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BEFORE THE CALIFORNIA WATER QUALTIY CONTROL BOARD

SAN FRANCISCO BAY REGION

In the Matter of: TENTATIVE CLEANUP AND ABATEMENT ORDER: POINT BUCKLER ISLAND, Solano County	)	Prosecution Team Rebuttal Brief

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I. INTRODUCTION

With complete disregard for the need for multiple permits from multiple agencies, John D. Sweeney and Point Buckler Club, LLC (Dischargers) filled in approximately 3.23 acres of tidal marsh, channels, and wetlands in building a levee around Point Buckler Island (the Site), creating roads, constructing a large dock, excavating artificial ponds, installing helipads, and creating a lounging area with storage containers, complete with a large Astroturf area and a composting toilet. They mowed or destroyed an additional 5.8 acres of tidal marsh vegetation. The new levee blocked tidal channels and disrupted overland tidal flow into approximately 27.18 acres of the island's interior tidal marsh. (Ex. 11, Point Buckler Club Technical Assessment of Current Conditions and Historic Reconstruction since 1985, Appens. K and Q.) The Dischargers invite members of the Silicon Valley community to helicopter or boat in for kite boarding, and now also duck hunting. (Exs. 19i and 19j [Point Buckler website amended between March 30 and May 23, 2016 to add reference to duck hunting].) The unauthorized fill remains in place, continuing to impact numerous beneficial uses, with no plans to restore the beneficial uses to the island, and no permit applications pending as of this submission. In drafting section 401 of the Clean Water Act, it was Congress's intent that water quality effects would be taken into account *before* these kinds of activities occurred.

> No state water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements.

(116 Cong. Rec. 8984 (1970); Clean Water Act found at 33 U.S.C. 1251 *et seq.*) In this case, Dischargers presented the San Francisco Bay Regional Water Board (Water Board) and other regulatory oversight agencies with a fait accompli. Under ordinary circumstances, the Water Board could impose conditions through the certification process to ensure the project met water quality standards and protected beneficial uses. Among the many policies the Water Board would have taken into account in considering an application for water certification is San Francisco Bay Basin Water

Quality Control Plan (Basin Plan) directive "to avoid wetland disturbance. When this is not possible, disturbance should be minimized. Mitigation for lost wetland acreage and functions through restoration or creation should only be considered after disturbance has been minimized." (Basin Plan, § 4.23.4.) No such protections occurred in this case and the impacts of the construction activities amount to "the most egregious illegal fill of tidal marshland in the Bay's recent history." (Ex. 20a, Nicole Sasaki, San Francisco Baykeeper, p. 33.) The Water Board must address these effects.

The Opposition to Issuance of Cleanup and Abatement Order (Opp.) does not contest the failure to obtain a permit. It does not contest the placement of fill; the destruction of tidal marsh; or the intent to convert tidal marsh into managed wetland. Rather, Dischargers argue they did not need permits (questioning jurisdiction and claiming existing authorizations); contest the Water Board's authority under Water Code section 13304; claim the Suisun Marsh Preservation Act prohibits the Water Board's action; and raise a half-dozen miscellaneous claims attacking the Tentative Cleanup and Abatement Order (CAO) (due process, CEQA, etc.). The revised Tentative CAO seeks restoration of beneficial uses to the island and requires mitigation for the momentous losses caused by the Dischargers' unauthorized activities. Not only is the Water Board clearly authorized to issue the Tentative CAO, but is encouraged to do so by statutes, case law, State Water Resources Control Board (State Water Board) precedent, and numerous organizations who have submitted comment letters supporting the Tentative CAO.

II. POINT BUCKLER ISLAND IS NEARLY ALL JURISDICTIONAL TIDAL MARSH AND WETLANDS UNDER FEDERAL CLEAN WATER ACT

The Opposition Brief presents a scattershot argument concerning the location and significance of the high tide line, claiming the Water Board does not have the authority to issue the Tentative CAO because "the great majority" of the island is not subject to the federal Clean Water Act. (Opp., p. 10.) Much of the basis for that

argument is attorney conjecture unsupported by any expert declaration, report, or evidence. The following discussion focuses on the facts relevant to the Water Board's authorities and the legal standard for when an activity requires a Clean Water Act 401 water quality certification.

A. Why Does the High Tide Line Matter?

The "waters of the state" include all "navigable waters" under the federal Clean Water Act, as well as other waters. (Wat. Code §§ 13050(e), 13373.) Clean Water Act jurisdiction exists over "all waters which are subject to the ebb and flow of the tide" and "wetlands adjacent" to them. (33 C.F.R. § 328.3(a)(1), (a)(7).) The landward limit of jurisdictional tidal waters is the high tide line. (33 C.F.R. § 328.4(b)(1).) When adjacent wetlands are present, jurisdiction extends to the limit of the wetlands. (*Id.* at § 328.4 (c).) There is no disagreement that the high tide line defines the limit of federal jurisdiction over tidal waters and identifies "'waters of the state subject to the jurisdiction of the Regional Board." (Opp., p. 14. See also Ex. 11, Expert Report, App. M, N and O [jurisdictional authorities under McAteer-Petris, Clean Water and Rivers & Harbors Acts].)

Contrary to Dischargers' assertion that the high tide line should be determined from the wrack line (Opp., p. 14), the regulations state a preference for determining the high tide line by reference to water elevation data. (*Ibid.* ["in the absence of actual data"].)[1] The Prosecution Team's expert, Dr. Stuart Siegel, assessed the high tide line using three indicators: observed water level at the island; nearby Port Chicago high tide

[1] The "high tide line" is: "[T]he line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, *in the absence of actual data*, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm. (33 C.F.R. § 328.3(e)(7) [emphasis added].) See Exhibit 11, Expert Report, Appendix N page N-9 for a visual depicting jurisdictional analysis.

elevations;[2] and evidence of the wrack line. (Ex. 11 Expert Report, App. I.) Dr. Siegel determined, based on the high tide line at Port Chicago adjusted based on field observations at the Site, a high tide line of 8.2 feet at Point Buckler Island, a lower elevation than the surveyed wrack line.[3] The Expert Response further notes that the estimated high tide line, based upon conditions in the field, is actually lower than tide predictions provided by the National Oceanic and Atmospheric Administration (NOAA) for Point Buckler. (Ex. 22, Expert Response., p. 9.)

