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STATE OF CALIFORNIA

REGIONAL WATER QUALITY CONTROL BOARD, SAN FRANCISCO BAY REGION

In the Matter of:	)	**PROSECUTION TEAM'S REBUTTAL BRIEF**
COMPLAINT NO. R2-2016-1008 ADMINISTRATIVE CIVIL LIABILITY	)	
JOHN D. SWEENEY AND POINT BUCKLER CLUB, LLC POINT BUCKLER ISLAND, SUISUN MARSH, SOLANO COUNTY	)	Hearing Date: December 14, 2016

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I. Introduction and Background

$4.6 million may be an unprecedented penalty amount for the San Francisco Bay Regional Water Board (Regional Water Board), but it is justified by unprecedented conduct and harm.

In issuing Cleanup and Abatement Order R2-2016-0038 (CAO), the Regional Water Board found that it has Clean Water Act jurisdiction over most of Point Buckler Island (Island), that Mr. John Sweeney's and Point Buckler Club, LLC's (Dischargers') unauthorized activities have caused harm and threaten to continue to cause harm, and that the Dischargers are the liable parties. The Regional Water Board found that prior to the unauthorized activities, the interior of Point Buckler Island consisted of marsh plains that were subject to periodic high tide flows, and as such, are subject to the Clean Water Act jurisdiction. (CAO, Ex. 32.a.; Experts' Response, Ex. 22.) The Regional Water Board's findings further established that the Dischargers' unauthorized activities are preventing salmonids from accessing feeding grounds, preventing export of food material from the interior wetlands that could support Delta smelt, preventing longfin smelt from accessing spawning grounds, and have resulted in other harms from the continuing dieback and degradation of tidal marsh vegetation. (*Id*.) Res judicata prohibits the Dischargers from re-arguing these findings.

In hearing Administrative Civil Liability Complaint R2-2016-1008 (ACL Complaint), the Regional Water Board's task is to determine the appropriate penalty for the Dischargers' illegal fill violations and failure to obtain the proper permits. Water Code section 13385(e) provides the list of factors that the Regional Water Board is to consider in imposing a penalty, and the State Water Resources Control Board' s May 2010 Water Quality Enforcement Policy (Enforcement Policy) contains guidelines for determining a liability amount that addresses these factors in a fair and consistent manner. The Prosecution Team's application of the Enforcement Policy's penalty calculation methodology is presented in Attachment A to the Administrative Civil Liability Complaint. (Enf. Policy, Ex. 1.e.) This brief addresses facts and issues discussed in the Dischargers' Opposition Brief, dated October 19, 2016, pertaining to penalty calculation factors, as well as the Dischargers' additional arguments (though many are redundant with the prior

proceeding) regarding due process, high tide lines, and the Suisun Marsh Protection Act (SMPA), etc., none of which impair the Regional Water Board's ability to assess a penalty in this action.

The Prosecution Team's recommended penalty is significantly less than the statutory maximum, and despite the Dischargers' claims to the contrary, is based on the violations alone and not on the identity of the dischargers or their comments about the Regional Water Board and its staff. The Prosecution Team has submitted evidence in support of each factor of the penalty calculation. In contrast, the Dischargers have submitted unsubstantiated argument and expert declarations lacking in sound scientific bases. Because the Regional Water Board must point to specific evidence to reduce the penalty in response to the Dischargers' arguments, the Regional Water Board should support the Prosecution Team's request for a penalty of $4.6 million.

II. Penalty Factors

This section explains the Prosecution Staff's approach to calculating the penalty and rebuts issues raised by the Dischargers. The Enforcement Policy incorporates the factors in Water Code section 13385(e) that the Regional Water Board is to consider, and provides further guidance to reach appropriate penalties. The Enforcement policy aims to ensure equity between parties who comply with regulatory programs and those who choose to violate the law. (Enf. Policy, Ex. 1.e., p. 1.) The complete original penalty factors analysis and penalty methodology is fully discussed in the Complaint's Attachment A.

a. Step 1 – Potential for Harm

Step 1 of the Enforcement Policy evaluates the potential for harm and includes three factors:

Factor 1 – Harm or Potential Harm to Beneficial Uses
Factor 2 – The Physical, Chemical, Biological or Thermal Characteristics of the Discharge
Factor 3 – Susceptibility to Cleanup or Abatement

The following sections address each of these three factors.

i. Factor 1 – Harm or Potential Harm to Beneficial Uses

The Opposition Brief claims that the "Prosecution Team overstated and misclassified the harm." (Brief, p. 24.) The Dischargers make six[1] arguments contesting the extent of the harm or potential harm to beneficial uses on Point Buckler:

1. The Prosecution Team did not consider the beneficial effects on recreation.
2. The Prosecution Team did not consider the beneficial effects on wildlife.
3. There is no evidence of harm to wildlife.
4. There was no "mass dieoff" of vegetation.
5. The asserted harm to endangered fish is speculative.
6. The Prosecution Team's misclassification greatly increases the penalty.

(Brief, pp. 23-27 and 43-44.) Each of these arguments is factual,[2] not legal, and the Regional Water Board has already determined that the harm alleged in the Complaint occurred, rejecting these same arguments. CAO paragraphs 14 through 18 identify beneficial uses, and paragraphs 58 through 70 document the Regional Water Board's findings of harm resulting from unauthorized activities on Point Buckler. (See CAO, Ex. 32.a.) In particular, the Regional Water Board found impacts to beneficial uses, "including estuarine habitat, fish migration, preservation of rare and endangered species, fish spawning, wildlife habitat, and commercial and sport fishing. (*Id.*, ¶ 60.) Blocking tidal channels prevents young salmonids from accessing feeding grounds and increases the risk of predation. (*Id.* at ¶ 66.) Additional impacts will occur with respect to restricting the export of food material supporting Delta smelt and preventing access to spawning grounds for longfin smelt. (*Id.* at ¶¶ 67 and 68.)

The Prosecution Team previously rebutted these same assertions in the Factual Rebuttal, Expert Report, and Expert Response filed in support of the CAO. (See CAO Factual Rebuttal, Ex. 45, Ref. 41-43, 78; Expert Report, Ex. 11, pp. 18, Apps. P and Q, pp. Q2-Q11, and Expert

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[1] Two additional arguments concerning the calculation of days of violation are addressed in Section 5, below, and the argument that the harm at Point Buckler is not comparable to a "real disaster" is addressed in Section 2.e., comparing other enforcement actions.

[2] The Prosecution Team separately addresses the Opposition Brief's numerous factual errors in the Administrative Civil Liability Factual Rebuttal. It uses a table format and tracks the subjects covered in this legal brief for convenience. Please refer to the ACL Factual Rebuttal in conjunction with this legal brief.

Response, Ex. 22, pp. 27, 31-33.) The Factual Rebuttal filed in support of the ACL Complaint again addresses these same arguments. (See ACL Factual Rebuttal, Refs. 4, ¶¶ 10-21.) The Expert Response and CDFW Review address new nuances to the arguments and new declarations submitted by the Dischargers. (Expert Response, Ex. 46; CDFW Review, Ex. 48.)

If there was any question about the evidence supporting the Regional Water Board's prior findings, the Expert Response refutes the recently submitted Huffman Declaration concerning the mass die-off of vegetation. (Expert Response, Ex. 46, §§ 3.1-3.7.) The Expert Response notes the following deficiencies in the Huffman Declaration analysis and conclusions:

- Water quality data was erroneous and collected using questionable methods;
- Assessing pepperweed in the fall is inappropriate and cannot be compared with a late winter assessment because it ignores the plant's seasonal development patterns;
- Vegetation sampling bias and error also applies to native wetland vegetation;
- The Huffman Declaration did not refute the May 2016 Technical Assessment report's findings that significant recent pepperweed invasion was limited to new disturbed levees and diked portions of Point Buckler Island, which is a key finding of diking and drainage impacts;
- The Huffman Declaration erroneously compared post-drought condition observations reported in the May 2016 Technical Assessment with fall 2016 conditions after a full growing season following a winter with significant rainfall;
- The "morphological" inspection of plant roots to determine their live/dead status was neither morphologically sound nor valid or standard field methodology, and provides no conclusive or even suggestive evidence for whether plants were dead, dying, weakly alive, or alive and thriving;
- The October survey failed to document living above-ground growth of dominant vegetation, and failed to compare adjacent tidal and non-tidal diked marsh; and
- The Huffman Declaration incorrectly identifies key plant species and genera in text and figures and makes unreasonable conclusions about their morphological evidence regarding age or viability (living or dead, relict 2015 plant litter or recently dead 2016 plants).

(*Ibid.*)

Further, it is disconcerting why work presented in the Huffman Declaration was not done by the Dischargers' expert when in the field with Prosecution Team experts on March 2, 2016, or why the Prosecution Team's findings from this field visit (reported in May 2016) were not checked within a couple months. The Dischargers' waited until fall and the start of the rainy season to generate additional data at Point Buckler Island. The new data is not directly comparable to the Prosecution Team's and has led to some faulty conclusions

The Expert Response and CDFW Review also provide additional support for the conclusions that conversion of tidal marsh to diked duck ponds is harmful (Expert Response, Ex. 46, § 1.3 and CDFW Review, Ex. 48). Dr. Keeler-Wolf notes in the CDFW Review that "the wetlands at the Site would have contributed to food web productivity and export to the Bay in support of Delta smelt, and feeding habitat for threatened and endangered species of salmonids, and the wetlands impacted at the Site could have been viable habitat for the following State Sensitive Species: Black Rail, Ridgway's rail, salt marsh yellowthroat, Suisun song sparrow, salt marsh harvest mouse, and longfin smelt." The Expert Response documents the abundance of waterfowl in Suisun Marsh prior to the conversion of tidal marsh to managed wetlands, and further establishes that *any* conversion of tidal marsh is harmful to beneficial uses, citing the Suisun Marsh Habitat Management, Preservation, and Restoration Plan, which seeks to restore at least 5,000 acres of diked marshlands to tidal marsh. (Expert Response, Ex. 46, § 1.3. See also § 2.2 [describing benefits of tidal channel habitat on Point Buckler prior to unauthorized activities].) The Expert Response explains that the claimed harm to endangered fish was not speculative. (*Id.* at §§ 1.5.)

