agencies to enforce state law to protect our interest in a healthy environment.”</p>	<p>Comment noted.</p>

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<p>3. San Francisco Baykeeper</p>	<p>3.1 “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... [T]he Dischargers’ actions caused the loss of almost 30 acres of tidal marsh. This habitat was designed 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.”</p>	<p>Comment noted.</p>
	<p>3.2 “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.”</p>	<p>Please see response to comment 1.1.</p>
	<p>3.3 “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 days after acceptance of that plan, the Tentative CAO does not include a deadline by which the Dischargers must complete the restoration work.”</p>	<p>Please see response to comment 1.2.</p>
	<p>3.4 “Baykeeper encourages the Regional Water Board to require the Dischargers to apply for all necessary permits within three months of the Regional Water Board’s acceptance of the Restoration Plan and to complete the restoration work within one year after receiving all necessary permits. This</p>	<p>Please see response to comment 1.2.</p>

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	<p>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.”</p>	
	<p>3.5 “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.”</p>	<p>Comment noted.</p>
	<p>3.6 “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.”</p>	<p>Please see response to comment 2.1.</p>
	<p>3.7 “[T]he \$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.”</p>	<p>Comments concerning the Administrative Civil Liability Complaint will be addressed as part of the separate ACL hearing process, currently scheduled for December 2016.</p>

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	<p>3.8 “The Regional Water Board decreased the maximum administrative civil liability of \$39 million and the base fine of \$11.3 million ... 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.”</p>	<p>Comments concerning the Administrative Civil Liability Complaint will be addressed as part of the separate ACL hearing process, currently scheduled for December 2016.</p>
	<p>3.9 “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.”</p>	<p>Please see response to comment 1.1.</p>

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<p>4. Citizens Committee to Complete the Refuge</p>	<p>4.1 “We are extremely concerned that it has been at least two years since the wetlands on Point Buckler Island have been cut off from natural tidal flows. Therefore we urge the RWQCB to require the Discharger to act diligently and expeditiously in pursuing restoration of the site to avoid further environmental harm.”</p>	<p>Please see response to comment 1.1.</p>
	<p>4.2 “Under the wording of H. Prohibitions, we are concerned the current wording of Prohibition #1 could be too open to interpretation and suggest the language be amended to read “The discharge of fill material is prohibited unless authorized by the U.S. Army Corps of Engineers and San Francisco Bay Regional Water Quality Control Board.” Or that Prohibition #1 be deleted, as Prohibition #2 clearly states that the placement of fill is prohibited unless approved by the Water Board. We suggest that approval by the U.S. Army Corps of Engineers should also be required.”</p>	<p>We agree that Prohibitions 1 and 2 are somewhat duplicative. We recommend revising the CAO to combine both Prohibitions as follows: “Prohibition 1. The discharge of fill material is prohibited, except as allowed by plans accepted by the Executive Officer or approved by the Water Board pursuant to this Order, or through permits (e.g., Waste Discharge Requirements or Water Quality Certification) issued by the Water Board subsequent to the adoption of this Order for the discharge of fill into waters of the State or United States. Further, the discharge of fill is prohibited without an appropriate Clean Water Act permit consultation and/or authorization from the U.S. Army Corps of Engineers.”</p>
	<p>4.3 “We concur with the San Francisco Baykeeper (Baykeeper), that the Tentative CAO should be amended to require the Discharger ‘apply for all necessary permits within three months of the Regional Water Board’s acceptance of the Restoration Plan’ and require restoration work is completed within one year of receiving all necessary permits.”</p>	<p>Please see response to comment 1.2.</p>

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	<p>4.4 “In addition to a Mitigation and Monitoring Plan for restoration of tidal marsh, the Discharger should be required to compensate for temporal losses (assuming all unauthorized fill is required to be removed and all impacted habitat restored) of habitat at a ratio of no less than 2:1 mitigation. This mitigation ratio is warranted due to the magnitude of the adverse impacts, the loss of special status species habitat, and the fact that the Discharger was aware that an individual Clean Water Act permit would be required prior to undertaking the unauthorized activities.”</p>	<p>Please see response to comment 2.1.</p>
	<p>4.5 “We echo Baykeeper’s concerns regarding the proposed reduction in civil liability of \$39 million and base fee of \$11 million to \$4.6 million. The evidence strongly suggests this was a knowing violation. The environmental harm of nearly 30 acres is one of the largest violations in the Bay Area in recent history. The unauthorized placement of fill and removal of natural tidal action impacted potential and known special status species habitat...”</p>	<p>Comments concerning the Administrative Civil Liability Complaint will be addressed as part of the separate ACL hearing process, currently scheduled for December 2016.</p>
	<p>4.6 “In light of the delays that have occurred ... we support the June 6, 2016 recommendation by the Sierra Club that the RWQCB ‘instigate a strong incentive for prompt restoration of the damaged wetlands by additionally assessing and obtaining a \$10,000 per day penalty against the Discharger for each and every day after August 10, 2016 that the damaged wetlands remain unrestored.’”</p>	<p>Comments concerning the Administrative Civil Liability Complaint will be addressed as part of the separate ACL hearing process, currently scheduled for December 2016.</p>
	<p>4.7 “In conclusion, CCCR strongly supports the Regional Water Board’s enforcement action in this case. It is imperative that regulatory agencies, such as the Regional Water Board,</p>	<p>Please see response to comment 1.1.</p>