The Dischargers present myriad theories of high tide measurements which could be used and other "evidence"[4] to cast doubt on Dr. Siegel's observations and calculations. Although Dischargers present pages of argument claiming that the island interior was dry, even the Dischargers' own wrack line "analysis"[5] does not refute critical data presented in the expert report demonstrating the elevation of the interior of the island was below the high tide line. (Ex. 11, Expert Report, App. F, Topography Data, Figure F-1 [data collected on the ground] and Figure F-11 [digital elevation model].)

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[2] Port Chicago data are verified high tide records at the National Ocean Service Port Chicago station. (Ex. 11, Expert Report, App. I, p. I-1.) Dr. Siegel measured the high tide on February 17, 2016, at Point Buckler Island. (Ex. 11, Expert Report, App. I, p. I-2.) By comparing the observed high tide at Point Buckler (7.3 ft. NAVD88) with Port Chicago data (7.03 ft. NAVD88), Dr. Siegel determined a difference in elevation of 0.27 feet, meaning that Point Buckler tides may be calculated on any given day by adding 0.27 feet to the data recorded for Port Chicago. (*Id.* at I-2.)

[3] Dischargers present an extensive discussion on the high tide line, but the bases supporting the arguments are attorney conjecture and misconstrued "facts" that lack any expert opinion or analysis. The Dischargers do not present their case of where the high tide line is, only that it must be lower than what the Expert Report concludes. (Opp., pp. 13-24.) The Factual Rebuttal and Expert Response (Exhibit 22) submitted in conjunction with this legal brief notes specific factual discrepancies.

[4] See Factual Rebuttal and Exhibit 22, Expert Response, which address these many theories in detail.

[5] The Dischargers' analysis equates the wrack line with "woody debris" and a "continuous white line at the edge of the island" (Opp., pp. 13-30 and Huffman Decl., ¶ 4 [citing a white curvilinear perimeter line visible on aerial photographs]) in aerial photos, and fails to consider "a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm" as recommended by in 33 C.F.R. § 328.3(e)(7). See the Expert Response (Exhibit 22) and Factual Rebuttal for a point-by-point rebuttal.

"The average elevation of the interior tidal marsh surface is 5.43 ft NAVD88." (*Id.* at p. F-1.)

Why does the high tide line matter? It matters in this case, because it indicates that more than 98% of Point Buckler Island falls within Clean Water Act jurisdiction.

B. Are There Other Relevant Means of Determining Jurisdiction?

While the high tide line is one important factor to consider, the Water Board also has jurisdiction over 1) areas where the levee closed tidal channels; and 2) wetlands adjacent to the island's waters. Jurisdiction over these areas does not depend upon a determination of the elevation of the high tide line.

The Dischargers concede that the Water Board had jurisdiction over the levee repair "where it crossed a channel or ditch." (Opp., p. 21.) That portion of the construction has caused the most detrimental impacts to the tidal wetland and endangered species habitat on the island:

> Closure of these channel and overland flow connections blocked all access to the tidal wetlands and its tidal channels and ditches by fish in the surrounding waterways. Also blocked was all movement of material, particularly potential food items produced in the tidal wetlands, from being exported to the waterways. The harm to beneficial uses began when the first channel was closed and continues through to the present, diked conditions.

(Ex. 11, Expert Report, App. P, at P-1. See also *id.*at App. G [Establishment of Tidal Marsh] and App. P and Q [Assessment of Adverse Effects on Beneficial Uses to Listed Fish and Wildlife Species].)

Nearly the entire island is jurisdictional "wetlands."[6] Dischargers evade this issue by claiming that the Expert Report did not use "the three-factor wetlands test." (Opp., pp. 27-28.) These three criteria are as follows:

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[6] "The term 'wetlands' means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(b).

> Wetlands must have three specific criteria in order to be classified as a wetland: hydric soils, hydrophytic vegetation, and hydrology. During a wetland delineation, a project area is surveyed to determine whether wetlands with the three criteria are present.

(EPA, Section 404 of the Clean Water Act, What is a Jurisdictional Delineation?, https://www.epa.gov/cwa-404/what-jurisdictional-delineation (July 15, 2016), referencing the Corps of Engineers Wetlands Delineation Manual, 1987, and the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0), September 2008) As a preliminary matter, the three criteria cannot be adequately applied to tidal areas where activities have already altered wetland hydrology, soils or vegetation. (Ex. 22, Expert Response, pp. 24-25 [describing "atypical situations"].) Prior to the violations, however, the Site was virtually entirely composed wetlands, over which the Water Board has jurisdiction. The Expert Report addresses the "3-parameter vegetation, soil, hydrology indicators" and demonstrates how the Site has evidence of each. (Ex. 11, Expert Report, App. N, p. N2-3 [island interior covered with obligate wetland plants; presence of Joice Muck; strong phenological evidence of tidal marsh hydrology; tidal flows and overtopping of derelict levees].)

The wetland assessment in the Expert Report is consistent with the Corps of Engineers' guidance for wetland determinations in atypical situations. This assessment used evidence from adjacent reference sites, aerial photography, vegetation maps, and soils. (Ex. 22, Expert Response, pp. 24-25.)