The Dischargers submitted the Mayer Declaration, which posits that restoration of Point Buckler could potentially create a feeding ground for predatory fish and questions the conclusion that all tidal habitat will provide "good" habitat for small and juvenile fish. (Mayer Decl., ¶¶ 4-9.)[3] The Expert Response refutes the speculative statements in the Mayer

[3] Notably, we agree with much of the Mayer Declaration, which suggests that restoration should be done in a thoughtful manner, assessing "both the good and bad fish habitat conditions at a specific site level of investigation." (Mayer Decl., ¶ 11.) This is the exact kind of investigation the Prosecution Team has been asking the Dischargers to conduct in support of proposed restoration plans, and precisely the type of investigation that has been lacking in the Dischargers' proposals to date. (Meeting Minutes,

(continued…)

Declaration with citations to scientific literature establishing the benefits of natural marsh and channel habitat for small fish, namely:

1. Refuge for small fish from larger predatory fish;
2. Foraging opportunities for piscivorous wading birds, which preferentially feed on larger fish, thus reducing predation on small fish;
3. Access to a wide variety of food, including insects, benthic and epibenthic invertebrates, and prey attached to plant stems; and
4. Refuge from storm events that can carry juvenile fish downstream before they are ready.

(Experts' Response, Ex. 46, §§ 2.1-2.2). Assuming that Point Buckler is restored to the natural conditions existing prior to the unauthorized activities, Dr. Mayer's Declaration supports the Expert Response conclusions that restoration will provide better habitat for small or juvenile fish, including endangered species, and shelter from predators. (Mayer Decl., ¶¶ 3 [agreeing that restoration of tidal flow into the island will restore beneficial uses]; 5 [sharing "Mr. Herbold's vision of a fish waystation of rest and growth"]; 7 [agreeing with majority of conference experts, who conclude that marsh systems generate increased levels of primary and secondary aquatic production]; and 8 [assuming that marsh and wetland habitat "is good, and that more of it is better"].) These statements further support the conclusion that the natural state of Point Buckler, prior to unauthorized activities, provided this type of habitat, conceding that the unauthorized activities restricted or impaired these beneficial uses.

Finally, it is true that the determination of the harm factor can greatly impact the recommended penalty. Here, however, the Prosecution Team has properly weighed the beneficial uses of Point Buckler and surrounding waters and assessed harm appropriately.

ii. Factor 2 – The Physical, Chemical, Biological or Thermal Characteristics of the Discharge

The Opposition Brief argues that the Prosecution Team should have applied a score of 2 for Factor 2 because "the material at issue is dirt, which is not toxic. The number should have been zero." (Brief, p. 31.) A score of 2 is the standard score assessed to penalty actions for

(…continued)
June 9, 2016, Ex. 13.k.; July 22, 2016, Ex. 36.a.; Oct. 25, 2016, Ex. 53.a.; ICAP Memo, Nov. 18, 2016, Ex. 53.c.)

dischargers' dredge and fill activities that involve discharges of sediment into adjacent water bodies.[4]

Exhibit A to the Complaint supported a score of 2 based upon the following analysis:

> The risk or threat of the discharge is moderate (i.e., a score of 2). Moderate is assigned when chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection.

The determination to describe the discharge as "moderate" was based upon the "high potential for sediment discharges to bury and smother organisms and aquatic and wildlife habitats." The Expert Report supports this finding. (Expert Report, Ex. 11, Appen. Q) Moreover, even the Opposition Brief acknowledges that fill material was discharged when Mr. Sweeney filled the seven levee breaches, releasing sediments. (Brief, p. 31.) The Opposition Brief agrees that fill was placed onto existing habitat, and additionally where sediment could have been suspended in the water column, but argues that because no specific measurements were taken of the amount of material suspended, the finding of a moderate degree of threat is inappropriate. In so doing, it simply does not address the findings regarding existing habitat being smothered by the fill's placement. Additionally, the finding of moderate harm is based on basic science regarding how fine-grained soils are suspended into the water column, backed by specific scientific references that identify the harm caused by such sediment. The fill was discharged in a manner such that it was susceptible to further erosion and resuspension in the water column.

The Opposition Brief does not refute the basic science, nor does it present alternative references refuting the harm likely to have been caused by the suspended fine-grained sediment from the discharged fill:

> All organisms in the soil placement path would be smothered, including terrestrial, benthic and epibenthic invertebrates that provide forage for birds and, in or near filled water areas, for fish… Loose soil can also drop from excavator buckets. When over water such as the tidal channels that were filled, that loose soil would have entered the water column and increased turbidity. Any fish in the general area would have experienced increased turbidity levels and associated harm

[4] See, for example, Orders R2-2015-1003 (OG Property), R9-2014-0044 (Scripps Mesa), R5-2014-0568 (Caltrans Sonora Bypass),R5-2013 (Donahue Schriber Asset Management Corp; Rocklin Crossings), and R9-2011-0048 (Jack Eitzen), all of which assessed a score of 2 for toxicity in cases involving sediment discharges.

(Experts' Response, Ex. 46, § 1.3.) The ACL Complaint cited to a United States Environmental Protection Agency review for the proposition that "fine-grained sediments would clog the gill structures of fish, make water-column feeding difficult or impossible, and eliminate light penetration that is needed for primary production." (Complaint, Ex. 5, Attach. A, p. A4.) Prohibition No. 9, Basin Plan section 4.20.4 (Environmental Impacts of Dredging and Disposal in the Aquatic Environment) and Table 4-12 ("Potential Consequences and Impacts of Dredging and Dredged Material Disposal") all illustrate the types of harm sediment may cause to beneficial uses. Dischargers provide only argument and no scientific evidence to counter the Prosecution Team's evidence demonstrating that the discharge of sediment caused a "moderate" level of harm.

iii. Factor 3 – Susceptibility to Cleanup or Abatement

There is no disagreement on the Prosecution Team's assessment of zero for this Factor.

b. Step 2 – Per Gallon and Per Day Assessments

The Dischargers claim that the Prosecution Team "miscalculated the number of days of the discharge," suggesting that the number of days the illegal fill remained in place (Violation 1) should not count toward the number of days of violation. (Brief, p. 27.) Also with respect to Violation 1, Mr. Sweeney provided a declaration stating that he worked on the levee only 100-130 days, as compared with the 887 days the Prosecution Team used in the penalty calculation. Separately, the Opposition Brief argues that the failure to get a permit (Violation 2) was only a single day violation. (*Id.* at pp. 30-31.) Case law and evidence supports the Prosecution Team's proposed penalty.

Under the Clean Water Act, the days of violation include not only the day a person discharges a pollutant from a point source into a water of the United States, but also include the days the pollutant remains. For purposes of section 404 of the Clean Water Act, a day of violation may either be a day that actual discharge or dredge or fill material takes place, and may also include any day that such dredged or fill material is allowed to remain in the waters or wetlands. (*U.S. v. Cumberland Farms of Conn.* (D. Mass. 1986) 647 F. Supp. 1166, *aff'd* F.2d 1151 (1st Cir. 1987).) In *Cumberland* the court held, "[a] day of violation constitutes not only a day in

which [the defendant] was actually using a bulldozer or backhoe [to fill the waters] but also every day the defendant allowed illegal material to remain therein." (*Id.* at p. 1183.) *See also United States v. Tull* (4th Cir. 1983) F.Supp. 610, 626, *aff'd* 764 F.2d 182.

Additional cases cite to *Cumberland* to support the finding that the violation is every day the discharge is allowed to remain in the water unmitigated by the discharger: *Informed Citizens United, Inc. v. USX Corp.* (S.D. Tex. 1999) 36 F.Supp.2d 375, 377 (noting that several courts have found that "a violation is 'continuing' for the purpose of the statute until illegally dumped fill material has been removed"); *Sasser v. Administrator, United States E.P.A.* (4th Cir. 1993) 990 F.2d 127, 129 ("[e]ach day the pollutant remains in the wetlands without a permit constitutes an additional day of violation"); *North Carolina Wildlife Federation v. Woodbury* (E.D. N.C. 1989) 29 ERC 1941 [WL 106517] (treating the failure to take remedial measures as a continuing violation is eminently reasonable; "because it is not the physical act of discharging dredge wastes itself that leads to the injury . . ., but the consequences of the discharge in terms of lasting environmental degradation."). See also *United States v. Reaves* (M.D. Fla. 1996) 923 F. Supp 1530, 1534 ("[d]efendant's unpermitted discharge of dredge and fill materials into wetlands on the site is a continuing violation for as long as the fill remains").

Sasser is the case most analogous to the issue at hand in Pt. Buckler. In *Sasser,* the discharger owned abandoned rice fields that had dikes that breached, creating tidal freshwater wetlands, much like what occurred at Point Buckler. The discharger sought a permit from the Army Corps to reconstruct approximately 4,800 linear feet of dikes around a 76-acre field to impound water for duck hunting. The Army Corps denied his permit request. Years later, the *Sasser* discharger wrongly assumed that a nationwide permit allowed him to construct a new embankment inside of the old one, fill in the breaches, install a tide gate, and discharge dredged or fill material into wetlands. The discharger refused to restore the site and the case ended up going to trial with the EPA alleging the discharger violated Clean Water Act section 301. The main issues on appeal in the case included whether: the administrator had subject matter jurisdiction, the administrative proceeding did not violate the discharger's right to jury trial, and there was no abuse of discretion in the administrator imposing a penalty though the discharger acted in good faith in following his attorney's advice. The court held that there was subject

matter jurisdiction because the violation continued after a relevant amendment to the Clean Water Act allowing the administrator to assess civil penalties. The court stated: "Each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation. *See United States v. Ciampitti,* 669 F.Supp. 684, 700 (D.N.J.1987); *United State v. Cumberland Farms,* 647 F.Supp. 1166, 1183-84 (D.Mass.1986), aff'd 826 F.2d 1151 (1st Cir. 1987). The administrative complaint appropriately charged a continuing violation." (*Sasser v. Administrator, United States EPA*, *supra*, p. 129.)

Dischargers begin their argument concerning days of violations with citations to *South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians* (2004) 541 U.S. 95, 109 (*Miccosukee*) and *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc.* (2013) 133 S.Ct. 710, 712-713 (*LA County*) for the proposition that movement of a pollutant from one water body to another is not a discharge. (Brief, p. 28.) According to Dischargers, "[i]t necessarily follows that the non-movement of a pollutant that merely says in the same place within a body of water cannot be an addition, and therefore not a violation of the Clean Water Act." (*Ibid*.) These cases pertain to a completely separate concept involving NPDES permits and are inapplicable to this situation. For example, Miccosukee involved flow of water through various canals and pump stations in reclaimed portions of Florida's Everglades. The court considered whether operation of a pump which pumped water from water body to another hydrologically-connected water body constituted the "discharge of pollutants." (*Miccosukee*, *supra*, 133 S.Ct. at 102-103.) Similarly, the Court evaluated the same question with respect to movement of water from a concrete channelized portion of a river into the lower portion of the same river. (*LA County, supra*, 133 S.Ct. at 713.) The Prosecution Team has never argued that Dischargers need an NPDES permit for the discharge in question.

