PROSECUTION TEAM FACTUAL REBUTTAL

Abbreviations Used

Bazel	Lawrence S. Bazel, counsel for Sweeney and Point Buckler Club LLC (Club)
BCDC	San Francisco Bay Conservation and Development Commission
CAO	Cleanup and Abatement Order
CDO	Cease and Desist Order issued by BCDC, effective April 22, 2016 (Exhibit 10a.)
Dischargers	John D. Sweeney and the Club
Corps	U.S. Army Corps of Engineers
DWR	California Department of Water Resources
EPA	U.S. Environmental Protection Agency
PT Evidence	Prosecution Team's Initial Evidence Submittal
Expert Response	Experts' Response to July 11, 2016 Evidence Package
IMP (also Plan)	1984 Individual Management Plan for Annie Mason Point Club or Club 801 (Exhibit 3a. and 26a)
Rebuttal Brief	The companion rebuttal brief to this document prepared by the Prosecution Team.
RGP 3	Regional General Permit issued by the Corps, dated July 8, 2013 (Exhibit 2b.)
SRCD	Suisun Resource Conservation District
Sweeney	John D. Sweeney
Expert Report	"Point Buckler Technical Assessment of Current Conditions and Historic Reconstruction since 1985" Report, dated May 12, 2016 (PT Evidence, Exhibit 11)
Water Board	San Francisco Bay Regional Water Quality Control Board

Ref.	FACTS PRESENTED IN OPPOSITION **Bazel Opposition Brief**	FACTS PRESENTED IN REBUTTAL
1	IMP - Point Buckler has been managed as a duck club since at least the 1940s (p. 1)	Point Buckler Island was historically managed as a duck club, but aerial photos show the Island has been fully tidal since at least 1993 (Expert Report, p. 5). SRCD's records show no action to maintain the levee or any water control structure since 1994 (PT Evidence, Exhibit 10a, CDO, Steve Chappell Declaration Para. 16).
2	IMP - The SRCD prepared the IMP (p. 9)	The Soil Conservation Service of the U.S. Department of Agriculture prepared the IMP (PT Evidence, Exhibit 10a, CDO, Steve Chappell Declaration Para. 11)

	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
3	IMP – The Club Plan includes a map identifying "levee repair" in several locations (pp. 9,31).	In 1990, the owner of Point Buckler submitted a "Wetlands Maintenance Management Report" that proposed to repair several sections of the levee and included the referenced map. There is no evidence that the proposed work was ever initiated or completed (PT Evidence, Exhibit 10a, CDO, Steve Chappell Declaration Para. 14). This 1990 document postdates and is not part of the 1984 Certified IMP (see PT Evidence, Exhibit 26a for an accurate copy of the IMP).
4	IMP – The Club Plan refers to specifications for the "restoration" and repair of levees (pp. 9-10).	The IMP does not call for the restoration of levees (PT Evidence Exhibit 26a).
5	LEVEE CONSTRUCTION - The levee repair was done above the high tide line (p. 3.).	A new levee was constructed in tidal marsh and tidal waters without proper authorization (Expert Report, p. 7).
6	LEVEE CONSTRUCTION – The levee repair was also part of a mitigation project required by CEQA. (p. 3.)	There is no evidence to support this claim (PT Evidence, Exhibit 13c), and DWR has stated that Point Buckler is not required mitigation (PT Evidence, Exhibit 13l).
7	LEVEE CONSTRUCTION – The levee is about 1 to 4 feet high. (p. 15)	The levee is 0.26 to 5.55 feet above the marsh (Expert Report, Appendix F, Table F-1)
8	CORPS PERMITS – RGP3 authorizes, among other things, repairing levees, installing bulkheads, grading to improve water management capability, discing, installing pumps, and replacement of water control structures. RGP3 authorizes the placement of "443,000 cubic yards of earthen material." (pp. 42-43)	RGP 3 only authorizes maintenance activities. Work conducted by the Dischargers was not maintenance and was not permitted or permittable under RGP 3 (PT Evidence, Exhibit 10b).
9	CORPS PERMITS - The RGP 3 permit calls for the submission of a work request form. The Club did not file the paperwork before conducting the Work. (p. 43)	The work would not have been permitted under RGP 3 had the Dischargers filed the paperwork (PT Evidence, Exhibit 10b)
10	CORPS PERMITS - The Corps has issued, and the Water Board has certified, a permit authorizing external dredging in ambient waters and placement of that dredged material on levees. This certification authorizes the placement of one million cubic yards of dredged material. (p. 43.)	This permit authorizes dredging for levee maintenance only and specifies that levees requiring more extensive repairs fall outside the scope and will be regulated via individual project certifications; does not allow for the expansion of levees into existing wetlands; requires avoidance of emergent and submerged aquatic vegetation; does not allow dredging in areas that would disturb or remove vegetation; limits work to

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		between August 1 and November 30 to avoid and minimize impacts to listed fish species; and limits the volume of material that can be dredged; (Bazel Declaration, Exhibit 35; PT Evidence, Exhibits 25a and 25b).
11	STAFF INTERACTION - Following [the CAO] rescission, the Club tried to meet with staff. Staff refused to meet, however, until they had inspected the island. As a result, there was no discussion about whether the Club would proceed with the work it had outlined in its December 1 letter, and no request by staff that the Club perform the work in the letter notwithstanding the rescission of the [September] order. (p. 12.)	The Parties met on October 7, 2015, prior to inspecting the island on October 21, 2015, to discuss violations and coming into compliance. The parties met again on November 20, 2015. There were joint agreements that additional information on conditions at Point Buckler Island needed to be obtained to inform the decision-making process, and the Dischargers agreed to provide the information. Staff formally requested this information in a December 9, 2015 letter (PT Evidence, Exhibit 13c). Staff also scheduled a meeting on February 22, 2016, which the Dischargers suggested postponing. The Parties met again on June 9, 2016 (PT Evidence, Exhibit 13k) and are scheduled to meet again on July 22, 2016.
12	TIDES – The Technical Report produced a set of elevations for the island that cannot be right. (p. 1.)	This statement is not supported by evidence from a qualified professional. No substantial evidence was submitted on this topic from a qualified scientist or licensed professional that refutes the lengthy evidence submitted by the Prosecution Team, as discussed further in the Expert Report (App. E, F, and I) and Expert Response (pp. 9-15).
13	TIDES – According to the Technical Report, for example, the tide rose above the crest of the repaired levee – more than seven inches above the levee crest – on a day when the Technical Report team was on a boat circling the island. If the tide had truly been above the levee crest, water would have flowed across the top of the levee and poured into the center of the island. (p. 1.)	See Rebuttal Fact 12. In addition, the Experts' Response (Ex. 22) addresses arguments concerning the facts that the island would not experience water "pouring" or "flowing" across the levee top, explaining that mature tidal marshes high in the tidal frame may not experience daily flooding. (Ex. 22, pp. 2-7.)
14	TIDES – According to the Technical Report, the water level at Point Buckler was 7.3 feet on February 17. A water elevation of 7.3 feet is 0.6 feet above 6.7 feet, which is the lowest elevation along the levee crest.	See Rebuttal Facts 12 and 13.