The Dischargers' only argument regarding the presence of wetlands on the island is to assert that an open pond visible in a 1981 aerial photo no longer exists. The Dischargers ignored the evidence of the tidal brackish marsh wetlands that flourished on the island until they were destroyed in 2014. (See Ex. 11, Expert Report, App. G, and Factual Rebuttal.)

III. THE TENTATIVE CAO COMPORTS WITH CALIFORNIA WATER CODE SECTION 13304

A. The Discharges Were in Both Waters of the State and United States

The Tentative CAO explains that Water Code section 13304 requires any person who has discharged waste into waters of the State and created a condition of pollution shall clean up and abate the effects of the waste. (Ex. 21, Tentative CAO.) The Opposition Brief first argues that section 13304 is limited to waters of the State and again argues that "almost none of the material was placed in waters of the State." (Opp., pp. 36-37.) As discussed above, nearly[7] the entire island is under federal jurisdiction. Waters of the State are much broader in scope than (and include) all waters of the United States, including "any surface water or groundwater, including saline waters, within the boundaries of the state." (Water Code § 13050, subd. (e).) Therefore, the fill the Dischargers placed into the Bay, tidal wetlands, and channels were in both waters of the State and United States.

B. The Discharges Were a Discharge of "Waste"

Dischargers claim that the unauthorized activities were not a discharge of "waste," citing to a case construing recycling of secondary materials under the federal Resource Conservation and Recovery Act, and further contend that "[c]ases interpreting the discharge of a pollutant under the Clean Water Act[8] are not relevant here." (Opp., p. 46-47.) The Dischargers attempt to distinguish *Lake Madrone Water District v. State Water Resources Control Board* (1989) 209 Cal.App.3d 163 (*Lake Madrone*) from their

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[7] As stated before, only 0.538 acre is lowland terrestrial. (Ex. 11, Expert Report, Fig. 4.)

[8] Clean Water Act authorities are relevant here, where virtually the entire island is below the high tide line or wetlands adjacent to waters of the United States. In fact, "in every relevant sense for this action [pertaining to sediment discharges], the Porter–Cologne Act imports its definitions from the [Clean Water Act], including those for "pollutants," "discharge," and "point source." (*Environmental Protection Information Center v. Pacific Lumber Co.* (N.D. Cal. 2007) 469 F.Supp.2d 803, 810, n. 4 [citing Water Code § 13373].) Undoubtedly, it is because the Clean Water Act defines "pollutant" to specifically include dredged spoil, dirt and rock (33 U.S.C. § 1362) that Dischargers would prefer to focus on the term "waste."

actions, claiming that "silt can be a waste in some situations but not in others." (Opp., p. 47.) In fact, it is settled law that sediment may be a "waste" regulated under the Water Code.

In *Lake Madrone Water District v. State Water Resources Control Board* (1989) 209 Cal.App.3d 163, the court held that the State Water Board lawfully issued a cleanup and abatement order when dam operators discharged sediment into a creek, causing it to silt up. "There is no doubt that concentrated silt or sediment associated with human habitation and harmful to the aquatic environment is 'waste' under the statute." (*Lake Madrone, supra,* p. 169. See also, State Water Board Resolution No. 2004-0030 [favorably citing the *Lake Madrone* finding that accumulated sediment was a discharge of waste and also noting the impact of sediment on steelhead habitat].)

In this case, the discharge was entirely associated with human habitation as opposed to a natural deposition.[9] The harmful effects of the fill on the aquatic environment is described extensively by Dr. Bruce Herbold in the Expert Report. (Exhibit 11, App. P.) Dr. Herbold explains how the Site is designated habitat for numerous endangered species including Delta smelt and Chinook salmon, and that the new levee blocking the seven breaches likely blocked young salmonids from accessing feeding grounds while exposing them to a higher risk of predation. (Ex. 11, Expert Report, App. P, pp. 1-3.) The fill clearly meets the Water Code definition of "waste" because it was caused by and associated with human habitation, and is harmful to the aquatic environment. [10]

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[9] Note that sediment run-off from diffuse sources may also be regulated under the Nonpoint Source Policy and Waste Discharge Requirements. (State Water Board Nonpoint Source Policy; Water Code § 13263.)

[10] Basin Plan Discharge Prohibition 9, which prohibits the discharge of "Silt, sand, clay, or other earthen materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity or discoloration in surface waters or to unreasonably affect or threaten to affect beneficial uses" and notes that the intent of prohibiting such discharges " is to prevent damage to the aquatic biota by bottom deposits which can smother non-motile life forms, destroy spawning areas, and, if putrescible, can locally deplete dissolved oxygen and cause odors." (Ex. 1b,Basin Plan, Table 4-1.)

The Opposition Brief mischaracterizes the Tentative CAO's discussion of the unauthorized mowing, goats, and heavy equipment. The Tentative CAO does not call these activities "waste" (although heavy equipment can leak oil).[11] Rather, the Tentative CAO includes as background the myriad unauthorized activities the Dischargers conducted that have the potential to cause a discharge of waste or impact water quality. The Tentative CAO does not specifically order the Dischargers to cease mowing, grazing goats, or parking heavy equipment. The Dischargers' plans prepared in response to the Tentative CAO, however, should evaluate potential water quality threats associated with these activities.

C. The Illegal Fill Activities Created Conditions of Pollution

The Opposition Brief presents six arguments contending that the unauthorized activities were not and did not create a condition of nuisance or pollution. The first, second, and fifth arguments pertain to the Suisun Marsh Preservation Act, which are addressed in the Experts Report and expanded upon in this Brief. The Factual Rebuttal also refutes the third argument, which claims that the levee repair was required for a California Environmental Quality Act (CEQA) (Pub. Res. Code § 21000 *et seq.*) mitigation project. The following discussion addresses the fourth and sixth arguments which claim that the Water Board has certified that levee repair is not a condition of pollution or nuisance and the unauthorized work at issue here does not come within the statutory definition of "pollution" or "nuisance" that the Water Board can remedy under section 13304. (See Opp., p. 45 [summary of six arguments] and pp. 37-45 [arguments in entirety].)