The Opposition Brief also misconstrues several cases pertaining to tolling the statute of limitations, none of which are relevant to finding a continuing violation. Most notably, in *Friends of Warm Mineral Springs, Inc. v. McCarthy* (M.D.Fla. May 8, 2015) 80 ERC 2238 [WL 2169241], the court refused to find the presence of fifty-gallon drums, sheet plastic, and sand in a 200–foot-deep pond a continuous discharge for the sake of tolling the statute of limitations. The court ruled that pursuant to 28 U.S.C. 2462, a five-year statute of limitations applied to the date

of the discharge and that the violation was not continuous for the purpose of tolling the statute.

Dischargers argue that the holding in *United States v. Rutherford Oil* (S.D. Tex. 2010) 756 F.Supp.2d 782 establishes that there is no continuing violation once "the violator stops adding a pollutant." (Brief, p. 29.) The facts in Rutherford, however, like *Friends of Warm Mineral Springs*, explain how the court found a discharge was not a continuing violation for purposes of tolling the statute of limitations. In *Rutherford*, the discharge was the cleaning of an oil tanker/tugboat propeller. Running the propeller in shallow water caused turbidity. The resulting sediment settled in the water on to the bed. Thus, in that case there were specific dates the actions of the discharger created pollutants that would eventually dissipate, reducing the impact on beneficial uses.[5]

In this case, the presence of the levee is continuous and the impacts on the beneficial use have not dissipated. The Regional Water Board does not have any statute of limitations arguments before it. Alleging continuing violations of Clean Water Act sections 301 and 401, and the Basin Plan, is consistent with well-established case law.

Dischargers also claim that the number of days of violation for Violation 2 should be one day, not 57.[6] The Opposition Brief cites *United States v. Trident Seafoods Corp.* (9th Cir. 1995) 60 F.3d 556, 557, which evaluated the question of whether Trident's failure to notify officials of its intent to remove asbestos was a "one-time" violation or a "continuous" violation, for purposes of penalty determinations. (*Id.* at pp. 557-559.) In *Trident*, the court acknowledged that there was ambiguity: "Neither the statute nor the regulation expressly addresses whether the failure to comply with the notice requirement is a one-time violation or a continuing violation." (*Id.* at 558.)

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[5] The Dischargers' references to *S. Fla. Water Mgmt. Dist.v. Miccosukee Tribe of Indians* (2004) 541 U.S. 95 and *L.A. County Flood Control Dist. v. NRDC, Inc.* (2013) 133 S.Ct. 710 are off point. Neither case is analogous to the issue at hand because they analyze whether the removal of contaminated water from one source into a separate unpolluted water source is considered a discharge. That does not relate to the facts at Point Buckler Island where the presence of the fill in the water itself and its interaction with the surrounding environment is the discharge at issue.

[6] The violations are alleged in the Complaint in a manner that reflects the more egregious conduct of filling in waters of the State and United States in Violation 1, and to reflect the Dischargers' conduct in failing to comply with the permitting program in Violation 2. They reflect separate conduct. This is why the penalty methodology in the Complaint's Attachment A reduces or "collapses" the number of days of violation for failing to get a permit, but not for Violation 1. (See Complaint, Attach. A, Methodology, Ex. 5, p. A-6.)

Unlike *Trident Seafoods Corp.,* there is no such ambiguity here. The Enforcement Policy explains that for "violations that are assessed a civil liability on a per day basis, the initial liability amount should be assessed for each day up to thirty days." (Enforcement Policy, Ex. 1.e., p. 18.) On that same page, there is a complex explanation of collapsing violations in various circumstances, underscoring that "per day" assessment does in fact mean for each day of violation.

The plain language of Water Code section 13385 describes a penalty of $10,000 "for each day in which the violation occurs." (See also Water Code § 13385(c).) Notably, Water Code section 13385 does describe situations in which an ongoing violation "shall be treated as a single violation." (*Id.* at (f)(1) and (2).) If the Legislature intended to treat failure to get a permit as a single violation, it would have clarified as it did in these situations.

The State Water Resources Control Board held consistently with the Enforcement Policy and plain language of the statute in precedential Order WQ-2001-01, which evaluated the assessment of days of violation for a non-discharge violation in which a discharger failed to turn in a quarterly report. The assessment was for each day of violation, the language used in the statute, not a one-time penalty. (State Board Order WQ 2001-01 (*County of San Diego, San Marcos Landfill*), p. 5. See also State Board Order WQ-2014-0017-EXEC [settlement detailing over 1000 days of violation for a non-discharge violation involving a deadline for uploading a report], Attachment A.) There is simply no question in this case that the penalty for non-discharge violations, such as failing to apply for a permit, considers how many days the unauthorized activity took place.

c. Step 4 – Adjustment Factors: Culpability, Cleanup and Cooperation, History of Violations

i. Culpability

The Opposition Brief argues that Mr. Sweeney had never heard of a 401 certification, and that he did not know he needed a permit from the Regional Water Board, and therefore the Dischargers are not culpable for their own actions. (Brief, pp. 38-40.) However, mistake or ignorance of the law is not a defense. The evidence establishes that Mr. Sweeney knew or

should have known the activities on the Island required permits and he chose to not comply with any of the relevant permitting programs. (See ACL Factual Rebuttal, ¶¶ 25-34.)

The evidence supports the finding that not only did the Dischargers know they needed permits, but they intended to perform activities on Point Buckler Island without permits. In February 2014, Mr. Sweeney posted on Facebook that he was looking for a crew to frame out and essentially put up a pre-fabricated house on Point Buckler Island, but "[n]ot building to code or w[ith] permits." (Facebook Post, Feb. 22, 2014, Ex. 19.b.) The Dischargers should not benefit from failing to complete any due diligence in researching what permits would be needed to build a levee around an island by claiming they did not know better.

The Dischargers argue that because Mr. Sweeney never heard the phrase "401 Cert" before undertaking the unauthorized activities that the Regional Water Board should not find that he violated the law, and not find the Dischargers culpable. (Brief, Sections II.E. and IV.H., for example.) "It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof."(*People v. O'Brien* (1892) 96 Cal. 171, at p. 176) that: That concept, expressed by the California Supreme Court in 1892, remains relevant, as discussed by the California Supreme Court again in 1978 in *Hale v. Morgan* (11 Cal.3d 388; citing *People v. O'Brien*) in a case where a landlord turned off a tenant's utilities:

> Further, a constitutional distinction between those persons who have actual knowledge of a law and those who do not, directly offends the fundamental principle that, in the absence of specific language to the contrary, ignorance of a law is not a defense to a charge of its violation.

The Court continues to cite *O'Brien* by stating, "The denser the ignorance the greater would be the exemption from liability" should a mistake of law claim be validated. (*Hale v. Morgan, supra,* p. 376; citing *People v. O'Brien, supra,* at p. 176.) The Court explained that there was no reason to treat a landlord who was ignorant of the law any differently than a landlord who understood the law.

Not only is mistake of law not a defense, it is not a reasonable claim for someone who has undertaken the permitting process before. Mr. Sweeney has had interests in approximately five duck clubs,[7] including clubs on Chipps and Spinner Islands in addition to Point Buckler. He

[7] It is unknown how many clubs Mr. Sweeney presently owns. He testified at the BCDC (continued…)

applied for a permit through Suisun Resource Conservation District (SRCD) in 2008 to replace floodgates on Spinner Island. (Application, Ex. 19.a.) He contacted SRCD in 2011 to obtain an emergency permit for a broken levee, and asked what permits were in effect for maintenance and dredging on Chipps Island. (E-mail, June 20, 2011, Ex. 38.a.)

The Dischargers claim the RGP3 applies to their actions, when language in RGP3 itself clearly identifies the certification process by the Regional Water Board. For instance, Permit Special Condition 6 states:

> All parties must comply with the attached conditions of the State of California San Francisco Bay Regional Water Quality Control Board Certification, dated June 27, 2013, Title, "Subject: Conditional Water Quality Certification for the Reginal General Permit Number 3 Reissuance Project, Suisun Marsh, Solano County", (CIWQS Place ID: 792443).[8]

(RGP3, Dischargers' Ex. A and PT's Ex. 2.b., p. 8.) Page 2 of a Regional Water Board letter, dated June 27, 2013, regarding Conditional Water Quality Certification for the Regional Permit Number 3 Reissuance Project, Suisun Marsh, Solano County states, "We have determined that the Project, as proposed, will not violate State water quality standards, and accordingly issue conditional Clean Water Act Section 401 water quality certification for the Project." (Bazel. Decl. Ex. 4, Ex. A, and PT's Ex. 51.b.) The RGP3 itself explains the requirement for a 401 Certification. It is unreasonable for the Dischargers to claim total ignorance of the requirement for Clean Water Act section 401 water quality certification.

The Opposition Brief and Mr. Sweeney's declaration state that the SRCD did not tell Mr. Sweeney he needed a 401 Certification. (Brief, p. 39; Sweeney Decl., ¶ 35.) However, SRCD Executive Director Mr. Steve Chappell testified at the Bay Conservation and Development Commission (BCDC) Enforcement Committee hearing on the Cease and Desist Order (CDO), that Mr. Sweeney never contacted him regarding Point Buckler Island, even though they had

(…continued)
Enforcement Committee CDO and Civil Penalty hearing on October 6, 2016, that he sold all of his other duck clubs. (Bazel Decl. Ex. 4, p. 38.) News articles describe part of Chipps Island being sold to Metropolitan Water District of Southern California recently, but the Prosecution Team has not confirmed or ruled out the transaction included Mr. Sweeney's portion. (For example, see Nov. 20, 2015 article in the San Francisco Chronicle that states Mr. Sweeney and his partners want to sell their land on Chipps Island to Metropolitan, http://www.sfchronicle.com/science/article/Water-wars-L-A-behemoth-sets-sights-on-delta-6644635.php .)