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	There is at least one other location along the top of the levee where the elevation is less than 7.0 feet. As a result, water should have been flowing over the top of the levee and into the center of the island in at least two places on February 17, when staff and their consultants took a boat tour around the island. Surely they would have noticed and reported it. (pp. 18, 22.)	
15	TIDES – If the island had been flooded at high tide, the aerial photographs would have shown ponding. (p. 2.)	See Rebuttal Facts 12 and 13.
16	TIDES – If the island had been flooded, the debris would have been carried to the center of the island, rather than remaining at the edges. (p. 2.)	See Rebuttal Facts 12 and 13 and Exhibit 22, Experts' Response, page 31, which addresses the issue of tidal debris. The Expert Report also presented data and scientific analysis of an identifiable wrack line from a recent high tide. There can be multiple tides lines such as the drift line of wave-deposited debris along the outer tidal marsh edge . The drift line was not ignored but not surveyed because it was not the high tide line (Expert Report, App. I, pp. I-2 thru I-3; Expert Response, pp, 29-31).
17	TIDES – The high tide line encompasses tides that occur with periodic frequency but not storm surges. (p. 14.)	See Rebuttal Fact 12. In addition, pages 10 and 13 and of the Experts' Response (Exhibit 22) specifically addresses storm surges.
18	TIDES – In fact, the interior of the island, except for a few small channels and ditches, was above tidal inflows and outflows. (p. 14.)	See Rebuttal Fact 12.
19	TIDES – The Technical Report recognizes that the highest tides at Port Chicago are most likely attributable to storms, and should be omitted from the calculation, but the Technical Report drops out only a very few of the highest elevations: less than 0.1%. The Technical Report's own figure, however, shows that the highest tides during what the figure labels as "drought" are much lower than those before the drought: the highest water elevation recorded during the 5-year drought is	See Rebuttal Fact 12. Pages 12 to 14 of the Experts' Response (Exhibit 22) specifically address the use of Port Chicago data.

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	7.4 feet, whereas the highest before the drought was about 9.0 feet. Because nothing during the 5-year drought approached the Technical Report's figure of 8.2 feet, that figure cannot be a fair assessment of "spring high tides and other high tides that occur with periodic frequency," as the Corps regulations specifies. Instead, the 8.2 figure must be based on storm surges, which the definition says should not be considered. (p. 16.)	
20	TIDES – The Technical Report could have determined whether high flood flows from these rivers coincided with high tides at Port Chicago, identified those high tides attributable to storm flows, and removed those data from the analysis. But it did not. (p. 17.)	See Rebuttal Facts 12 and 19.
21	TIDES – The Technical Report ignored evidence that the tide heights at Point Buckler may be *lower* than those at Port Chicago. Mean high tide for a location in Montezuma Slough, which is across Grizzly Bay from Point Buckler, was calculated to be 5.0 feet, which is *lower* [than] mean high tide at Port Chicago. (p. 17.)	See Rebuttal Facts 12 and 19.
22	TIDES – Aerial photographs [taken in September and October 2013] show that there was a "more or less continuous" line of debris along the edge of the island *before* the levee was repaired. (p. 19.)	See Rebuttal Fact 12. In addition, the Experts' Response specifically addresses arguments regarding the wrack or debris line. (Ex. 22, pp. 29-30.)
23	TIDES – The white line along the shore of the island consists of debris, including dead vegetation and whitened wood, along with some other detritus including styrofoam. The Technical Report ignored the white debris line running around the edge of the island, as its own figure makes clear. No elevations were taken of the white line along the edge of the island, except perhaps where that line intersected with the levee. At these points, the Technical Report appears to have surveyed the top of the levee, based on the rationale	See Rebuttal Facts 12 and 22.

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	that there were bits of vegetation on top of the levee. But these bits of lightweight vegetation could easily have been tossed on top of the levee by wind or waves. Even if there were a place where wave-tossed lumber had been found at an elevated location, one location is not a "more or less continuous" line of debris. (p. 19.)	
24	TIDES – The white debris line seen in the aerial photographs is plainly at a much lower elevation than 6.3 feet. Remnants of the old levee were measured at elevations as low as 5.45 feet. The Technical Report did not measure the elevation of the white line, and paid no attention to it. (p. 20.)	See Rebuttal Facts 12 and 22.
25	TIDES – The Technical Report concluded that the top of the debris line was at 8.3 feet. It obtained this figure by averaging the two highest readings. The lowest reading of the top of the debris line was 6.3 feet, a full two feet lower than the highest reading. Because the number 8.2 is not calculated from a "more or less continuous" line of debris, it is not the debris line called for by the Corps regulation. (p. 20.)	See Rebuttal Facts 12 and 22.
26	TIDES – The island was mostly high and dry, and not affected by the tides. (p. 21.)	See Rebuttal Fact 12. In addition, the Experts' Response specifically addresses the arguments regarding the island being "high and dry" and the ability to drive heavy equipment across tidal marsh. (Ex. 22, pp. 25-29.)
27	TIDES - Aerial photographs show that the levee repair was done inside the white debris line, and therefore above the high tide line except where it crossed a channel or ditch. (p. 20.)	See Rebuttal Facts 12 and 22.
28	TIDES - Google Earth photo taken on May 19, 2012, taken shortly after cleared vegetation clearly shows water in the duck ponds. It also shows that the western side of the island and all the roads are *completely dry*. If the Technical Report were right, there would be signs of	See Rebuttal Facts 12, 13 (ponding) and 26 ("high and dry" nature of the island).