Water Code section 13050(*l*) defines pollution as an alteration of the quality of the waters of the State by waste "to a degree which unreasonably affects the waters for

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[11] Courts have held that bulldozers and discing equipment used to fill in sloughs and level land in wetlands results in a redeposit of fill material into waters of the United States, which "constitutes a "discharge of a pollutant." (*Avoyelles Sportsmen's League, Inc. v. Marsh* (5th Cir. 1983) 715 F.2d 897, 929-30. See also *Avoyelles Sportsmen's League v. Alexander* (W.D. La. 1979) 473 F.Supp. 525, 532 [more detailed discussion of this equipment as a "point source" causing a "discharge"].)

beneficial uses." Dischargers' unauthorized fill activities are unreasonably affecting the beneficial uses of the tidal marsh and caused, and are causing, a condition of pollution. Approximately 3.23 acres of waters of the State and United States were filled by the Dischargers, adversely impacting estuarine habitat, fish migration, the preservation of rare and endangered species, fish spawning, wildlife habitat, and commercial and sport fishing beneficial uses. (Ex. 11, Expert Report, Appens. K, Q; Ex. 1b., Basin Plan.) Blocking the tidal action has deprived the island of estuarine waters, draining and drying it out, resulting in the mass dieback of tidal marsh vegetation. (Exhibit 11, Expert Report, Appendix L.)

The Opposition Brief only contends that the *levee construction* did not constitute pollution or nuisance (Opp., pp 37-45), but ignores additional unauthorized activities, including dock pier installation; excavating ponds and placing spoils in tidal marsh; excavating two trenches in the east and southwest and discharging spoils onto tidal marsh; discharging fill in the borrow ditch for the west borrow ditch road crossing; discharge fill onto tidal marsh at west end to create a road to water's edge; grading and thus discharging fill of the marsh plain for road access across interior tidal marsh; and filling in tidal marsh with shipping containers. All of these fills created conditions of pollution, not just building the levee. (Ex. 11, Expert Report, App. K, Table K-1.)

D. Dischargers May Not Rely on Inapplicable Water Quality Certifications

The Dischargers rely on two Water Board Clean Water Act section 401 water quality certifications pertaining to levee repair (Opp., pp. 42-43) however; each of the cited certifications require an application and authorization before a discharger may proceed. (Ex. 3a., RGP3; and Bazel Decl., Ex. 35) and Dischargers concede that they did not apply for any permits for the dredge and fill activities. (Opp., p. 43, lines 6-8.)

Neither of the cited certifications covers the types of activities that occurred at the Site. As discussed herein, Regional General Permit No. 3 (RGP3) would not have authorized the activities on the Site, so the existence of a water quality certification

related to RGP3 is irrelevant. The Dischargers also erroneously claim that that because the Water Board issued the Conditional Water Quality Certification for the Suisun Marsh Exterior Levee Maintenance Dredging Program (Suisun Certification), this provides evidence that its dredge and fill activities are not considered pollution or nuisance. (Opp., p. 43 [citing Bazel Decl., Ex. 35].) The Dischargers make no showing that they could have received authorization under the Suisun Certification, however, which is limited to placement of dredged material only on the levee crown and backslope (i.e. where levees already exist), and prohibits dredging in areas that would disturb or remove vegetation. (Bazel Decl., Ex. 35, p. 3 and 8 [Condition 5].) The Suisun Certification excludes levees requiring more extensive repairs and notes that such projects will need individual project certification. (*Id.* at p. 3.)

IV. DISCHARGES VIOLATED THE SUISUN MARSH PRESERVATION ACT BY BUILDING LEVEES AND CONDUCTING OTHER DEVELOPMENT WITHOUT A PERMIT FROM BCDC

The Dischargers' activities are not exempt from the Suisun Marsh Preservation Act (SMPA) and required their own permits and water quality certification because the Site was tidal marsh – not managed wetlands - when unauthorized activities began.

A. BCDC and SRCD Responsibilities Under the Suisun Marsh Preservation Act

In 1977, the Legislature enacted the Suisun Marsh Preservation Act (SMPA). (Pub. Res. Code §§ 29000-29612.) The San Francisco Bay Conservation and Development Commission (BCDC) implements the SMPA. (*Id.* § 29200.) Any person wishing to perform or undertake "development" (*id.* § 29114(a)) in the primary management area of the Suisun Marsh must obtain a marsh development permit. (*Id.* §§ 29500, 29501.) The Site is located in the primary management area of the Suisun Marsh. (*Id.* § 29102; Ex. 2c., Suisun Marsh Protection Plan (Protection Plan) at 70-71.)

In addition to its permitting authority, BCDC has prepared and adopted the Suisun Marsh Protection Plan (Protection Plan). (*Id.* § 29113(a).) BCDC has also certified the local protection program (LPP) (*id.* § 29111). One component of the certified LLP is the Suisun Marsh Management Program (Management Program) prepared by SRCD. (*Id.* §§ 29401(d), 29412.5. Ex. 31.) The SMMP consists of the following principal elements:

1. A general management program;
2. Individual water management programs for each privately-owned managed wetland within the primary management are of the Suisun Marsh;
3. Enforceable Standards Covering Diking, Flooding, Draining, Filling and Dredging of Tidal Waters, Managed Wetlands and Tidal Marsh Within the Primary Management Area; and
4. Regulations adopted by SRCD to ensure effective water management on privately-owned lands within the primary management area.

The SMPA and the Management Program define the term "managed wetland" to mean diked areas "in which water inflow and outflow is artificially controlled or in which waterfowl food plants are cultivated, or both, to enhance habitat conditions for waterfowl and other water-associated birds...." (*Id.* § 29105; Ex. 31, Management Program, Exhibit C, § II.2.)