[8] The RGP3 also states, "[t]his permit does not obviate the need to obtain other Federal, State, or local authorizations required by law." (RGP3, Dischargers' Ex. A and PT's Ex. 2.b., p.11.)

previous conversations about other properties. (BCDC Transcript, Bazel Ex. 4, p. 83.) Had the Dischargers worked with SRCD, as directed in a number of correspondence mentioned below, they would have been reminded of the full scope of the regulatory requirements for construction activities in Suisun Marsh. To illustrate, SRCD employee Mr. Orlando Rocha e-mailed Mr. Sweeney and copied Mr. Chappell on June 24, 2011, describing to Mr. Sweeney that if the work to repair the breach on Chipps Island was outside the scope of RGP3 and the biological opinion, Mr. Sweeney may need "a different avenue like the RGP5 process to complete the work." (E-mail, June 24, 2011, Ex. 38.a., e-mail dated June 24, 2011; RGP3, Dischargers' Ex. A and PT's Ex. 2.b., p.11.) The communications with Mr. Rocha demonstrate that the SRCD provides site-specific information regarding the types of permits needed.

As further evidence of Dischargers' knowledge of the permitting process, on June 23, 2011, Mr. Sweeney e-mailed Mr. David Wickens at the Army Corps, saying he needed to get a permit as soon as possible to fix the break at Chipps Island and asked what form to fill out. (E-mail, June 23, 2011, Ex. 38.a.) Mr. Wickens replied that Mr. Sweeney should work with SRCD to see if Mr. Sweeney's suggested repair of placing storage containers in the broken levee would comply with RGP3; but if RGP3 was not suitable to authorize said repairs, to continue to coordinate with SRCD and contact the Army Corps again for additional guidance.[9] (*Id.*) This clearly gave Mr. Sweeney notice that levee repairs may not comply with RGP3.

Mr. Sweeney also received a full description of Clean Water Act sections 301 and 404 in the Notice of Alleged Violation the Army Corps issued on October 24, 2011, for his unauthorized levee repair work below the High Tide Line and Mean High Water at Club 915 on Chipps Island. (Army Corps NOV, Ex. 40.a.) It is simply disingenuous to state that the Army Corps never notified Mr. Sweeney about the permitting process. (Brief, p. 39.) The Notice of Alleged Violation explains that Mr. Sweeney's actions in sinking a metal shipping container into the breached portion of the levee and filling it up with dredge material did not comport with RGP3. It further explains that under Clean Water Act section 301, "it is illegal to discharge any dredged or fill material without a permit issued by the Corps of Engineers pursuant to Section 404 (33 U.S.C. §

[9] Steve Chappell e-mailed Mr. Wickens at the Army Corps that Mr. Chappell had spoken with Mr. Sweeney and told him that he felt this levee repair for Chipps Island would require an individual permit. (Ex. 38.a., email dated June 24, 2011.)

1344) of the Clean Water Act." Section 404, subdivisions (g) and (h) describe how states may administer their own individual and general permits, providing notice to Mr. Sweeney that there was a permit program with the State of California.

The Dischargers continue to claim that Mr. Sweeney thought that his activities on Point Buckler Island were covered by the RGP3 permit, even though he never applied to SRCD for permit coverage.[10] The Opposition Brief incorrectly states that "coverage under RGP3 can be obtained directly from the Corps" suggesting one could completely circumvent SRCD. (Brief, p. 40, lines 1-2, citing Bazel Decl., ex. 35, the RGP3.) RGP3 allows two methods to obtain permit coverage: 1) the Routine Procedures, which involves submitting a work request form to SRCD, or 2) applying directly to the Corps *and providing a copy of the application to SRCD*. (RGP3, Dischargers' Ex. A and PT's Ex. 2.b., "Permit Administration," p. 6 [emphasis added].) The Prosecution Team recently learned in October 2016 that an incomplete application was provided to the Army Corps in February 2015, after BCDC issued their stop work letter on January 30, 2015. (2015 Application, Ex. 56; BCDC Letter, Jan. 30,2015, Ex. 17.a.) The application was never sent to SRCD as required by RGP3.[11]

Regardless, the Dischargers' activities do not comply with RGP3. As stated by Mr. Chappell in his declaration for the BCDC Executive Director Cease and Desist Order: "Based upon my own personal knowledge that there had been no such permit authorization or request under the RGP3, nor could it have been authorizable by the USACE [Army Corps], for the construction activity we observed on the Site on March 19 [2014]." (Chappell Decl., Ex. 10.a., ¶ 17.) After the October 21, 2015, site visit to the Island, the Army Corps wrote in their Memorandum Documenting Potential Enforcement Action Verification/Field Verification of Jurisdictional Waters that "[t]he unauthorized discharge activity is found to be inconsistent with RGP 3 in that it only authorizes placement of material 'on the crown and backslope of the existing levees to repair damage from storms and to counteract subsidence of levees'." (Memo, 11/9/2015, Ex.

[10] The Prosecution Team previously addressed the inapplicability of RGP3 in the CAO process. (CAO Factual Rebuttal, Ex. ¶¶ 8-10; Prosecution Team Rebuttal Brief, Section III.D., pp. 10-11.) The Opposition Brief submits no new facts since the August Regional Water Board hearing on the CAO.

[11] "Since 1994, the records of the SRCD reveal no reports for purposes of compliance with an RGP3 or other evidence of any action on the part of the owners of the Site to maintain the levees and other water control structures…" (Declaration of Steve Chappell, BCDC Executive Director Cease and Desist Order, Ex. 10.a., p. 4, ¶ 16.)

10.b.)

Had the Dischargers contacted BCDC about their construction activities at Point Buckler Island, they would have learned about the regulatory process for the Clean Water Act. In his declaration for his Statement of Defense for the BCDC CDO Enforcement Committee hearing, Mr. Sweeney stated he had handwritten notes from a call with Adrienne Klein from BCDC on September 1, 2011, and at the BCDC Enforcement Committee meeting October 6, 2016, Mr. Sweeney stated that he spoke with both Ms. Ming Yeung in March of 2011, and that Ms. Klein called him September 2, 2011, and both conversations included Point Buckler. (Sweeney Declaration, Ex. C, ¶ 12; BCDC transcript, Bazel Declaration 4, pp. 51-52.)

In contrast, Ms. Klein's declaration for that same hearing states that: "I believe I never received a call from, or placed a call to, John Sweeney concerning this – or any other – matter. Enforcement file No ER2011.028 lacks any records of a conversation between Mr. Sweeney and me, which affirms my belief." (Klein Decl., Ex. 49.a., ¶ 8.) Her declaration further states that she never stated to anyone that Point Buckler Island is not located in BCDC's jurisdiction, and she had never heard of Point Buckler Island until spring 2014. (*Id.*, ¶ 9.) Similarly, Ming Yeung has provided a declaration for rebuttal in this proceeding in which she states succinctly, "I have no recollection of ever speaking with John Sweeney," and "I have no recollection of ever receiving any inquiry from anyone as to whether Point Buckler Island is in BCDC's jurisdiction." (Yeung Decl., Ex. 49.b., ¶¶ 4-5.) The evidence shows that Mr. Sweeney was not in contact with BCDC to discuss Point Buckler Island prior to the Dischargers' activities on the Island, and continued his unauthorized activities even after having received a stop work request from BCDC (BCDC Letter, Jan. 20, 2015, Ex. 17.a.; see also Section II.c.ii., Cleanup and Cooperation, below.)

Mr. Sweeney had full notice of the Clean Water Act sections 301, 404, and a State permitting program concerning levees in jurisdictional waters three years prior to starting the levee construction at Point Buckler. From at least March 8, 2014, (when aerial photos show levee construction begun) to the present, Mr. Sweeney has intentionally violated Clean Water Act section 301, as identified in the Complaint as Violation 1. Even after receiving a Notice of Violation from the Regional Water Board on July 28, 2015, the violations continue today. (Army Corps NOV, Ex. 8.) Similarly, the Dischargers had notice there was a State certification program:

Mr. Sweeney failed to obtain permit coverage since at least May 19, 2012, and Point Buckler Club, LLC failed to obtain permit coverage since October 27, 2014, as described in the Complaint as Violation 2. Both violations continue today.

Not only is mistake of law not a defense, but the mere concept does not apply here since Dischargers fully intended to avoid obtaining permits for activities on Point Buckler Island. Dischargers knew permits were required for levee repairs specifically, and they chose to ignore the entire regulatory framework.[12]

ii. Cleanup and Cooperation

The cleanup and cooperation factor considers the "[e]xtent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage, including any voluntary cleanup efforts undertaken." (Enf. Policy, Ex. 1.e., p. 17.) None of that has occurred here. The Prosecution Team chose a factor of 1.1 in its methodology, but would certainly agree if the Regional Water Board decided to increase that factor at the hearing based upon events that have occurred since the Complaint was issued. (Complaint, Attach. A, p. A8.) The Notice of Violation was issued July 28, 2015, an initial CAO was issued September 11, 2015,[13] and the Complaint was issued May 17, 2016, yet there has been no restoration initiated to date. Because the Dischargers have not engaged in voluntary cleanup and cooperation, the Regional Water Board issued CAO R2-2016-0038 on August 10, 2016.

The Dischargers submitted an Interim Corrective Action Plan (ICAP) due November 10, 2016, as required by the CAO. (ICAP, Ex. 53.b.) The goal of the ICAP is to prepare the Island for tidal restoration, which is to restore the water quality functions and values of the tidal marsh to conditions existing prior to the Dischargers' unauthorized activities. The Prosecution Team reviewed the document and found that is lacks significant and substantive information. Several

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[12] *Leslie Salt Co. v. San Francisco Bay Conservation and Development Commission* (1984) 153 Cal.App.3d 605 recognized the exception to the mens rea requirement and approved of strict liability in some public welfare offenses, making the mistake of law claim moot. The court stated:

> Thus, whether the context be civil or criminal, liability and the duty to take affirmative action flow not from the landowner's active responsibility for a condition of his land that causes widespread harm to others or his knowledge of or intent to cause such harm but rather, and quite simply, from his very possession and control of the land in question.