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	water ponding on the roads and the western part of the island. These tides should have covered the island with a half foot or more of water. When the tide retreated, it should have left ponds in the low areas of the island and large puddles or ponds on the cleared areas. (p. 23, 24.)	
29	TIDES - The May 19, 2012, photo shows several roads or pathways across the island, all dry. The following thirteen aerial photographs show the same thing: no ponding or water on the island other than in the channels and ditches and the two small ponds dug by Mr. Sweeney. (Opp. at p. 23.) An infrared aerial photograph obtained from NOAA was taken at mean high water. It shows water staying within the channels and ditches and not spreading out over the interior of the island. (p. 24.)	See Rebuttal Facts 12, 13 (ponding) and 26 ("high and dry" nature of the island).
30	TIDES - If the island were subject to *daily* inundation, there should be some evidence of this inundation in at least one of these photographs. The absence of any visible ponding on the island in aerial photographs during this time is therefore powerful evidence that the island *was not* subject to daily tidal inundation. (p. 24.)	See Rebuttal Facts 12 and 13.
31	TIDES - A pond is visible in an aerial photograph taken in 1981. These ponds apparently silted in, perhaps when storms and wave action breached the levee. (p. 5.) Whether or not the pond seen in 1981 was a wetland then, it has never been seen in the aerial photographs since. It must have silted up and become elevated above the high tide line. (p. 28.)	See Rebuttal Fact 12. Page 36 of the Experts' Response specifically addresses the claim regarding silt in the interior ponds. (Ex. 22.)
32	TIDES – If seven inches of water had flowed across that unpaved, ungraveled, unreinforced levee made only of dirt and peat, the water would [have] left erosion marks across the top (or gouged deep cuts in it). (p. 1, 15.) The Technical Report team reported no sign that water	Evidence of levee overtopping, in the form of vegetation debris, was observed on the levee crest on March 2, 2016 and documented in the Expert Report (App. I, Photo I-1 and App. R, Photos R-3b, R-4b). There is further discussion in the Expert Response which explains the relationship between field

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	had ever flowed across the top. (pp. 2, 15.)	observations, the tidal record, and elevation data surveyed at Point Buckler (pp. 16-18).
33	TIDES – The high tide line may be determined from a line of debris along the shore. (pp. 14, 18.) The Technical Report ignores the actual debris line on the island. (p. 2, 17.)	The Expert Report presented data and scientific analysis of an identifiable wrack line from a recent high tide. There can be multiple tides lines such as the drift line of wave-deposited debris along the outer tidal marsh edge. The drift line was not ignored but not surveyed because it was not the high tide line (Expert Report, App. I, pp. I-2 thru I-3; Expert Response, pp, 29-31).
34	TIDES – The Technical Report team reported no sign that water had ever flowed across the top. (Opp. at pp. 2, 15.)	Evidence of levee overtopping, in the form of vegetation debris, was observed on the levee crest on March 2, 2016 (Expert Report, p. 16).
35	TIDES – The Technical Report does not assert that the Corps now has jurisdiction over any part of the island based on the three-factor wetland test. It does assert that the three-factor test would have applied "through the mid-1980s," when water was ponded on the island. (p. 28.)	The 3-parameter wetland delineation methodology does not necessarily establish jurisdictional boundaries in tidal areas under the Clean Water Act (Expert Response, pp. 24-25). Point Buckler would have met the 3-parameter test in the 1980s, based on the presence of obligate wetland plants, hydric soils, and periodic flooding of the site as a managed wetland (Expert Report, Appendix N, p. N-3).
36	BENEFICIAL USES - The great majority of the island was not tidal marsh. (p. 25.)	No substantial evidence was submitted on this topic from a qualified scientist or licensed professional that refutes the lengthy evidence submitted by the Prosecution Team, as discussed further in the Expert Report and Expert Response. The description of impacted beneficial uses are in Appendices P and Q of Exhibit 11, the Expert Report.
37	BENEFICIAL USES - Scientists are at the very earliest stages of research for understanding the usefulness of the shallow-water channels. Scientists often assume that marsh habitat is good and more of it is better. Arguing that all of the Delta's sloughs and channels are good for the listed species lacks scientific certainty, and in fact this argument is hardly more than a lightly researched theory. (p. 26.)	No evidence supports this statement. In fact, leading Pacific Coast scientists on estuarine ecology of anadromous salmonids held a symposium on June 10, 2013 where they developed and published consensus conclusions on the role of tidal marsh restoration on conservation of salmonids. The consensus is that tidal marsh restoration benefits many fish species and can be extremely important for the growth and survival of salmonids (Expert Report, p. 26).