In or about 1984, individual management programs (commonly referred to as individual management plans or IMPs) were developed for each of approximately 165 privately-owned managed wetlands in the primary management area, including the Site and were certified by BCDC. (Ex. 31, Management Program, p.34.) The SMPA provides that, in a managed wetland, no permit is required for development specified in a certified IMP. (Pub. Res. Code. § 29501.5.) However, a marsh development permit from BCDC is required for any development: (1) in a managed wetland that is not specified in a certified IMP; or (2) in areas that are not managed wetlands. (*Id.,* §§ 29500, 29501.)

B. The Site Was Not Operated as a Managed Wetland for Over 20 Years After Certification of the IMP and Reverted to Tidal Marsh

The 1984 IMP for the Site, entitled the Annie Mason Point Club (Annie Mason IMP) (Ex. 3a.), states that the club is contained within a single levee surrounded by Grizzly Bay to the north and Suisun Cutoff to the south, and describes two water control structures. The Annie Mason IMP further states, in a subsection captioned "Water Management, Needed Improvements," that it is "necessary that the club follows a regular program of water management," and that:

> Proper water control necessitates inspection and maintenance of levees, ditches, and water control structures....Levees require frequent inspection and attention to prevent major breaks from occurring.

(*Ibid.*) The Annie Mason IMP also contains a subsection, "Vegetation Management, Needed Improvements," that discusses removal of undesirable vegetation to provide for the establishment of new vegetation more preferred by waterfowl. (Ex. 3a., IMP and Ex. 10a., BCDC Executive Director Cease and Desist Order No. ECD2016.01 (April 22, 2016 ("BCDC Order") at ¶ 9 and Exhibit A.) Finally, the Annie Mason IMP emphasizes the need for frequent inspection and maintenance of the levees for proper water control, which is an essential feature of a managed wetland. Dischargers provide no evidence that the levees were maintained or that waterfowl plants were cultivated at the Site at any time after certification of the Annie Mason IMP. (Ex. 10a., BCDC Order, at ¶¶ 10-14 and its Exhibit B (Chappell Declaration) at ¶¶ 12, 14-16. See also Ex. 11, Expert Report, at pp. 13-15.)

The Dischargers mistakenly claim that the Annie Mason IMP includes a map showing "levee repair" at several locations. (Opp., p. 31, lines 16-17.) The Dischargers are referring to a Wetlands Maintenance Management Report prepared in January 1990, which is not part of the Annie Mason IMP certified in 1984. (*See* Ex. 10a., BCDC Order at ¶ 11 and its Exhibit A (Index of Administrative Record) and Factual Rebuttal.) The Wetlands Maintenance Report proposed certain work at the Site, including clearing

ditches and levee repair, but there is no evidence this work was ever done. (Ex. 10a., BCDC Order at ¶ 11 and its Exhibit B (Chappell Declaration at para.14).)[12]

Substantial evidence documents the progressive levee breaches, beginning no later than August 1988, and daily tidal exchange from Grizzly Bay into the interior ditch and channel network. Thus, the Site reverted to tidal marsh due to: (a) the lack of maintenance of the levees and water control structures; (b) the constant exposure of the Site to daily tides and the forces of the waves and winds; and (c) the periodic exposure of the Site to storm events. (Ex. 11, Expert Report, Appendix G [Opening of Tidal Connectivity and Establishment of Tidal Marsh, 1985 to 2011]. See also Ex. 10a., BCDC Order at ¶¶ 13-14.)

The Site did not contain "managed wetlands," as defined in the SMPA and the Management Program, for approximately 20 years before the Dischargers purchased the Site in 2011. For this reason, when the Dischargers purchased the Site, the Annie Mason IMP no longer applied to the Site, and any potential development at the Site was not specified in the SRCD's component of the LPP. Therefore, the Dischargers were required to obtain a marsh development permit from BCDC prior to building levees or conducting any other "development" at the Site, which they did not. (Pub. Res. Code § 29114(a). See also Ex. 10a., BCDC Order at ¶ 16 and its Ex. B (Chappell Declaration) at ¶¶ 17-21.)[13]

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[12] The Wetlands Maintenance Management Report was likely prepared in connection with a permit application submitted to BCDC in September 1989 by the owner of the Site at that time, John Taylor, to place approximately 50,000 cubic yards of dredged material on levees to improve water control. In October 1989, BCDC staff determined that the application was incomplete and requested additional information. No additional information was provided, the application was never filed as complete, and no permit was issued for this proposed work. (Ex. 10a., BCDC Order at ¶ 10.)

[13] Because the Site is located in BCDC's "San Francisco Bay" jurisdiction, as defined in Government Code § 66610(a), the Dischargers also were required to obtain a permit from BCDC under the McAteer-Petris Act (Gov't Code § 66632(a)) to authorize the placement of any fill or to make any substantial change in use of any water, land, or structure at the Site.

C. The Dischargers Violated the SMPA by Failing to Obtain a Permit from BCDC

The Discharges claim that the "levee repairs conducted in 2014 implemented" the Annie Mason IMP. (Opp., p. 32.) However, the Dischargers did not even have a copy of the Annie Mason IMP until November 14, 2014, when BCDC staff provided the Dischargers with a copy of the document during a site inspection, after Dischargers had already completed levee construction activities around the entire Site. (Ex. 10a., BCDC Order at ¶ 21.)

By definition, an IMP may apply only to a "managed wetland in private ownership within the primary management area." (Pub. Res. Code § 29412.5; Ex. 31, Management Program, p. 23.) As discussed above, the Site had not been operated as a managed wetland for over 20 years after certification of the Annie Mason IMP and had reverted to tidal marsh. Furthermore, none of the extensive development conducted by Dischargers is specified in the Annie Mason IMP, which may have authorized maintenance of pre-existing levees but not building new levees, digging new ditches, excavating new ponds, or a change of use of the Site to include recreational kite boarding. (Ex. 10a., BCDC Order at ¶ 42.) Therefore, Dischargers violated the SMPA by failing to obtain a permit from BCDC.