[13] Rescinded January 5, 2016. (See letter from Bruce Wolfe, 1/5/2016, Ex. 8.b.)

of the proposed actions may result in additional harm to tidal marsh functions and values. (Memo to Wolfe, Nov. 18, 2016, Ex. 53.c.) For example, the ICAP proposes to control an invasive plant using an herbicide that is not approved for use in aquatic environments. Similarly, the ICAP does not address potential water quality issues such as when discharging ponded water from the Island whether that water would have low dissolved oxygen that could harm fish. (*Id.*)

BCDC issued a letter to Point Buckler, LLC, attention John Sweeney, on January 30, 2015, that notified the Dischargers of a myriad of violations. (BCDC Letter, Jan. 30, 2015, Ex. 17.a.) The letter requested the Dischargers stop work, and hire an environmental specialist to assist with site restoration. (*Id.*, p. 2.) Despite requests from regulatory agencies as early as January 30, 2015, that the Dischargers hire environmental specialists, the Dischargers continued to fail to provide adequate environmental analysis on the Island. (Meeting minutes, Exs. 13.k.,36.a., 36.b., 53.a.; ICAP, Ex. 53.b.; ICAP Memo, Ex. 53.c.) No restoration activities have occurred.

After receiving the Notice of Violation, the Dischargers continued violating the Clean Water Act, including excavating the fourth crescent pond and placing the fill on marsh, adding storage containers on the marsh, erecting two helicopter landing pads on the marsh, placing Astroturf on the marsh, and installing a new tidal gate (closed), among other unauthorized activities. (CAO, Ex. 32.a., p. 5, citing Expert Report, Ex. 11, Fig. K-32; Ex. 11, Table K-4; Facebook Post, April 19, 2016, Ex. 29.) Although the Dischargers agreed to provide information about the Island, such as a topographic survey, there were continued delays until the Prosecution Team had to seek out a warrant to access the Island and obtain the information themselves before seasonal vegetation would interfere. (Affidavit and Warrant, Ex. 7.) The information was needed to inform a decision-making process that included finalizing the penalty case now before the Regional Water Board.

The Dischargers did, finally, take on the task of conducting their own topographic survey in early October 2016.[14] Mr. Bazel requested the Prosecution Team contact adjacent land owners for access. Prosecution Team member Brian Thompson went to great lengths to contact the land owners to assist the Dischargers' survey team. (See Case File Memo, Nov. 9, 2016, Ex. 53.) However, the Dischargers did not provide adequate accommodation in coordinating their

[14] Note that the Dischargers did not submit any survey results in their evidence.

field visit with Prosecution Team staff. Staff only had approximately 2 business hours' notice of the survey date and start time. Therefore, much of the survey was completed by the time Prosecution Team member Ben Martin was able to mobilize the following morning, locate the surveyors in the field, and get to the Island on October 4, 2016, after 10:30 a.m. (*Ibid.*) On the Island, Mr. Martin observed a red ground-to-dock steel ramp on the eastern levee marked with a 20,000 pound capacity that had not been previously observed on the Island.(*Ibid.*) During the site visit, Mr. Sweeney told Mr. Martin to either delete the photographs he had taken from walking the perimeter of the Island or surrender his camera. (*Ibid.*) Mr. Martin deleted the photos he had taken so far, and only took a few photos of the survey activities as allowed by Mr. Sweeney. (*Ibid.*) Ordering Regional Board staff to destroy evidence provides additional grounds to increase the cleanup and cooperation factor above 1.1.

The Prosecution Team and representatives from BCDC and EPA have continued to meet with the Dischargers in an effort to streamline permitting and encourage restoration activities. However, the Dischargers' focus of those meetings has been primarily finding a permitting track for the Dischargers to continue developing the Island. (See meeting minutes, June 9, 2016, Ex. 13.k.; July 22, 2016, Ex. 36.a.; October 25, 2016, Ex.53.a.) At the July 22, 2016 meeting,[15] the Dischargers agreed to provide an interim corrective action plan, mitigation proposals, proposals for future plans at the Island that maximize tidal restoration, and technical justification, such as hydraulic modeling, to justify their preferred restoration alternative. However, only the Draft Interim Corrective Action Plan was available when the parties met October 25, 2016. (Meeting Minutes, Oct. 25, 2016, Ex. 53.b.) As discussed above, even the Interim Corrective Action Plan submitted on November 10, 2016 lacks substantive information necessary to understand the impacts the proposed actions would have on the environment. (ICAP, Ex. 53.b.; Memo to Wolfe, 11/18/2016, Ex. 53.c.)

These facts demonstrate that the Dischargers not only failed to restore the site, but actually continued violating the Clean Water Act with additional activities after the issuance of

[15] The Dischargers provided an aerial photo with lines drawn in on July 22, 2016, that is considerately called the Draft Concept, contained in Ex. 36.b. The Prosecution Team does not consider this a plan.

the Notice of Violation. The fact that they have continued to fail to provide requested and required information since the August CAO hearing only emphasizes the need for enforcement.

iii. History of Violations

When the Complaint was issued in May 2016, the Prosecution Team alleged that there was no prior history of violations for the Regional Water Board to consider in this penalty assessment. Since then, however, BCDC's Enforcement Committee heard evidence and statements regarding its CDO on October 6, 2016. The Enforcement Committee recommended to the full Commission that they find violations true and impose a $772,000 penalty against the Dischargers. (BCDC Recomd., Ex. 49.d.; BCDC Transcript, Ex. 49.c., and Dischargers' Ex. C.) The full Commission ruled on the matter at their meeting November 17, 2016, and imposed the CDO and Civil Penalty. The Prosecution Team is not recommending increasing this factor. However, the Regional Water Board may consider the matter an adjudicated prior violation, though based on the same conduct as alleged in this matter.

d. Step 6 – Ability to Pay

The Dischargers have not substantiated their claimed inability to pay the recommended $4.6 million penalty. Point Buckler Club, LLC, in particular, has not submitted any evidence or even argument about its finances. Mr. Sweeney has provided a declaration containing only broad-brush statements concerning his finances, and a declaration from his certified public account, Mr. Robert Bucci. (See November 14, 2016, Prosecution Team's Objections to Evidence.) Mr. Bucci's declaration is not supported by any records; it merely reiterates what Mr. Sweeney states in his declaration, and discloses no specifics to paint any sort of picture of Mr. Sweeney's true financial status. Mr. Bucci offers no expert analysis whatsoever.

Financial expert Bryan Elder reviewed the Dischargers' Opposition Brief, and the declarations from Mr. Bucci and Mr. Sweeney, and provided his November 14, 2016 Ability to Pay Analysis Supplemental. (See Elder Analysis, Ex. 47.a.) Mr. Elder's analysis explains that a person's or business' ability to pay is based on net cash flow and net worth. Mr. Sweeney has stated that he is retired and has no net taxable income, to which Mr. Elder responds: "that is not representative of cash flow, as there are several allowable non-cash expenses and adjustments

in the tax code that can be used to reduce or offset tax liability, but that do not affect cash flow." (*Id.*, p. 2.)

Net worth is determined by assets and liabilities and is an additional factor in determining a person's ability to secure financing. Mr. Sweeney has not provided an accurate accounting of his assets and liabilities, but it appears he is plenty capable of securing financing. Public records establish that Mr. Sweeney purchased real estate in July 2016 for $1.125 million, with an $805,000 mortgage. Mr. Bucci's declaration states that Mr. Sweeney states there is a second mortgage of $160,000. (Bucci Decl., p. 2., ¶ 4.) It is unreasonable that a lending institute would provide these large loans to a retired individual who has had no taxable income for several years unless he secured these loans based on his assets, or other ability to pay, which have not been disclosed. (Elder Analysis, Ex. 47.a. [Net worth is considered in the ability to secure financing].) One such piece of evidence suggesting that there may be more assets is a recent post on Facebook indicating he sold a car for $400,000. (Facebook Post, Nov. 4, 2016, Ex. 57.d.) The Regional Water Board does not have a full picture of Mr. Sweeney's cash flow and net worth.

Mr. Elder also reviewed the value of Point Buckler Island itself. In his Ability to Pay Analysis Supplemental, Mr. Elder opines it is reasonable to conclude that the value of the Island is on par with the investments in it. Mr. Elder's analysis concludes that the value of the Island is approximately $3.335 million. (Elder Analysis, Ex. 47.a, p. 3.)

The ability to pay the penalty also takes into consideration an entity's ability to stay in business. Water Code section 13385(e) requires that the Regional Water Board *consider* that factor; the factor does not drive the penalty amount. A Regional Water Board may find value to the public interest in not assisting a repeat violator to remain in business.

In the present matter, little to no information has been provided about the Dischargers' businesses. From the public record search, one can reason that Point Buckler Club, LLC, is selling memberships for about $600,000 as explained in the Complaint Attachment A, Ability to Pay analysis and Mr. Elder's Ability to Pay Analysis Supplemental (*Id.*) For Point Buckler Club, LLC, a Facebook posts indicate that there are ten memberships available[16] (Facebook Page, Point

[16] The General Information section for the Point Buckler Facebook page reads: Exclusive Private

(continued…)

Buckler Club, Ex. 55.e.), and that seasonal memberships are available for summer. (Facebook Post, June 20, 2016; Ex. 55.f. ["The Point Buckler Club has one summer membership left," then references kite gear].) It appears that Point Buckler Club, LLC, has a connection to both the kiteboarding business and to duck hunting memberships. It is not clear how many members there are to the LLC, or how many employees it has. A Facebook post indicates Jeff Kafka may be part owner or an employee. (Facebook Post, 2014, Ex. 55.a.) Point Buckler Club, LLC has not submitted any information on those memberships, or any other information to refute the Prosecution Team's contending it has the ability to pay the recommended fine.

According to the Suisun Marsh Property Owners Forum on Facebook on April 6, 2016, the Club is "super well funded,"calling into question claims of inability to pay. (Facebook Post, April 6, 2016, Ex. 55.b.)

Similarly for Mr. Sweeney, the evidence indicates he has or has had some monetary or propriety interests in numerous duck and social clubs, limited liability companies, a business called SuperCarDirect,[17] and rents out the Delta Landing Craft for $6,500 a day (Deed, Ex. 12.c., p. 4; Secretary of State Search, Ex. 57; Business Wire – SuperCarDirect, 2007-2009, Ex. 59.c. [see article titled *SuperCarDirect CEO Ditches Corporate Jet, Drives NASCAR to Work*]; Letter to SRCD, 3/18/2008, Ex. 19.a. [Letterhead says SuperCarDirect; signature block identifies Mr. Sweeney as the managing member of Spinner Island, LLC], Letter to Club Owners, Ex. 38.b.; Craigslist post, accessed 8/9/2016, Ex. 34.a). A news article from 2012 states: "Sweeney, 41, made his fortune by selling an outdoor advertising business in 2001 and owns a total of three Delta islands that are all at risk for future levee breaks." (News10, *Delta island owners seeks feds' OK for quick levee fix,* 1/3/2012, Ex. 59.b.) The Dischargers have not provided any information or explanation for any of these interests and ventures. All of these matters found in public records searches raise more and more questions about the Dischargers' ability to pay the recommended penalty. The claim that Mr. Sweeney is not making any taxable income is offset by the wealth

(…continued)
Island for 10 special owners. Kiteboarding and other sports year round. 15 minutes by air from Silicon Valley, or hour by high speed yacht. Two helipads and docking for up to 300 foot yachts." (Facebook, Ex. 55.e.)