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38	BENEFICIAL USES - For salmon, there is no real conclusion about what is good or bad. Small shallow channels can be detrimental because of the dangers of predation, as well as stranding and temperature. A similar discussion could be had about the life strategies of the listed species other than salmone, but unfortunately with much less scientific knowledge at scientists' finger tips and a lot more educated guesses than proven fact. (p. 27.)	Studies of west coast salmonids broadly demonstrate the use of shallow water habitat by juvenile salmon, and shallow water habitat has historically supported salmon food webs. Scientific consensus has concluded that tidal wetland loss constrains the growth and survival of juvenile salmonids (Expert Report, p. 26).
39	BENEFICIAL USES - Staff have asserted that the levee repair dried out tidal marsh. The Club has protested that this assertion is not true, to no avail. (p. at p. 11.)	The Prosecution Team asserts that the Dischargers drained the island, and that dried vegetation and soil are symptomatic of a drained wetland. The Dischargers have not presented evidence to refute the scientific evaluation of conditions at Point Buckler Island presented in the Expert Report and a Water Board inspection report dated April 19, 2016. (PT Evidence, Exhibits 6 and 11.)
40	BENEFICIAL USES - The Technical Report attempts to relate past conditions and wet and dry periods to site conditions observed during March 2016 indicating that the island has been dried out. But the May 2016 photographs taken of the island contradict the report's conclusion. (p. 25.) The Technical Report asserts that the levy repair is "causally associated with mass dieback of obligate wetland plants." But there were mass diebacks of vegetation *before* the levee repair. In May 2012, for example, Mr. Sweeney observed that the vegetation on the island was brown and brittle and appeared dead. Photographs taken by Mr. Sweeney show what appears to be dead vegetation. An aerial photograph shows that the island appeared mostly brown in May 2012. Aerial photographs show that the island appeared brown throughout most of 2013 and 2014. Because the vegetation on the island was brown	Tidal marsh vegetation undergoes natural seasonal senescence, such that vegetation is green and at peak growth during the late summer and fall, and dormant in the winter. This is different from mass dieback of marsh vegetation observed during the March 2, 2016 site inspection. (Experts' Response, p. 27). This is supported by color and non-color (infrared) aerial photographs taken since the levee was constructed. These aerial photos show vegetation that is predominantly green outside of the levee and predominantly brown inboard of the levee, where wetlands have been drained. In contrast, aerial photos of nearby reference sites taken at the same time show predominantly green tidal marsh vegetation. Aerial photos from the flyover contracted on February 10, 2016, and June 29, 2016, as well as photographs taken at Point Buckler during the March 2, 2016 inspection, all tell the same story, that vegetation outside the levee is green and inboard of the levee

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	and brittle and appeared dead in 2012, two years before the levee repair, mass diebacks cannot be attributed only to levee repair. (p. 26.) In May 2016 the island was very green, as photographs show. There are, in short, times when the island is green, and times when it is brown – both before and after the levee repair. (p. 26.)	is brown, which is contrary to images provided by Sweeney (PT Evidence, Exhibit 11, App. D, Fig. D-36, and Exhibits 6 and 12d. It is also important to note that the May 2016 photographs show that the island is dominated by obligate wetland plants, which demonstrate the presence of wetland habitat under Clean Water Act jurisdiction (Expert Report, p. 25).
41	BENEFICIAL USES – Staff have asserted that the levee repair dried out tidal marsh. The Club has protested that this assertion is not true, to no avail. (p. 11).	Construction of the new levee resulted in mass dieback of obligate wetland plants, therefore tidal marsh vegetation on the island no longer go through periods of regeneration and dormancy. Tidal marsh vegetation has been converted to standing dead litter, and replaced with weeds and high marsh/transition zone plants (Expert Report, p. 18).
42	BENEFICIAL USES - The Technical Report asserts that the levee repair was detrimental to several beneficial uses, principally those involving fish. (p. 3.)	Unauthorized work conducted by the Dischargers adversely impacted beneficial uses including estuarine habitat, fish migration, preservation of rare and endangered species, fish spawning, wildlife habitat, and commercial and sport fishing (Expert Report, Apps. P and Q). Construction of a road likely destroyed colonies of Mason's lilaeopsis, a special status wetland plant. Blocking tidal action at the island resulted in increased surface water and groundwater salinity which can adversely affect growth and mortality of young ducklings. And the degradation of tidal marsh vegetation likely resulted in degraded wildlife habitat for waterfowl, passerines birds, and mammals including river otters (Expert Report, App. Q, pps. Q6 thru Q-10).
43	BENEFICIAL USES - The Technical Report has no direct evidence of harm, and relies on speculation. (p. 3.) The Technical Report implicitly concedes that there is no direct evidence of harm to any endangered species. It refers to "likely impacts." (p. 26.) The Technical Report cannot establish that detrimental effects are even likely. They are speculation. (p. 26.)	The Expert Report provides evidence of discharge of fill into 3.3 acres of waters of the State and United States and ongoing degradation of 27.18 acres of the Site's interior tidal marsh. The unauthorized fill resulted in indirect impacts to the island's vegetation and soils; special status plants, fish, and wildlife; and general wetland wildlife (Appendix Q, pp. Q-2 thru Q-11). It also provides evidence of unauthorized work

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		conducted outside appropriate work windows for special status species that likely resulted in impacts to these species (*Id.,* Appendix K, Figs. K-18 thru K-24).
44	TENTATIVE CAO - The prosecution team asserts that the Club should be ordered to destroy all or part of the levee. (p. 1.) The Tentative Order would prevent the "[c]ontinued recreational use of privately-owned managed wetlands" by requiring the Club to destroy its levee. (p. 32.) The Tentative CAO would appear to prohibit the restoration of duck ponds on the island, and that would prevent the restoration of duck ponds on the island. Preventing the Club from restoring duck ponds would also interfere directly with hunting and other recreation related to the duck ponds.	The Tentative CAO requires the Dischargers to submit a Point Buckler Restoration Plan designed to restore tidal action. The Tentative CAO does not prescribe the means or methods for tidal restoration and does not specify the destruction of all or part of the levee (Tentative CAO, Provision 2). The Water Board works collaboratively with owners and managers of duck clubs to protect recreation as a beneficial use and to improve water quality in Suisun Marsh. For example, staff is currently working on a multi-pollutant TMDL that includes support for grant funds to help improve duck club water management activities (Exhibit 27).
45	TENTATIVE CAO - The Tentative Order is neither necessary nor appropriate. The parties are now on track to resolve this dispute through standard permitting procedures. (p. 4.) A cleanup and abatement order is more likely to get in the way of productive discussions than it is to help them along. (p. 4.)	A CAO is necessary and appropriate. It is the standard regulatory tool at the Water Board's disposal to oversee the cleanup and abatement of unlawful work (the unauthorized construction of a new levee). Staff at the Water Board have and continue to work with the Dischargers to permit planned recreational uses at Point Buckler Island. However, no plans or permit applications have been submitted. Plans or permits may be submitted separately or in parallel with work done to comply with tasks in the CAO. It is premature at this point in time to say that efforts are on track to resolve this dispute.
46	AERIAL PHOTOGRAPHS - The Technical Report used aerial photographs to evaluate vegetation, but the colors were not standardized, which made the interpretation significantly more subjective. (p. 25.)	Absolute color correction is not necessary for accurate diagnostic comparative identification of tidal marsh vegetation. When known reference sites of tidal marshes and non-tidal marshes occur in the same photograph as the marsh image being tested, only relative color contrasts that distinguish green from straw, tan, or brown is necessary (Experts' Response, pp. 7-9).
47	FILL VOLUME - The Technical Report asserts that 3.2 acres of tidal marsh was filled. The report submitted by	The Conditions at Point Buckler report prepared by Applied Water Resources (AWR) (PT Evidence, Exhibit 16b.)