Dischargers make a number of unfounded assertions to support their argument that the Annie Mason IMP continued to apply to the Site in 2011 and, therefore, Dischargers were exempt from the otherwise applicable SMPA requirement that they obtain a permit from BCDC for the levee construction and other development they performed at the Site. As discussed below, Dischargers' assertions are based on erroneous interpretations of the SMPA.

1. Property Owners Are not Required to Implement IMPs

Dischargers incorrectly claim that the SMPA, and the regulations adopted by SCRD, require property owners to implement their IMPs. (Opp., pp. 32 and 34.). As discussed above, the SMPA allows development specified in an IMP to be conducted

without an otherwise-required permit from BCDC, and successive property owners can assume responsibility for complying with an IMP. (Ex. 31, Management Program at 18.) However, a property owner is required to implement the IMP for its property only to the extent that the owner operates its property as a "managed wetland," as that term is defined the SMPA. There is nothing in the SMPA that compels a property owner to continue to operate its property in perpetuity as a managed wetland against his or her volition.

SRCD's Management Program similarly requires the owner of a property operated as a managed wetland to comply with the IMP for the property (Ex. 31, Management Program, p. 18), but if a property owner discontinues operating, or otherwise fails to operate, its property as a "managed wetland," the IMP certified for that property, and SRCD's regulations governing privately-owned managed wetlands, becomes inapplicable thereto, as was the case for the Site.[14]

2. The Annie Mason IMP is Not Still in Effect because BCDC Never Issued a Permit to Abandon the Managed Wetlands at the Site

Dischargers erroneously argue that because none of the previous owners of the Site applied for or obtained a permit from BCDC to abandon the managed wetlands, the Site is "still a 'managed wetland' as a matter of law, regardless of whether it is a managed wetland as a matter of fact." (Opp., p. 35.)

The term "development" as defined in the SMPA includes "change in the density or intensity of use of land," but does not include "abandonment." (Pub. Res. Code § 29114(a).) Instead of basing their argument on the SMPA, Dischargers assert that a permit is required for "abandonment" because a BCDC regulation defines the term "substantial change," as used in the McAteer-Petris Act (MPA), to include "abandonment." (Cal. Code Regs., tit. 14, § 10125(a).) Section 66632(a) of the MPA

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[14] A similar analysis applies to Dischargers' claim that the Annie Mason IMP remains in effect in perpetuity because it has never been modified. (Opp., pp. 10 and 35.) If an owner of private property in the Suisun Marsh fails to operate the property as a "managed wetland," the IMP certified for that property becomes inapplicable thereto as a matter of fact, thus resulting in the effective termination of that IMP.

in turn requires a permit for any "substantial change in use of any water, land, or structure...." But it does not follow that a permit is required for every conceivable incidence of "abandonment."

Section 66632(a) of the MPA requires a permit where a person *wishes* to make a substantial change in use. The term "wishes" implies a necessary element of volition or intent before an act of "abandonment" requires a permit. Mere neglect is not sufficient to trigger the need for a permit. There is no evidence that the neglect that resulted in the reversion of the Site to tidal marsh was the result of a conscious choice on the part of the previous owners of the Site during the time that the reversion was occurring.

Even if an argument can be made that the inaction and neglect of Dischargers' predecessors might have triggered the need for a permit for abandonment under the MPA, the fact that no such permit was applied for or issued does not negate the physical facts on the ground of a reversion of the Site to a tidal marsh, or operate as an obstacle to the ability of the Water Board or BCDC to take otherwise appropriate regulatory action in light of such a reversion. For more than 20 years prior to Dischargers purchasing the Site, the subject property was not operated as a managed wetland. Thus, use of the Site as a managed wetland was de facto abandoned even though no prior owner applied for or obtained a permit from BCDC.

3. The Tentative CAO is Consistent with the Water Board's Duty to Comply with the SMPA

Dischargers incorrectly claim that the Tentative CAO would violate the SMPA and policies of the Protection Plan to protect duck clubs by requiring Dischargers to breach the unpermitted levee constructed by Dischargers and to restore tidal flow to the Site. (Opp., p. 32.) Similarly, contrary to Dischargers' claim that the Tentative CAO would destroy a "duck club," in violation of policies calling for continued recreational use of privately-owned wetlands, there are a number of duck clubs in the Suisun Marsh that engage in waterfowl hunting in areas of tidal marsh. (Ex. 27.) By requiring restoration of the tidal marsh that the Dischargers destroyed, the Tentative CAO meets the Water

Board's duty to carry out its responsibilities in conformity with the SMPA. (Pub. Res. Code § 29302(a).)

Dischargers ignore the applicable provisions of the Protection Plan and Management Program regarding the preservation of tidal marshes. For example:

- The tidal marshes of the Suisun Marsh are an important wildlife habitat and also contribute to the maintenance of water quality in the San Francisco Bay. (Ex. ***, Protection Plan at 34, Land Use and Marsh Management, Finding 1.)
- The tidal marshes in the primary management area should be preserved. (*Id.*, Land Use and Marsh Management, Policy 3.)
- "[T]he policies of the [Protection Plan] prohibit future conversion of tidal marshes or open water areas to managed wetland or agricultural status. (Ex. ***, Management Program at 13 (Part I, § II.C).)

The Tentative CAO is fully consistent with these provisions.