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	<p>enforce the law to protect wetlands, beneficial uses of waters of the State, and sensitive species 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.”</p>	
<p>5. National Marine Fisheries Service</p>	<p>5.1 “NOAA’s National Marine Fisheries Service (NMFS) wishes to express our support for the enforcement actions of the San Francisco Bay Regional Water Quality Control Board regarding violations of the Federal Water Pollution Control Act (Clean Water Act) and the California Water Code for unauthorized discharges at Point Buckler Island located in the Suisun Marsh, Solano County, California.”</p>	<p>Comment noted.</p>
	<p>5.2 Available information indicates Federal Endangered Species Act listed species Distinct Population Segments and Evolutionarily Significant Units and critical habitat under the jurisdiction of NMFS may have been negatively impacted by the unpermitted project including: Sacramento River winter-run Chinook salmon; Central Valley spring-run Chinook salmon; Central California Coast steelhead; California Central Valley steelhead; and North American green sturgeon.</p>	<p>Comment noted.</p>
	<p>5.3 “The area affected by the unpermitted project is also located within an area identified as essential fish habitat (EFH) under the Magnuson-Stevens Fishery Conservation Act for various life stages of fish species managed through the following Fisheries Management Plans (FMP) by the Pacific Fisheries Management Council: Pacific Coast Salmon FMP; Pacific Groundfish FMP; and Coastal Pelagic FMP.”</p>	<p>Comment noted.</p>

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	<p>5.4 “Point Buckler Island is also within an area designated as a Habitat Area of Particular Concern (HAPC) for various federally managed fish species within the Pacific Groundfish FMP. HAPC are subsets of EFH that are rare, particularly susceptible to human-induced degradation, especially ecologically important, or located in an environmentally stressed area. As defined in the Pacific Groundfish FMP, San Francisco Bay, including Point Buckler, is identified as estuary HAPC.”</p>	<p>Comment noted.</p>
	<p>5.5 “Construction activities associated with the unpermitted action likely resulted in effects on ESA listed species, critical habitat, and EFH in the form of degradation of water quality; and the in-water excavations and filling of tidal channels for levee construction may have directly injured or killed fish by crushing or causing other physical injuries.”</p>	<p>Comment noted.</p>
	<p>5.6 “However, the larger impact of the unauthorized activities on listed fish and EFH is associated with the loss of tidal marsh habitat. Cutting off tidal flow and the burying of vegetation in the former tidal channels of Point Buckler Island has reduced the amount and diminished the value of critical habitat and EFH in the Suisun Marsh, Solano County. Tidal marsh habitat in Suisun Bay supports ESA listed fish and EFH by providing habitat for prey species, foraging areas, and cover/shelter for protection from predators during the physiological transition of juveniles from fresh to saltwater osmoregulation (smolting).”</p>	<p>Comment noted.</p>

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	<p>5.7 “Based on the impacts to tidal marsh habitat in Suisun Marsh resulting from unauthorized discharges at Point Buckler Island, NMFS supports the San Francisco Bay Regional Water Quality Control Board’s proposed enforcement action in the matter of John D. Sweeney and the Point Buckler Club, LLC.”</p>	<p>Comment noted.</p>
<p>6. Napa Solano Audubon Society</p>	<p>6.1 “Solano County provides one of California’s greatest treasures, the Suisun Marsh, which is part of the San Pablo Bay Marine Global Important Bird Area. This marsh, and the wetlands it supports, are particularly important because 95% of all wetlands in California have been destroyed. The good news is that we now know better, and we have put safe guards in place to protect the remaining remnants. Unfortunately, these safe guards can be ignored, and this is the case at Point Buckler Island, an island that is located in the Suisun Marsh, where wetlands that were providing habitat just a few years ago have been severely damaged.”</p>	<p>Comment noted.</p>
	<p>6.1 “The Board of Napa-Solano Audubon Society fully supports the Cleanup and Abatement Order issued by the SF Bay Regional Water Board against Point Buckler Island owners John Sweeney and Point Buckler Club LLC, who own an approximately 50-acre island located in the Suisun Marsh in Solano County.”</p>	<p>Comment noted.</p>