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	Applied Water Resources identified the channels and ditches that were actually wet at high tide, calculates the amount of fill at 500 cubic yards. Assuming a fill depth of two yards, the fill was about 0.05 acre. (p. 25.)	erroneously assumed that mean high water correlates with the debris line, and that the extent of jurisdictional waters of the State and United States are limited to areas below mean high water. The report made no estimate of the extent of tidal marsh on which fill was placed (Expert Report, p. 16). As such, the report's estimate of the amount of fill is wrong and grossly underestimates the actual volume of fill placed within waters of the State and United States.
48	FILL VOLUME - In other words, about 99% of what the Technical Report calls fill was placed above the high tide line, on dry land rather than in water. (p. 25.)	Topographic survey data was collected by CLE Engineering, with expertise in topographic surveys. The topographic survey used the high tide line as the jurisdictional boundary for Clean Water Act Section 404 to map the extent of jurisdictional areas. The topographic survey data was used to create a digital elevation model of Point Buckler Island and calculate fill and excavation volumes. These results show that 3.2 acres of tidal marsh was filled (Expert Report, p. 16, Appendix K, p. K-2, and Appendix Q, Table Q-1).
49	DUE PROCESS - The prosecution team estimates the permitting costs alone at $1.1 million (ACL Complaint, Appendix A at A-12)	The cost of permitting is incorrectly cited as $1.1 million. The economic benefit gained by the Dischargers' from unlawful levee construction is estimated to be $1.1 million dollars. The estimate of economic benefit is not based on permitting costs alone, but a number of delayed and avoided costs.
	Bazel Declaration	
50	PARA. 5 - Attached as Exhibit 4 is an accurate copy of a document (the individual development plan for Point Buckler), which I obtained from SRCD through a Public Records Act request….For convenience, pagination has been added.	An accurate copy of the individual management plan, as certified in 1984, is provided as Prosecution Team Evidence, Exhibit 26a. The Bazel Declaration Exhibit 4 contains multiple documents, is not an accurate copy of the IMP, and should not have been sequentially numbered. As an example, the "Wetlands Maintenance Management Report" dated 1990 postdates certification of the IMP in 1984.
51	PARA. 18 - Because staff insisted on conducting an inspection before [t]he parties met, there was no discussion about whether the Club would proceed with	See rebuttal to STAFF INTERACTION in Bazel's Opposition Brief (Ref. 11).

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	the work it had outlined in its December 1 letter, and no request that the Club perform the work in the letter notwithstanding the rescission of the September 2015 order.	
52	PARA. 24 - Staff, as well as EPA and BCDC, supported the Club's plan to submit applications, and had no objection to the use of the island for kiteboarding and as a duck club.	During the June 9, 2016 meeting, Water Board, BCDC, and EPA staff discussed restoring tidal flow to the Island and permitting requirements for future activities. Any future activities require a permit, and must demonstrate avoidance and minimization of impacts to the maximum extent practicable. Any unavoidable impacts will require compensatory mitigation (PT Evidence, Exhibit 13k). At this time, staff has not approved or objected to any specific plan, including kiteboarding and duck club activities; the Dischargers have not provided any plan. No determination will be made about what may be acceptable at Point Buckler Island until a complete application is submitted for staff review.
53	Para. 27 - The tide data at Port Chicago (on which the Technical Report relied) show no high tides anywhere near 8.2 since the levee was repaired.	See Rebuttal Fact 12. There is further discussion of Bay tides, use of Point Chicago as a reference station, and erroneous statements presented in the Dischargers' evidence submission in the Experts' Response (pp. 9-15).
54	PARA. 29 - On July 3, 2016, the tide at Port Chicago reached the same level it had on February 17, as I determined from comparing the data in Exhibit 24 with the data reported by the Technical Report.	Bazel Declaration Exhibit 24 does not include data for July 3, 2016. Consistent with paragraph 27, the Exhibit 24 contains information from March 1, 2014 to May 31, 2016.
55	PARA. - 33. Attached as exhibit 29 is an accurate copy of e-mails between Dyan Whyte and me.	The record of emails provided as Bazel Declaration Exhibit 29 is incomplete. The complete chain of emails is provided in PT Evidence, Amended Inspection Warrant Affidavit, Exhibit 7c.
	Sweeney Declaration	
56	PARA. 2 - Duck clubs use levees to maintain control over water levels in the duck ponds. Conversations with previous owners of the island confirm that it was used as a duck club back in the 1920s. The Department of Water Resources ("DWR") installed a pump and generator on	DWR never installed a pump on Point Buckler as documented in PT Evidence Exhibits 13e and 13l and discussed in a DWR Memo (PT Evidence, Exhibit 28). Further, neither of the Dischargers has provided any documentation to support this claim, despite requests from Water Board staff (PT Evidence,

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	the island in the early 1990s, according to the owner of the island at the time. An old pump and generator are still there….This equipment appears to be the pump and generator that DWR installed.	Exhibit 13c).
57	PARA. 3 - Duck clubs do not generally use pumps because they do not need them. Duck ponds are typically below high tide levels. Duck clubs open their tide gate to maintain the water level. At the end of the season they drain their ponds by opening the tide gate and allowing the water to drain out.	This is a misstatement. Duck clubs often have to use pumps to effectively drain water from their property because managed wetlands become subsided over time and siltation can block channels and tide gates and limit or prevent gravitational drainage (PT Evidence, Exhibit 3g). In addition, John Sweeney stated his intent to keep water in when he described inflow associated with water management at Point Buckler Island in a series of earlier emails to Stuart Siegel on May 14, 2015 (Exhibit 23). He says that Point Buckler Island is a "partially muted tidal wetland" that can be managed "with flood gates and the many riser boards on each small pond inlet." "The three small inlets to ponds had wood riser boards to trap water in…They are not there to keep water out but keep it in." A series of flood and drain cycles are required at the end of the season.
58	PARA. 4 - There is only one Reason that a pump would have been installed at Point Buckler, and that DWR would have wanted the levees repair. The island was above high tide, and did not flood naturally. To flood a duck pond, the owner would have had to pump water onto the island.	DWR agreed to the concept of providing a pump so that less saline water could be pumped into Point Buckler when water quality needed improvement as a way of helping to address increased salinity in Suisun Marsh. However, DWR records show that it never provided a pump because of the condition of the levees (PT Evidence, Exhibits 13e, 13l, and 28). The claim that an owner had to pump water onto the island conflicts with the idea that duck clubs have been operating at Point Buckler since at least the 1940s, but a pump was not installed until the early 1990s (see Sweeney Declaration, para. 2). There is no evidence that pumping has been needed to manage wetlands at Point Buckler. It is not mentioned in the 1984 IMP and is not consistent with other statements that