Finally, far from violating the SMPA, the Tentative CAO complements enforcement actions being taken by BCDC against the Dischargers. Specifically, on April 22, 2016, BCDC's Executive Director issued a temporary Cease and Desist Order against Discharges for alleged violations of the SMPA and MPA at the Site. (Ex. 10a., BCDC Order.) In addition, on May 23, 2016, BCDC's Executive Director issued a Violation Report and Complaint for the Administrative Imposition of Civil Liability ("Report/Complaint") against the Dischargers concerning the same violations alleged in the BCDC Order. (Ex. 10a.) The Report/Complaint, and a proposed Commission Cease and Desist Order, are currently scheduled to be considered by BCDC's Enforcement Committee on September 1 and by the full Commission on October 6, 2016.

V. THE TENTATIVE CAO COMPLIES WITH THE LAW

A. Due Process

The Opposition Brief devotes significant discussion to whether a CAO requires a hearing (Opp., pp. 50-54), but is a moot point; the full Water Board will consider the Tentative CAO on August 10, 2016. The hearing itself fully complies with due process.

Both the Dischargers and the Prosecution Team are afforded the ability to submit an unlimited amount of documentary evidence for the Board Members to consider prior to the hearing. At the hearing itself, the Board Members may ask questions and may also take the matter under submission to consider the evidence, and may require further briefing from the Parties if they have outstanding questions.

B. Void-for-Vagueness Doctrine

The void-for-vagueness argument (doctrine requiring that a penal statute define the criminal offense with sufficient definiteness) is inapplicable here. First, the Dischargers mischaracterize the CAO as "penal" in nature. (Opp. Brief, p. 54.) The Water Board does not have the authority to impose any criminal penalties as required by the void-for-vagueness doctrine. The CAO is designed to address improper Discharger activities, but it is not penal law.[15] No one's personal liberty is as risk.

To the extent that the Dischargers are arguing that the CAO does not provide notice of what the CAO will ultimately require, the submission of the required plans are, by nature, an iterative process, and the Water Boards may not specify the "design, location, type of construction, or particular manner in which compliance may be had" with the Tentative CAO pursuant to Water Code section 13360. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357-358.) The Dischargers are "permitted to comply with the order in any lawful manner." (Wat. Code § 13360.)

C. Delegated Authority to Executive Officer Bruce Wolfe

Arguments pertaining to Executive Officer Bruce Wolfe's involvement, including whether he may sign the final CAO, are meritless. Mr. Wolfe has been removed from the Advisory Team and the Prosecution and Advisory Teams have adhered strictly to a separation of functions in this case. The Water Board may, however, delegate its

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[15] Black's Law Dictionary (1996) defines penal law [code] as "a law enacted to preserve the public order by defining an offense against the public and imposing a penalty for its violation [citations omitted]. Statutes that grant a private [civil] action against a wrongdoer are not considered penal, but remedial in nature."

authority and modify the signature block and who may accept the Interim Corrective Action Plan and Restoration Plan as it deems suitable pursuant to Water Code section 13223.

D. Compelled Speech

The Tentative CAO does not violate the United States Constitution by compelling speech by the Dischargers. The Tentative CAO does not violate free speech protections because it does not require Dischargers to adopt or endorse a political, ideological, or moral message (*Beeman v. Anthem Prescription Management, LLC* (2013) 58 Cal. 4th 329, 347-49.) It merely requires a general statement of the discharger's acknowledgement of responsibility to reimburse the State for cleanup costs (which is required by Water Code section 13304) and identification of an address where the State Water Board may send invoices. The requirement for a statement of intent to repay is akin to requiring someone to sign an agreement to take an *action*, not compelling them to adopt a viewpoint or creed. The provision does not violate constitutional free speech protections.

E. Water Code Section 13267 Requiring Technical Reports

Water Code section 13267 does not require a formal assessment of the cost to comply with a 13267 Order. It does require the Water Board to demonstrate a "reasonable relationship" between the burden[16] to complete the requested documents or tasks and the need and benefits to be obtained from the reports. The Dischargers are tasked with preparing technical reports to determine how to restore beneficial uses at Pt. Buckler Island and mitigate for impacts. As described above, the Water Board does not prescribe how restoration must occur. (Wat. Code § 13360.) The cost of preparing the plans is almost entirely within the Dischargers' control and may vary depending upon their ultimate proposal. They may choose to hire consultants and do

[16] See Factual Rebuttal for a discussion of the alleged $2 million cost for permits.

surveys to determine how to set aside parts of the island for tidal versus managed wetlands, or they may propose a plan to simply mitigate, as examples. The cost of the plan should not be confused with the cost of the actual restoration work, which will be ordered under Water Code section 13304.

The cost of preparing a plan is directly (more than reasonably) related to the need for the report, the enormous damage caused to date, and the benefits expected, all of which are documented at length in the Expert Report. (Exhibit 11.)

F. CEQA

Dischargers contend that the Water Board has failed to comply with CEQA because 1) it has committed to a particular project and therefore "cannot postpone CEQA review;" 2) the categorical exemption for adoption of an order enforcing the general rule, standard, or objective (CEQA Guideline 15321) does not apply; and 3) the categorical exemption for actions to ensure the restoration, enhancement or protection of the environment (CEQA Guideline 15308) does not apply. (Opp., pp. 59-61.)[17]

Dischargers contest the applicability of categorical exemptions under CEQA Guidelines sections 15321 (issuance of an order enforcing the general rule, standard or objective) and 15308 (restoration of the environment or environmental protection) on grounds that there is an exception to the exemption under CEQA Guideline section 15300.2, subdivision (c), which prohibits the use of a categorical exemption to CEQA "where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." Dischargers claim that the Tentative CAO will result in construction and other impacts to Point Buckler Island, which will cause significant impacts. (Opp., pp. 59-60.) Any future construction on the island likely would a permitting process such as a water quality certification, a new discretionary decision that would require independent CEQA review. There is no requirement to evaluate "future dreams" at this time. (*Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, 161-162 ["The dreams of the rabbis and others for expansion ... are not substantial evidence that future expansion of the project, as presented to the Board, is reasonably foreseeable;" future expansion would be subject to an initial environmental review]; *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter* (9th Cir. 2006) 456 F.3d 978, 995-96 ["Any later expansion would have to go through a new application process with a new EIR].) In conjunction with any application for water quality certification, the Dischargers shall provide "any draft or final CEQA document(s), if available, prepared for the activity." (Cal. Code Regs., tit. 23, § 3856, subd. (f).) The California Code of Regulations contemplate that "the certifying agency shall be provided with and have ample time to properly review a final copy of valid CEQA documentation before taking a certification action." (*Ibid.*)