[17] John Sweeney at john@supercardirect.com is listed in 2006 as the contact for the sale of a restored America's Cup yacht for $373,000. (www.vsail.info, Ex. 59.c.)

demonstrated in various articles and websites, his ability to secure large loans, and his ability to live comfortably while acquiring expensive assets and work on business ventures that apparently do not generate income. (Sweeney Decl., ¶ 31; News Articles, Ex. 59; Websites, Ex. 55; Westlaw real property transaction records, Ex. 34.a.; Business Wire – SuperCarDirect, 2007-2009, Ex. 59.c.)

The only documented evidence in the record has been provided by the Prosecution Team, which demonstrates that Dischargers are able to pay the recommended penalty. Point Buckler Club, LLC, has not provided any information supporting an inability to pay the penalty claim, and Mr. Sweeney has not provided any supporting records to his generic claims. Without any information on ability to pay or what businesses may be affected by the imposition of this penalty, the Regional Water Board should find that the Dischargers have an ability to pay the recommended penalty.

e. Step 7 – Other Factors as Justice May Require

This factor in the Enforcement Policy penalty methodology allows the Regional Water Board some flexibility to adjust the penalty when the other factors in the methodology recommend imposing a disproportionally high or low penalty, as long as the Regional Water Board articulates express findings for why it made such an adjustment. None of the Dischargers' contentions regarding Other Factors as Justice May Require compel a reduction in the recommended penalty.

i. The Misconduct and Harm in this Case is Egregious and Deserving of the Recommended Penalty

The Enforcement Policy promotes fair, firm, and consistent enforcement, taking into consideration "the specific circumstances related to the discharge...." (Enf. Pol., Ex. 1.e., p. 2.) The egregious misconduct in this matter is unlike any prior enforcement matter in the San Francisco Bay Region. However, true to the intent of the Enforcement Policy, the Prosecution Team applied the factors in a fair, firm, and consistent manner, which resulted in a penalty reduced from the $39,211,860 statutory maximum to an $11,226,468 penalty, which the Prosecution Team then reduced again down to $4,600,000. (Complaint, pp. 15-16; Complaint

Attach. A., pp. A11-A14.)

The Opposition Brief compares the final dollar amounts in the top ten penalty cases in the Region over the past ten years. (Brief, pp. 20-22.) However, it does not discuss relevant facts for the cases as they may relate to the recommended penalty for this matter. For example, In the Matter of: OG Property Owner, LLC, (R2-2010-0085) the discharger was in receivership after filing for bankruptcy when it settled its case with the Regional Water Board. Neither discharger in this matter purports to have filed for bankruptcy.

It is also important to note that all of the listed cases in the Opposition Brief were settled without going to hearing. Settlement agreements can include Supplemental Environmental Projects (SEPs) pursuant to the SEP Policy, whereas Water Board Orders cannot. The relevancy here is unclear since the Dischargers have not proposed any SEP for this matter.

The Opposition Brief mentions two cases in particular, the Palmaz/Cedar Knolls Vineyard, Inc. settlement (R2-2011-0015) and the Kinder Morgan matter. The potential for harm in this case is far greater than either of those cases because, in this case, multiple federally- and state-listed species are affected by the discharge, along with critical habitat for five federally-listed species.

Both the Palmaz/Cedar Knolls Vineyard and the Kinder Morgan cases preceded the Enforcement Policy. The Palmaz/Cedar Knolls settlement expressly recognized that the agreement was negotiated consistent with the 2002 Enforcement Policy because the violations and substantial negotiations were completed prior to the 2010 Enforcement Policy taking effect. (Bazel Ex. 33, p. 6.) Similarly, the Kinder Morgan matter was settled in 2007, three years before the 2010 Enforcement Policy was adopted. (Consent Decree, Bazel Ex. 32.) As such, neither case contained a factors analysis using the penalty methodology; therefore, they are not comparable to the current case. Furthermore, the Kinder Morgan matter was resolved in the United States District Court for the Eastern District of California, and not administratively, and the Regional Water Board, the Department of Fish and Game (now the Department of Fish and Wildlife), and the Lahontan Reginal Water Board, were all plaintiffs whereby multiple interests had to be accommodated in reaching a settlement.

f. Step 8 – Economic Benefit

The Dischargers did not provide any new evidence countering the Prosecution Team's economic benefit analysis and the Opposition Brief misconstrues the meaning of the economic benefit factor. Economic benefit is not limited to monetary gain, but also the savings derived from the violation.

The Dischargers should have complied with the Clean Water Act by obtaining permits and mitigating for impacts associated with their dredge and fill activities in 2014. These avoided costs of compliance are considered an economic benefit to the Dischargers and were calculated based on costs that would have been incurred by a similarly-situated discharger who abided by the law.

Dischargers argue they should not have to pay a significant penalty because they must also restore the Island. This logic is contrary to the underpinnings of the Enforcement Policy. The Dischargers should not be allowed to benefit from avoiding the permitting process.. The Dischargers have enjoyed the benefits of the unauthorized levee since 2014, by conducting the kiteboarding and duck hunting businesses without having to first pay for permits and mitigation. The Enforcement Policy states that Regional Water Boards should not adjust the economic benefit factor "for expenditures by the discharger to abate the effects of the unauthorized conduct or discharge, or the costs to come into or return to compliance. In fact, the costs of abatement may be a factor that demonstrates the economic extent of the harm from the violation." (Ex. 1.e., p. 20.)

Without any substantial evidence to change the economic benefit analysis in the methodology contained in the Complaint's Attachment A, there is no reason to reduce the penalty amount.

II. The Regional Water Board has Already Determined it has Jurisdiction

Dischargers reiterate prior arguments and evidence that Point Buckler Island was "high and dry" and contest whether the island was subject to jurisdiction under Clean Water Act section 401. (Brief, pp. 6, 44-46.) The Regional Water Board's prior determination is well-supported by evidence in the CAO Factual Rebuttal (Ex. 45, ¶¶ Ref. 12-35) and the Expert Report

(Ex. 11, Apps. I and N) and reinforced by the ACL Factual Rebuttal (¶¶ 1-9 and 73-75) and Expert Response (Ex. 46, pp. 1-4 and 7-10). Specifically, the Regional Water Board already found that "38.3 of the approximately 39 acres of the Site are below the high tide line, fall under Clean Water Act Section 404 jurisdiction, and therefore are waters of the State and United States," and that "the Dischargers have caused or permitted waste to be discharged or deposited where it has been discharged into waters of the State and United States, and created or threatens to create a condition of pollution." (CAO, Ex. 32, p. 3, ¶ 10 and p. 13, ¶ 75.) Even more specifically, the Regional Water Board found that:

> Construction of the new levee resulted in unauthorized placement of fill in approximately 2.6 acres of waters of the State and United States consisting of tidal marsh, tidal channels, and tidal remnant levee. Construction of a road to the water's edge on the Site's west end, placement of spoils, and installation of structures resulted in unauthorized placement of fill in an additional 0.63 acres of waters of the State and United States (total fill placed in approximately 3.23 acres of waters of the State and United States). Approximately 5.8 acres of tidal marsh vegetation were mowed or destroyed as a result of unauthorized activities. Finally, construction of the new levee blocked tidal channels and overland tidal flow into 27.18 acres of the Site's interior tidal marsh.

(*Id.*, pp. 10-11, ¶ 59.)

Res judicata prevents the Dischargers from re-arguing that the Regional Water Board does not have jurisdiction over the levee repair.[18] The doctrine of res judicata holds that a final judgment in a case governs the identical claim in a subsequent action. As a result, a prior administrative decision may preclude a subsequent administrative or judicial action. (*United States v. Utah Construction and Mining Co.* (1966) 384 U.S. 394, 422 [86 S.Ct. 1545].) Under this doctrine, a valid final judgment is conclusive of a claim or defense and bars all parties and persons in privity with the parties from re-litigating any issue material to the claim or defense that were or could have been adjudicated in the prior action. (*Takahashi v. Board of Ed. of Livingston Union School Dist.* (1988) 202 C.A. 3d 1464, 1473-1474 [249 C.R. 578].)

The Regional Water Board's findings in the CAO concerning Clean Water Act jurisdiction

[18] Alternatively, Dischargers' request for the Regional Water Board to make a new determination on the matter could be construed as a motion for reconsideration. Typically, a motion for reconsideration is supported by a change in the law or new evidence, neither of which has been established in this case. (See Code of Civ. Pro. § 1008(a) [A motion for reconsideration must be based on new or different facts, circumstances, or law].)

are strongly supported by evidence in the record. The Dischargers provide no case law or change in conditions that warrant revisiting that issue.

III. The Recommended Penalty is Consistent with the Porter-Cologne and Clean Water Acts

The ACL Complaint alleges liability pursuant to Water Code section 13385(a)(4) for violating Basin Plan Discharge Prohibition No. 9 and liability pursuant to Water Code section 13385(a)(5) for violating Clean Water Act sections 301 and 401. (Complaint, Ex. 5, ¶¶ 56 and 57.) The Dischargers' own admissions are sufficient to demonstrate violations of each.

The Dischargers contest whether Water Code section 13385 can govern this action, claiming first that Mr. Sweeney did not violate section 401 of the Clean Water Act in performing unauthorized activities. (Brief, pp. 55-56.) The Dischargers' argument depends upon the following tortured reasoning:

> The reasoning of Congress is clear. If the applicant does not submit a section 401 certification, the applicant never gets an NPDES permit. There is no harm to the environment from not requesting a certification, and as a result there is no reason to penalize any failure to request a certification.

(*Id.* at p. 56.) Dischargers claim that only an "applicant" can violate the discharge prohibitions in section 401, and Mr. Sweeney admittedly failed to apply for water quality certification. (*Id.* at pp. 55-56.)

The starting point of the analysis is section 301 of the Clean Water Act, which makes unlawful any discharge of any pollutant by any person into waters of the United States except in compliance with the Clean Water Act. Dischargers concede that Mr. Sweeney discharged into waters of the United States when he filled in the seven levee breaches. (Brief, p. 56.)