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		Sweeney made about water management at Point Buckler in his May 14, 2015 emails to Stuart Siegel (Exhibit 23; see also rebuttal to Sweeney Declaration Para. 3). Sweeney's statement that the island is above high tide is in direct conflict with professional licensed survey of the island and scientific analysis of tidal data (Expert Report, Appendix F and Experts' Response, pp. 9-15).
59	PARA. 5 - "Staff at BCDC provided me with an "individual development plan" (the "Plan") dated 1984…"	The sequencing in this statement makes it appear that John Sweeney obtained the 1984 individual management plan prior to constructing the new levee (presented as Para. 6). However, John Sweeney did not obtain a copy of the individual management plan until after he planned for and completed construction of the new levee. Any statements by John Sweeney about work being done according to the plan are factually wrong. His work started on or before May 2012, and the new levee was completed around the perimeter of the island by October 29, 2014 (Expert Report, Table K-1). BCDC staff gave Sweeney a copy of the IMP on November 14, 2014, a month after he finished building the new levee (PT Evidence, Exhibit 10a, BCDC CDO, para. 21).
60	PARA. 6 (also in PARA.S 7, 8, 16, 17, 18, 19, 29, 30, 31, 32) - Use and conjugations of the terms "repair" and/or "maintenance." I dug out material from an artificial ditch inside the levee and placed the material on the existing levee. Some material was placed where the levee had been breached, and (where part of the levee had eroded away) on solid ground inside the former levee location.	The Dischargers unlawfully constructed a levee. Only approximately 0.55 acres of the work overlapped the former levee (the degraded tidal levee), while approximately 2.2 acres of the work was a new alignment and involved new construction of a levee (Expert Report, Figure K-1). The Expert Report documents the following: (1) Due to lack of maintenance, what remained of the former levee had degraded and reverted back to tidal marsh. Therefore, material placed on top of the old levee resulted in fill of tidal marsh; (2) Tidal channels were located in areas where the levee had breached, and material placed here resulted in fill of tidal waters; and (3) Areas interior of the former levee were tidal marsh. Therefore, construction of the new levee resulted

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		in the fill of tidal marsh. The Conditions at Point Buckler report acknowledges that "Recent activities at the Island has resulted in the placement of fill material into waters of the State (PT Evidence Exhibit 16b, p. 4)
61	PARA. 7 (Part 1 of 2) - Although the island is used for kiteboarding, the levee repair was not needed for kiteboarding because the great majority of Point Buckler is dry at high tide, and was before the levee repair.	See Ref. 57 rebuttal.
62	PARA. 7 (Part 2 of 2) - The levee repair was so that the duck club could be rejuvenated. Work stopped in October 2014, when the Club learned that there were regulatory objections. The Club would like to finish levee repair, install a second tide gate, and do the additional work necessary for a fully functioning duck club, including…"	Levee construction was completed in October 2014 (Expert Report, Appendix D, Fig. D-25), but the Dischargers did not stop all work in October 2014. Development for kiteboarding continued despite notices from BCDC, on January 30, 2015, and staff, on July 28, 2015, to stop work and obtain permits (PT Evidence, Exhibit 29). The work done is compatible with plans for kiteboarding (i.e., construction of a levee to cutoff tidal flow, installation of only one tide gate and a means to drain the interior to its current state (Expert Report, Appendix L), and installing kiteboarding facilities on drained wetlands. There are issues with work the Dischargers did with respect to managing a wetland for a duck club. Cyclic flooding and draining (see Para. 3 rebuttal) would require at least two flood gates (specified in the 1984 IMP), yet only the one tide gate was installed. The work that John Sweeney states he now wishes to conduct is generally not compatible with current development. Most of the kiteboarding facilities (club, trailers, helicopter pads, etc.; Expert Report Appendix K) are below mean high water (Expert Report elevation transect, Figures F9 & 10) and would be subject to the tidal flooding that would be required for a managed wetland.
63	PARA. 9 - At the time the Regional Water Board issued a cleanup and abatement order, Regional Board staff had not visited the island. Their first visit, at the invitation of the Club, was in October 2015.	Findings for issuance of the CAO were based on sufficient and adequate information including the following: (1) historical and current aerial photos; (2) three letters from BCDC describing the nature of activities and violations; and (3)

