San Francisco Bay Conservation and Development Commission
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August 18, 2015

Wison Wendt
Miller, Starr, and Regalia
1331 N. California Blvd., 5th Fl.
Walnut Creek, CA 94596

SUBJECT: Pt. Buckler Island (BCDC Enforcement File No. ER2012.038)

Dear Mr. Wendt:

Thank you for meeting with us on Tuesday August 11, 2015 to discuss the outstanding violations at Point Buckler Island. We appreciate your willingness to provide us with additional information regarding the historic conditions on Pt. Buckler and on Mr. Sweeney's recent activities there. Our purpose in writing at this time is to provide you with guidance on what we believe the additional information you will be gathering and providing to us should focus on in order for it to be of maximum use to us in determining whether or not to proceed with the violation proceeding we have initiated against Mr. Sweeney. Based on the correspondence we have exchanged and on the statements made at the meeting the principal issues on which we disagree are the following: 1) whether or not the hydrological and other conditions on Pt. Buckler immediately prior to the levee construction and other improvements undertaken by Mr. Sweeney did or did not satisfy the definition of a "managed wetland" as that term is defined in section 29105 of the SMPA, and 2) whether or not Mr. Sweeney's recent development activities are consistent with the standards in the Pt. Buckler IMP and in the SRCD component of the Suisun Marsh LPP.

With respect to the first question, section 29105 defines a "managed wetland" to mean, in part, an area that is "diked" to a degree that is sufficient to "artificially control...water inflow and outflow." In your March 25 letter, as we understand it, you contend that all times during Mr. Sweeney's ownership of Pt. Buckler and prior to the commencement of his recent levee construction and other development activities, "water inflow [into] and outflow [from]" Pt. Buckler has been "artificially controlled" by a system of dikes and "two tidal gates allowing entry and circulation of water into the interior ditch system." We, on the other hand, believe that evidence consisting primarily of aerial photography shows that, as stated in our letters dated January 30 and May 7, immediately prior to the commencement of Mr. Sweeney's development activities "water inflow [into] and outflow [from]" Pt. Buckler was not controlled by any system of dikes and tide gates such that "tidal flow of the bay had multiple points of entry throughout the island all of which were completely uncontrolled and subject to natural tidal influence." These uncontrolled points of inflow and outflow include at minimum the three previously functioning tidal channels that allowed uncontrolled inflow and outflow of tidal

waters into and from the interior of Pt. Buckler that we describe in paragraphs 4.a. – c. on p. 3 of our January 30 letter. In that same letter we allege that Mr. Sweeney's levee construction "diked off" and thus obstructed tidal flow in these channels. (In your March 25 letter you vigorously dispute this allegation, contending that "none of [Mr. Sweeney's] filling and levee maintenance activities cut off any tidal inflow points into the interior of the island.")

It is hard to conceptualize two more fundamentally opposing characterizations of the hydrological conditions on Pt. Buckler immediately prior to Mr. Sweeney's levee construction and other development activities than those set forth in our respective letters. They cannot both be true. We ask that the additional information you will be gathering and presenting to us have as one of its principal goals the resolution of these conflicting characterizations of the hydrological conditions on Pt. Buckler before Mr. Sweeney's recent activities. This information should include, but not necessarily be limited to, the following:

1. A historical perspective of the inflow and outflow of tidal water on the island since 1984 when the IMP was certified, including the history of tidal gate maintenance;
2. An overlay of aerial photographs of Point Buckler since 1984 to determine the evolution of the levee; and
3. An assessment of the fauna and flora on Point Buckler, including those that are listed as rare and/or endangered.

In your March 25 letter you also contend that Mr. Sweeney's management of Pt. Buckler "has always constituted a managed wetland under both elements of the definition contained in the SMPA." (Emphasis in original.) The second "element" of the definition of the term "managed wetland" in section 29105 consists of the "cultivation" of "waterfowl food plants." We would like to have additional information to substantiate your contention with respect to this second element of the SMPA's definition of "managed wetland." Such information should include, but not necessarily be limited to, the following:

1. Identification of "waterfowl food plants" that Mr. Sweeney has "cultivated" at Pt. Buckler and whether those plants consisted of the two species, alkali bulrush and fat hen, identified in the Annie Mason Club water management program, and, if not, whether Mr. Sweeney's cultivation program is otherwise consistent with the "Recommended Management Schedules" for vegetation management on management wetlands in the Suisun Marsh as set forth in Attachments D-1 through D-5 of the SRCD component of the Suisun Marsh LPP;
2. Dates of all planting episodes (together with identification and quantity of of seeds or plants cultivated during each episode);
3. Aerial photography showing outline of cultivated area on Pt. Buckler;
4. Identification of any mechanical equipment used in discing or other cultivation activity including, if owned by Mr. Sweeney, photos of such equipment or, if not, identity of contractor(s) who performed cultivation activity.

Finally, we ask that where appropriate the additional information Mr. Sweeney will be providing us take the form of references to annual reports that Mr. Sweeney has provided to the SRCD pursuant to Regulation 4 of the SRCD, adopted pursuant to CPRC § 9962(b).

Consistent with our discussions on August 11, we would like you to provide us with this biological site assessment and related information regarding Pt. Buckler no later than 60 days after our meeting, or October 10, 2015.

Thank you again for taking the time to meet with us. We look forward to working with you to resolve issues arising out of the violation proceeding we have initiated with regard to activities at Point Buckler.

Sincerely,

JOHN BOWERS
Staff Counsel

JB/gg