Pursuant to section 402 of the Clean Water Act, the State of California is authorized to administer water quality certification on behalf of the United States Environmental Protection Agency (EPA), and has promulgated Title 23 of the California Code of Regulations, section 3855, which requires that an "application for water quality certification shall be filed with the regional board executive officer in whose region a discharge may occur." Section 401 must be construed in conjunction with both Clean Water Act Section 301, prohibiting discharge without a permit, and section 3855, requiring submission of an application for water quality certification before

discharging. Dischargers admit that Mr. Sweeney had no water quality certification for his unauthorized activities. (Brief, p. 56.)

Dischargers also contest whether Basin Plan Prohibition No. 9, prohibiting the discharge of silt, sand, clay, or other earthen materials from any activity, is applicable. They cite to the Basin Plan reasoning that the Prohibition is intended to "prevent damage to the aquatic biota by bottom deposits." The Dischargers claim that the prohibition does not apply because "the levee repair cannot legitimately be characterized as 'deleterious bottom deposits', even though a small amount of material was placed in the breaches." They cite to lack of evidence that any spawning occurred or benthic organisms lived in those breaches. (Brief, p. 56.)

To reach this conclusion, the Opposition Brief necessarily ignores additional reasoning in the Basin Plan supporting Prohibition No. 9:

> The prohibition would also prevent discoloration and/or turbidity that can be caused by silt and earth… Turbidity or discoloration caused by dredging is covered by the Regional Board's policy on dredging (see section under nonpoint source control).

The Basin Plan provides additional and extensive discussion on impacts associated with dredging that support the adoption of Prohibition No. 9, including Basin Plan section 4.20.4 (Environmental Impacts of Dredging and Disposal in the Aquatic Environment) and Table 4-12, entitled "Potential Consequences and Impacts of Dredging and Dredged Material Disposal." Section 4.20.4 states that dredging operations "cause localized and ephemeral impacts with related biological consequences." Table 4-12 lists impacts associated with dredging, including bottom disturbance, suspended solids loading, dissolved oxygen reduction, mobilization of toxicants adsorbed to sediments and release of biostimulatory substances." It is reasonable to conclude that these impacts occurred here, where the dredging operations discharged into both the Bay waters outside of the island as well as into tidal channels, the remnant borrow ditch, which was functioning as a tidal channel, and wetlands (Expert Report, Ex. 11, Appen. Q, Q-2). Dischargers admit that the dredging occurred. (Sweeney Decl., ¶¶ 6-7.)

Finally, the Dischargers challenge the applicability of Water Code section 13385(c), which authorizes the Regional Water Board to impose a penalty for gallons of discharge over 1,000

gallons. They claim that the statute could not have been referring to dirt, which is not generally measured by the gallon. (Brief, pp. 55-57.) Cubic yards, however, are easily converted to gallons. One cubic yard is equal to 201.97 liquid gallons. Whatever units are chosen to describe a discharge should be irrelevant. The statute would still apply to the discharge if it were described in liters or barrels.[19]

IV. The Penalty Does Not Violate Constitutional Protections

The following sections address Dischargers' contentions that the proposed penalty would violate several of the protections afforded by the Constitution of the United States. The Dischargers assert violations of their First Amendment rights, the Excessive Fines Clause of the Eighth Amendment, and of the Due Process Clause of the Fourteenth Amendment. (Brief, pp. 46-55.)

a. There is No 1st Amendment Retaliation and the Penalty is Not Vindictive because the Dischargers had Notice Since July 28, 2015, Five Months before Point Buckler Club, LLC Filed its Law Suit.

The recommended penalty, and the entire administrative civil liability complaint and process, is not a retaliation effort in response to *Point Buckler Club, LLC v. Bruce H. Wolfe*, *California Regional Water Quality Control Board, San Francisco Bay Region* filed in Solano County Superior Court (2015, No. FCS046410). The Dischargers' claim that the ACL Complaint is an act of vengeance is without merit. Assistant Executive Officer Whyte, in her role as Prosecution Team lead, directed staff to begin working on an ACL Complaint to address the illegal fill and failure to obtain permits in July 2015, prior to any action by the Dischargers challenging the Regional Water Board's authority or jurisdiction. (Whyte Decl., Ex. 58, ¶ 3,) Moreover, the court dismissed the case after sustaining the Regional Water Board's demurrer in July, 2016. (See Demurrer Court Order, July 1, 2016, Ex. 50.b. and Formal Dismissal, July 20, 2016, Ex. 50.c.)

First Amendment retaliation claims are brought under 42 U.S.C.A, section 1983. In pertinent part, it provides:

[19] An example of a case where gallons of fill were used in determining a penalty is in Administrative Civil Liability Order No. R3-2008-0057 issued by the Central Coast Regional Board in the matter of Tract 1990, LLC.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

The purpose of the statute is to deter state actors from using badge of authority to deprive individuals of their federally guaranteed rights, and to provide relief to victims if such fails. (*Wyatt v. Cole* (1992) 502 U.S. 158, 166 [112 S.Ct. 1827].)

Traditionally, claims under this statute were brought against government employers by employees. Actions brought by non-employee citizens in the land use context are on the rise. Since parties to administrative proceedings on land use matters often disagree heatedly about what the law requires, many landowners who receive an unfavorable decision feel that the responsible government officials penalized them simply because the landowners disagreed with and challenged them. (Zizka et al., State and Local Government Land Use Liability (2015) Ch. 17, § 17.14.) While many of the Federal Appellate Circuit Courts have allowed actions in this context,[20] other courts have resisted several attempts by plaintiffs to bring actions for First Amendment retaliation under section 1983.[21]

The generally accepted formulation for analyzing a First Amendment retaliation claim in the land use context was established by the various Federal Courts of Appeal. The Ninth Circuit framework for analyzing claims by a regulated entity against government regulators is set forth in *CarePartners, LLC v. Lashway* (9th Cir. 2008) 545 F.3d 867, 880 cert. den (2009) 129 S.Ct. 2382 [173 L. Ed. 2d 1294]. In *CarePartners* the court stated, "[the plaintiff] must initially show that the protected conduct was a 'substantial' or 'motivating' factor in the defendant's decision."

The Dischargers have failed to provide any evidence remotely suggesting that Point

[20] See *Paeth v. Worth Tp*. (6th Cir. 2012) 483 Fed. Appx. 956, where a jury found in favor of plaintiff home owners First Amendment retaliation claim against state zoning commission.

[21] See *Guth v. Tazewell County* (7th Cir. 2012) 698 F.3d 580, when other federal or state statutes provide adequate remedies for alleged retaliation against a plaintiff's prior lawsuit or administrative proceedings, 42 U.S.C.A section 1983 should not be deemed available.

Buckler Club, LLC, seeking a stay in Solano County Superior Court was a substantial, motivating, or even *relevant* factor in the Prosecution Team's decision to issue a complaint for administrative civil liability. The theory is pure conjecture.

The Dischargers' brief contrives the timing of actions as support for their theory. Generally, the brief claims that penalties were not discussed until after Point Buckler Club, LLC filed for a stay of the original CAO in Solano County Superior Court on December 23, 2015. Any retaliation would logically occur after that date.

On July 22, 2015, the Water Board's Watershed Management Division staff briefed Assistant Executive Officer Dyan Whyte about the unauthorized activities on the site and the potential harm. At this meeting Ms. Whyte, as the prosecution lead, advised staff on an enforcement strategy and directed staff to do the following (1) prepare a Notice of Violation informing Mr. Sweeney that he needed to cease all unauthorized activities at the site; (2) prepare a 13267 letter requiring submittal of information needed for an ACL action; (3) prepare a CAO requiring a restoration plan for the site; and (4) start an ACL case. This strategy was implemented months before Mr. Sweeney filed suit and is consistent with the Regional Water Board's enforcement staff's approach to addressing violation where there is significant harm. (Whyte Decl., Ex. 58, ¶3.)

On July 28, 2015, five months prior to the Club filing suit, Assistant Executive Officer Dyan Whyte issued a Notice of Violation to Point Buckler LLC, to Mr. Sweeney's attention. (Army Corps NOV, Ex. 9.) That Notice of Violation clearly states:

> The Regional Water Board reserves the right to take any enforcement action authorized by law, including seeking monetary penalties pursuant to Water Code Section 13385(a). Any person who violates Clean Water Act Section 301 and/or Water Code Section 13376 is subject to administrative civil liability pursuant to Water Code Section 13385(c). The amount of the penalty is up to $10,000 for each day in which the violation occurs and up to $10 per gallon of material discharged.

(*Ibid.* See also Whyte Decl., Ex. 58.)

The Regional Water Board is obligated to enforce the *Porter-Cologne Water Quality Act*, Water Code Division 7. Chapters 5 and 5.5 address how the Regional Boards are authorized to enforce water quality objectives and the Clean Water Act, with the administration of civil

liability specifically addressed in Article 2.5. The Prosecution Team was complying with the law and fulfilling the Regional Water Board's obligations when it issued the proposed CAO and Complaint on May 17, 2016.

Generally speaking, when there are on-going violations harming water quality, resources are best applied towards getting the harm to beneficial uses stopped, and ceasing the on-going violations, with penalty actions to follow. For Point Buckler, the initial CAO, No. R2-2015-0038, was issued September 11, 2015, a relatively fast process in light of the severity of the violations, a severity of which is also reflected in the amount of the penalty later proposed. By the time the initial CAO was rescinded in January 2016, and a new draft CAO prepared in May, the process in compiling enough information to issue the Complaint caught up with the process in issuing the new proposed CAO. After the Prosecution Team retained consultants who inspected the island with staff in March 2016, and the expert report was completed in May 2016, there was sufficient evidence to issue both the proposed CAO and Complaint at the same time.

Recall that initially, both hearings for the CAO and the Complaint were scheduled to be heard by the Regional Water Board on August 10, 2015. The Advisory Team memorialized the urgency to remediate the existing impacts and to restore beneficial uses when it issued its May 25, 2016, letter to Mr. Bazel, allowing the hearing on the Complaint to be delayed, but not the hearing on the proposed CAO. (Ajello Letter, May 25, 2016, Ex. 14.a.) It is evident that the need to stop the on-going harm takes precedence over issuing penalties, which explains why the Complaint followed the initial CAO.