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		conversations with staff at BCDC and CDFW describing the results of their November 2014 site inspection (PT Evidence Exhibit 8a).
64	PARA.S 11, 12, 13, and 18 - The top of the levee is made up of dirt and peat. It has not been paved, graveled, or otherwise protected against erosion. Any substantial flow across the top of the levee would have left erosion marks. The peat in the levee is especially fluffy and weak, and is easily eroded. There are no marks of water flowing over the top of the levee. I was on the island on July 3, 2016, and observed no erosion marks or any other sign that any water had flowed over the top of the levee. During all of the time I was repairing the levee, I never saw the island under water, nor have I seen it under water before or since. During the time I was working on the island, I did not see water rise up over the top of the interior channels and ditches and spread over the land.	There has been consolidation and compaction of the levee from drying and heavy equipment use (PT Evidence, Exhibit 6, p. A8), and we dispute characterization of the levee is fluffy and weak. It is not disputed that the levee is erodible; erosion of the levee was evident during the March 2, 2016 inspection (PT Evidence, Exhibit 6, p. A1 and A13). The wrack line discussed in the Expert Report and the report for the March 2, 2016 inspection record evidence of tidal water reaching the top and back of the levee, not any substantial overtopping of the levee. A scientific analysis of tides, tidal elevations that occurred during the time when Sweeney constructed the levee, and how tidal wetlands flood is provided in various discussions within the Expert Response. In summary, high tides are brief in time, often occurred at night during the work period, and overbank inundation is shallow and hidden by the extensive cover of tall, dense wetland vegetation.
65	PARA. 15 – The white line along the shore of the island consists of debris, included dead vegetation and whitened wood, along with some other detritus including syrofoam. Attached as Exhibit 2 are accurate copies of photographs I took of the debris line at Point Buckler.	The debris line documented by Sweeney is a drift line that forms along the first barrier, often along the outer tidal marsh edge, that intercepts and traps floating tide-deposited or wave-deposited debris (Expert Report, p. 14); it is not the high tide wrack line documented in the report for the March 2, 2016 inspection (PT Evidence, Exhibit 6) and Expert Report. The white debris or drift line is evident in front of the levee in the aerial photograph taken on February 10, 2016, and marsh in front of the levee was underwater on February 17, 2006 (Exhibit 30a).
66	PARA. 19 - When I drove a bulldozer across the island, the island was dry. To repair the levee, I used an excavator that weighs about 60,000 pounds. If the island had been tidal marsh, the excavator would have gotten	Mature tidal marsh at Point Buckler has soil sufficient to bear loads such as vehicles and equipment (Expert Response, p. 13). Sweeney states that, “my father in law Mike Frost can attest to the quality and practices I used in restoring buckler as he

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	stuck in the muck, but the island was not tidal marsh and the excavator never got stuck.	explained to me how to do it" (Exhibit 23). Images from Mike Frost's construction company website (http://www.wmfrostconstruction.com) show how heavy equipment may be used in the marsh (Exhibit 30b). The aerial photograph record of levee construction shows that he started from a point of higher elevation at Point Buckler Island (eastside; Expert Report Exhibit F-12 and Figs. D14-25) and proceeded clockwise around the island both, making it possible to both construct the levee and simultaneously build a pad of support for excavator work (similar to Photograph 2, Exhibit 30b). The Experts' Response specifically addresses the arguments regarding the island being "high and dry" and the ability to drive heavy equipment across tidal marsh. (Ex. 22, pp. 25-29.)
67	PARA.S 20 and 21 - In May 2012, I observed that the vegetation on the island was brown and brittle, and appeared dead. In May 2016 the island was very green. Attached as Exhibit 5 are accurate copies of photos taken of Point Buckler in May 2016.	The Prosecution Team inspected the island on March 2, 2016, and contracted to have aerial photographs (both color and non-color or infrared images) taken of Point Buckler Island on February 10 and June 29, 2016. On the dates these images, vegetation outside the levee is dominantly green while vegetation inboard of the levee is dominantly brown (Expert Report, App. D, Fig. D-36, and PT Evidence, Exhibit 12d). The timing of the photographs is in dispute because the reported color of vegetation in May is inconsistent with the color of vegetation in February 10, March 2, and June 29. More importantly however is the type of plants captured in the photographs, which document the presence of tidal wetlands inboard of the levee (Expert Report, p.12).
68	PARA.S 22 through 24 - Attached as Exhibit 6 [and Exhibit 7] is an accurate copy of an email I received from Stuart Siegel on May 14, 2015.	John Sweeney did not provide the complete email chain between himself and Stuart Siegel. The accurate and complete chain of emails is provided with a Declaration by Dr. Stuart Siegel (Exhibit 23). The complete record provides perspective and context to statements made by Stuart Siegel. It does not provide evidence that Stuart Siegel has an unfair bias in this

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		case, but it does provide insight into attempts by John Sweeney to make these types of claims and discredit him as an expert.
69	PARA.S 25 through 28 - Attached as Exhibit 8 is an accurate copy of a map entitled "Suisun Tidal Wetland Restoration Projects" that Stuart Siegel's firm created in 2004. Attached as Exhibit 9 is an accurate copy of a screenshot I took of the San Francisco Estuary Institute's EcoAtlas wetland map and database. Attached as Exhibit 10 is an accurate copy of an e-mail I received from Christina Grosso, of the San Francisco Estuary Institute, on June 17, 2015. I believe that the errors in the 2004 map were intentional, and I have made that belief known publically.	See Dr. Stuart Siegel Declaration (Exhibit 23)
70	PARA. 29 - Where the existing levee was intact, the levee was maintained by placing material on top of it. On the northern side of the island, where the old levee had been eroded away, the repaired levee turn inland, and stayed inside the debris line.	See rebuttal to Ref. 59.
71	PARA.S 30 and 32 - The levee repair work was stopped before it was complete because of regulatory objections. The Club intended to install another tide gate, and to make the slopes of the levee consistent with the Management Program. The Club also intended to disc the soil, to plant vegetation preferred by waterfowl, and otherwise to create duck ponds. The Club would like to proceed to complete the work and install duck ponds. The purpose of the levee was to create a duck pond or series of duck ponds.	See rebuttal to Ref. 60 (Part 2).
	Terry Huffman Declaration	
72	PARA.S 3 and 4 - Any substantial flow of water across the top of the levee at Point Buckler would have left erosion marks that would be readily observable. Water	Though substantial flow across the levee would have left erosion marks (see rebuttal to John Sweeney's Declaration; paras. 11, 12, 13, and 18),Huffman's declaration is unclear