Finally, Dischargers argue that section 15321 is inapplicable, construing the Guideline to apply only if there is an enforcement action of an existing lease, permit, license, certificate, or entitlement for use. (Opp., p. 59.) As Dischargers concede, there are no permits governing any of the illegal activities on the Site. (*Id.*) Dischargers cite no authority to support this novel construction of section 15321. The sole court decision construing section 15321 and prior State Water Board orders support the use of this exemption in conjunction with the adoption of the Tentative CAO.

Far from committing the agency to a project as Dischargers contend, the Water Board is still in the dark concerning the Dischargers' future plans for Point Buckler Island in response to the Tentative CAO; the Dischargers have not submitted any conceptual restoration concepts or work plans. (Opp., p. 61.)

At this juncture, the only "project" proposed by the Water Board is an order requiring Dischargers to develop an Interim Corrective Action Plan, a Restoration Plan, and a Monitoring and Mitigation Plan. (Ex. 21, Tentative CAO, pp. 15-16.) Requiring a plan has no physical effect on the environment. "Where it can be seen with certainty

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The State Water Board considered the use of a section 15321 exemption in *Matter of the Diversion and Use of Water from Big Bear Lake and Bear Creek in San Bernardino County by Big Bear Municipal Water District and Bear Valley Mutual Water Company*, Order WR 95-4 (1995 WL 92133, at *8). The Order noted that, "the SWRCB does not issue a permit or license for a pre–1914 appropriation of water such as the Big Bear Lake appropriation, the SWRCB has authority to supervise the exercise of pre–1914 water rights under the public trust doctrine." State Water Board upheld the use of this exemption. (*Id.* at *21-22.)

The State *Water* Board relied on section 15321 in initiating an action to enforce the requirements of the California Constitution, Water Code and the common law public trust doctrine, as these authorities applied to the diversion of water from the Bay/Delta Estuary. (*In The Matter Of Permits And Licenses Listed In Table I Of This Decision Held By Various Diverters Of Water From The Watersheds Of The Sacramento-San Joaquin Delta And From The Channels Of The Sacramento-San Joaquin Delta*, Decision No. 1630 (1992 WL 12623635).) The State Board derived its authority from the "Board's duty of continuing supervision over water rights. Under that duty, the Board has broad substantive authority to reconsider existing water rights and bring them into compliance with the current dictates of the reasonableness doctrine and the public trust doctrine." (*Id.* at *39.)

The only published *decision* construing section 15321 is *Apartment Ass'n of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162. In that case, the city council found that adoption of code enforcement program was "exempt under Class 21 ... because it is the enforcement of a law administered or adopted by the regulatory agency." (*Id.* at p. 1168.) In that case, like the instant case, there was "no lease, permit, license, certificate or other entitlement for use" being construed, and yet the court upheld use of the categorical exemption. (*Id.* at p. 1176.)

Finally, a plain reading of the regulation necessarily reaches a different conclusion than Dischargers suggest. The comma, followed by the word "or" in section 15321 indicates that there are two possible situations where the section may apply:

> [1] The adoption of an administrative decision or order enforcing or revoking the lease, permit, license, certificate, *or* [2] entitlement for use or enforcing the general rule, standard, or objective.

(Cal. Code Regs., tit. 14, § 15321, subd. (a) [brackets and emphasis added].) Use of the word "enforce" in both possible phrases further indicates that the second phrase is not intended as a modifier to the first phrase, as Dischargers suggest, because such a reading would be redundant.

that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA." (Cal. Code Regs., tit. 14, § 15061, subd. (b)(3).)

CEQA does not prevent the Water Board from issuing this Tentative CAO under the exemptions identified within the order, nor does the Tentative CAO tie the Water Board to a specific outcome requiring additional CEQA analysis at this time.[18]

VI. CONCLUSION

The Dischargers failed to obtain any permits before placing fill into federal and State waters, and continued placing fill after receiving a stop work letter from BCDC in January 2015,a Notice of Violation from Water Board staff in July 2015, and even after CAO R2-2015-0038 was issued and rescinded. (Exhibits 17, 9, and 8, respectively). This Tentative CAO is necessary to compel the Dischargers to cleanup and abate the fill they placed in the wetlands and tidal marsh in compliance with the law, in a timely manner, and to mitigate for the lost beneficial uses.

Staff from the Water Board, BCDC, and EPA are committed to continuing to meet with the Dischargers to guide them into future compliance with the various permitting programs. This process in no way supplants the need for an enforceable Tentative CAO requiring the Dischargers to restore the beneficial uses of the Site that existed before fill was placed into waters of the State and United States.

The Water Board has the authority and good cause to issue the Tentative CAO, which is consistent with enforcement measures taken by BCDC, and is supported by San Francisco Baykeeper, the Sierra Club, Save the Bay, Citizens Committee to Complete the Refuge, the National Marine Fisheries Service, and the Napa Solano

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[18] When future development is unspecified and uncertain, the EIR is not required to include speculation about future environmental consequences of such development." (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1449; see also Cal. Code Regs., tit. 14, § 15064, subd. (d)(3) ["A change which is speculative or unlikely to occur is not reasonably foreseeable"].)

Audubon Society. Issuing the Tentative CAO will ensure restoration of beneficial uses at the Site.

DATED: July 21, 2016

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