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	flowing with substantial velocity is powerful, and readily erodes unstabilized dirt. Water flowing over the Point Buckler levee at a depth of 1.5 feet would deeply erode the levee. When I was at the island, I did not see any sign that water flowed completely across the levee. I have observed a debris wrack line at the island…..I have also observed finer debris and other debris above that line….The Technical Report selected debris along the margin of the re-established levee when assessing the wrack line, and therefore may have based its determination on debris that was affected by wave run up.	about what wrack line he observed, and it is surprising that he only observed a wrack line. There are often multiple tide lines including the debris line observed by John Sweeney (rebuttal to Sweeney Declaration Para. 15) and the wrack line associated with a recent high tide documented by the Prosecution Team (Expert Report and Experts' Response). What is lacking is any evidence and scientific evaluation of a high tide wrack line, such as a wrack line that would have been associated with the high tide documented during a boat trip on February 17, 2016 (Exhibit 30a).
73	PARA. 5 - The report fails to provide evaluation of the debris line alone [along] the more protected areas on the eastern side of the island.	No debris wrack line was observed on the eastern shoreline during the March 2, 2016 site visit. The eastern shoreline is characterized by a steep bank to the upland levee crest lacking depositional settings for wrack to accumulate (Expert Report, p.16).
74	PARA. 6 - The Technical Report does not report the presence of any wrack lines, debris wrack line, or fine debris within the interior, even along the former tidal channels where the levee was breached.	No wrack line was observed on the interior of the levee. The wrack line documented in the Expert Report reached the top but did not substantially overflow the levee. Further recent tides relative to the levee height are presented in the Expert Report (Appendix F Fig. 8) and discussed further in the Expert Response.
75	PARA. 7 (Part 1 of 2) - The Technical Report used one data point to adjust tide data from Point Chicago to Point Buckler. Standard practice would be to install a temporary recording tide gage at the Point Buckler location.	The installation of a temporary tide gauge was not possible given the unwillingness of the Dischargers to provide timely access to Point Buckler Island and limited in the inspection warrant for the Prosecution Team to obtain information from Point Buckler Island. Selection of Point Chicago as the tidal reference point was done according to accepted practices as discussed in the Rebuttal Brief and discussed further in the Expert Response.
76	PARA. 7 (Part 2 of 2) - In addition, the data point used by the Technical Report involved a wet board. The board	The wetted mark on the board provides accurate evidence of high tide. The photograph was taken at approximately 9:47

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	approach cannot rule out waves generated by boats and moisture wicking up the dry board from the water surface.	a.m., which is after the high tide (9:12 a.m.; Expert Report Figure I-1). The wetted board and wetted levee show that the tide was higher before the photograph was taken. The wetted portion of the board is at the same height as wetted soil in the levee, which forms a consistent line across the photograph. This discounts the possibility of any significant moisture wicking or irregular wetting from waves, which would not be consistent with a continuous wetted surface (line) across the photograph (Expert Report, Appendix I, Fig. I-1)
77	PARA. 8 - I am an experience[d] aerial photo interpreter. I was schooled in aerial photo interpretation by the U.S. Army, the Defense Mapping Agency, and through graduate studies. The Technical Report used an array of photo sources. None of the aerial photographs was taken specifically for the Technical Report, and the aerial photographs were processed with no standardization of color. The Technical Report uses aerial photographs to try to identify changes in the plan vigor and vegetation as it relates to soil moisture. If the colors are not standardized, the photo interpretation becomes significantly more subjective. The Technical Report attempts to relate past conditions and wet and dry periods to site conditions observed during March 2016 indicating that the island has dried out. By May 2016 photographs taken of the island (provided to me by Mr. Bazel) contradict the report's conclusion.	It is incorrect to state that none of the aerial photographs were taken specifically for the Expert Report. The Prosecution Team contracted two flyovers of Point Buckler Island, one occurred on February 10 and the other on June 29, 2016, to obtain color and infrared images. A standardization of color would be needed for exact comparisons because there may be slightly different hues associated with image processing, but all the images are adequate for relative comparisons and basic color differences such as brown and green, and the infrared images help to overcome any slight variations in color (also see discussion in the Expert Response, p. 7-8). We note that Terry Huffman has relied on photographs taken by John Sweeney, which we dispute (see rebuttal to John Sweeney declaration Paras. 20 and 21), and he has not provided any additional evidence to contradict evidence including the Expert Report.
	David L. Mayer Declaration	
78	PARA. 3 – It [Technical Report] does not include an accurate assessment of the Island's fish habitat due mainly to our lack of scientific understanding of what is "good" marsh habitat and what is "bad" marsh. We are at the very earliest stages of research to understand the usefulness, good and bad, of the Delta's shallow water	Leading Pacific Coast scientists on estuarine ecology of anadromous salmonids held a symposium on June 10, 2013 where they developed and published consensus conclusions on the role of tidal marsh restoration on conservation of salmonids. The consensus is that restoration of tidal marshes in the San Francisco Estuary/Sacramento-San Joaquin Delta

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	habitat of its many sloughs and channels. We assume, as does Dr. Herbold, that this habitat is good, and that more of it is better.	benefits many fish species. These benefits can be extremely important for growth and survival of desirable species including salmonids. Studies of west coast salmonids broadly demonstrate the use of shallow water habitat by juvenile salmon, and shallow water habitat has historically supported salmon food webs. Scientific consensus has concluded that tidal wetland loss constrains the growth and survival of juvenile salmonids (Expert Report, p. 26).
79	PARA. 4 – But arguing that all of the Delta's sloughs and channels are good for the listed species lacks scientific certainty, in fact such an argument is hardly more than a lightly researched theory.	Same comment.
80	PARA. 5 – For salmon, there is no real conclusion about what is good or bad. Small shallow channels can be detrimental because of the dangers of predation, as well as stranding and temperature. Scientists are at the very beginning of our thinking about whether these small channels are good or bad for salmon. Point Buckler was not a salmon spawning area.	Same comment.
81	PARA. 6 – A similar discussion could be had about the life strategies of the listed species other than salmon, but unfortunately with much less scientific knowledge at our finger tips and a lot more educated guesses than proven fact.	Same comment.
82	PARA. 7 – It would be prudent to decide the site-specific goals of Point Buckler Island habitat restoration and maintenance planning with respect to each listed species and their unique life stages. I believe that in the process of assessing and developing such a set of goals and objectives, we can decide whether or not to open the Island channels and habitat, and whether the openings should be screened to keep fish out of potentially bad habitat, but allow nutrients to flow in	Same comment.

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	and out.	
83	PARA. 8 – I conclude as I began with a strong word of caution about assessing the good and bad of site-specific fish habitat conditions based on our generalized and embarrassingly poor understanding of the listed species' habitat "requirements".	Same comment.