The Prosecution Team was complying with the law and the Enforcement Policy when it recommended a penalty in the amount of $4.6 million. Each factor under Water Code section 13385(e) was extensively analyzed and articulated in the Attachment A to the Complaint, with this legal brief and associated ACL Factual Rebuttal further analyzing the facts to the factors. The Prosecution Team exercised its discretion in deciding which violations to allege in the Complaint. It combined the Clean Water Act section 301 violation and Basin Plan Prohibition No. 9 violation into Violation 1, instead of alleging two separate violations. Then, the Prosecution Team collapsed days of violation for Violation 2: instead of alleging the full amount of days of violation starting with May 19, 2012, through to the hearing, it lowered the number to 57 days of

violation. By consolidating violations and reducing the number of days of violation, the Prosecution Team significantly reduced the base liability. (Complaint, Attach. A, p. A6.) These actions do not suggest any retaliatory intentions on behalf of members of the Prosecution Team.

In their brief, the Dischargers accuse the Prosecution Team of coordinating an "attack" on Mr. Sweeney with vindictive motives. (Brief, pp. 48-49.) In reality, the Dischargers' actions are serious offenses and cross multiple media and agencies' jurisdictions.[22] The Dischargers are facing a $772,000[23] penalty imposed by BCDC, and have been notified that EPA is investigating. (BCDC Order, November 17, 2016, Ex. 49.e.; Army Corps NOV, Sept. 1, 2016, Ex. 40.b.) The agencies engaged in a mutual common interest in investigating potential violations consistent with the Common Interest Doctrine. (See *Oxy Resources California, LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 889.) Agency staff did not discuss what monetary penalties they would seek prior to issuing their respective charging documents. The Prosecution Team did not seek input on its recommended penalty from any other agency staff. (Whyte Decl., Ex. 58.)

Government agencies are often encouraged to work together for efficiency, and that is exactly what happened here. The Dischargers are actually benefitting from our coordinated efforts for compliance, evidenced by the Dischargers continuing to ask for more meetings with the Prosecution Team, BCDC, and EPA.[24] (See meeting minutes, Exs. 13.k., 36.a. and 53.a.) The Dischargers are obtaining exceptional customer service thanks to the agencies coordinating their resources in an effort to get the Dischargers to streamline permit applications and come into compliance. Any retaliation claims are completely meritless.

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[22] The Opposition Brief states that no agency responsible for protecting endangered species has taken any action against the Dischargers, it completely omits the fact that California River Watch filed a citizen suit against both Dischargers for violations of the Endangered Species Act (16 U.S.C. § 1531 et seq.) in the United States District Court, Northern District of California, Case Number 3:16-cv-05886. (A copy of the complaint is available upon request.)

[23] The Opposition Brief cites BCDC staff's recommended penalty of $952,000. (Brief, p. 48, line 13.) In fact, BCDC Enforcement Committee reduced the recommended penalty to $772,000. BCDC imposed a $772,000 penalty at its November 17, 2016, meeting.

[24] Note that the Corps is not part of the joint prosecution agreement. The Prosecution Team did not have anything to do with the Corps' September 1, 2016, notice of violation. Mr. Sweeney not having received the letter in the mail is likely due to the Corps sending it to an old address. The public property transactions researched suggest he moved in July 2016. Making the leap that Mr. Sweeney did not receive the letter in the mail because of a mass conspiracy against him is preposterous.

Despite the Prosecution Team's and multiple agencies' coordinated efforts to bring the Dischargers into compliance and restore the beneficial uses to Point Buckler, violations continue today, almost sixteen months after the Notice of Violation.

b. The Recommended Penalty Does Not Violate the 8th Amendment of the United States Constitution

Dischargers claim the proposed penalty violates the Excessive Fines Clause of the Eighth Amendment as it is disproportionate to their level of culpability, to the relationship between the penalty and the harm caused by their activities, and to other comparable matters. (Brief, p. 52.)

The Excessive Fines Clauses of the Eighth Amendment limits the government's power to issue a penalty that is disproportionate to the gravity of the defendant's offense. (*United States v. Bajakajian* (1998) 524 U.S. 321, 334.) The cornerstone of the inquiry under the Excessive Fines Clause is the proportionality of the proposed fine. (*Id*.) Proportionality is based on three criteria: 1) the degree of the defendant's reprehensibility or culpability; 2) the relationship between the penalty and the harm to the victim caused by the defendant's actions, and; 3) the sanctions imposed in other cases for comparable misconduct. (*Cooper Indus. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 435, citations omitted.)

Based on the Dischargers' experience with regulatory agencies his degree of culpability and reprehensibility is high. The Dischargers' degree of culpability is discussed, in depth, as part of the Penalty Factors analyzed in section II, subdivision (c)(i) of this brief. As highlighted by that section, the evidence supports a high degree of culpability being attributed to the Dischargers.[25] Mr. Sweeney is a sophisticated party, by virtue of his awareness of Clean Water Act and Water Code permitting programs, in addition to owning interests in multiple delta properties. For his levee activities on Point Buckler, Mr. Sweeney has stated, "My father in law Mike Frost can attest to the quality and practices I used in restoring buckler as he explained to me how to do it. I don't think many would argue aside from you [Dr. Stuart Siegel] he's the most knowledgeable person in the marsh on all things levee and flood gate based." (Sweeney e-mail to Siegel, May

[25] See *Sasser v. Administrator, United States E.P.A.* (4th Cir. 1993) 990 F.2d 127, 131 (Finding the re-impounding of freshwater tidal wetlands without a permit as a serious offense when determining the degree of culpability for assessing civil fines under the Clean Water Act.)

14, 2015, Ex. 23.) The website for W. Mike Frost Construction, Inc. touts they are "the oldest dirt working contractor in the Suisun Marsh area." (www.wmfrostconstruction.com, Ex. 30.b.) The evidence supports that the Dischargers knew or should have known the activities on the island required permits, yet they chose not to comply with the relevant permitting programs. Furthermore, numerous agencies could have readily informed him of the permitting requirements (e.g., SRCD, BCDC, the Army Corps, the Regional Water Board, or the county development department). The Discharger's lack of due diligence to further educate himself, or his willful negligence, is a testament to his high level of culpability. (See Section II.c.i, *supra*, regarding Culpability.)

The relationship between the penalty and the harm to the beneficial uses of Point Buckler Island caused by the Dischargers' actions are proportional. The Prosecution Team has discussed in depth the harm the Discharger's actions have caused to the beneficial uses and that the egregious misconduct in this matter is unlike any other enforcement matter seen before in the San Francisco Bay Region. (Complaint, Attach. A, Ex. 5.) The Prosecution Team also discussed at length the harm the Dischargers' activities caused to the beneficial uses of Point Buckler in section II, subdivision (a)(i)-(ii) of this brief. The evidence put forth in that section shows the strong relationship between the proposed penalty and the harm caused by the Dischargers. As such, the Prosecution Team has demonstrated the proportionality between the penalty and the damage done to the environment. The proposed penalty is difficult to compare with the sanctions imposed in other cases because it is unparalleled in the San Francisco Bay Region. The Dischargers rely on the final dollar amount of cases within the Region over the past ten years to support their claim that the proposed penalty is disproportional to other comparable matters. However, Dischargers fail to cite specific facts supporting the contention that the penalty is disproportionate to those matters. Additionally, the Prosecution Team distinguished the cases relied on by the discharger to support their claim in section II, subdivision (e)(ii) of this brief. As this enforcement action is unlike any prior enforcement action in the San Francisco Bay Region the Dischargers cannot establish that the penalty is disproportionate to other comparable matters. Nevertheless, while no two cases are the same, similar factors within the methodology analysis can be compared. The Discharger has not demonstrated that the penalty is

disproportionate, thus, is not afforded protection under the Excessive Fine Clause of the Eighth Amendment.

c. The Recommended Penalty Amount is Supported by Substantial Evidence

The Dischargers argue for the Regional Water Board to employ a beyond a reasonable doubt burden of proof for these administrative liabilities. (Brief, Section III.D., p. 50-51.) Though the Prosecution Team contends that the evidence submitted does, in fact, prove the Dischargers violated the Clean Water Act and the Basin Plan beyond a reasonable doubt, it is up to the Regional Water Board to determine whether substantial evidence is proffered for the Regional Water Board to find the alleged violations are true.[26]

In the Matter of Exxon, Order No. WQ 85-2, the State Water Resources Control Board established that there must be substantial evidence to support a finding of responsibility. This means credible and reasonable evidence indicating the named party has responsibility. Under State Water Board Resolution 92-49, the Regional Water Board may use any evidence, whether direct or circumstantial, including, but not limited to:

a. Documents of historical activities, waste characteristics, chemical use;
b. Site characteristics and location in relation to other potential sources of a discharge:
c. Hydrologic and hydrogeologic information;
d. Industry-wide operational practices that historically have led to discharges;
e. Lack of documentation of responsible management of wastes; and,
f. Physical evidence, such as analytical data and soil and/or pavement staining.

The court in *Sasser* addressed whether the administrator's imposition of the maximum penalty allowed by the Clean Water Act was an abuse of discretion. The court addressed the discharger's liability in assuming his actions were covered under the nationwide permit:

> Although persons operating under a nationwide permit generally need not obtain specific approval from the Corps before discharging dredged materials, "if a private party, acting under the assumption that its discharge is allowed under a nationwide permit, makes a discharge, that party bears the risk of liability for rectifying the harm done if in fact the discharge is not permitted." *Orleans Audubon Soc'y v. Lee,* 742 F.2d 901, 909-10 (5th Cir. 1984) (dictum).

The *Sasser* court found that imposing the maximum penalty allowed by statute was not an

[26] For a recent example of a Board using substantial evidence as its burden of proof, see San Diego Regional Water Board Order No. R9-2016-0064, paragraph 57, page 23.

abuse of discretion since the administrator considered the discharger's liability for assuming his coverage under a national permit, the circumstances of his attorney's advice, his refusal to comply with EPA orders, the degree of culpability, ability to pay, and that it was a serious offense.

In the present case against Mr. Sweeney and Point Buckler Club, LLC, the Regional Water Board may use the *Sasser* case for guidance in issuing an administrative civil liability since the facts and violations are on-point. The filling of wetlands to reconstruct a levee is a serious offense. The maximum daily penalty is $10,000, although the Prosecution Team is not recommending the full penalty amount. The methodology in Complaint Attachment A provides an analysis on the additional factors to consider in Water Code section 13385(e).

d. This is Not a Criminal Case, and This Is Not a Trial

The Dischargers argue that the recommended penalty is so high that it becomes criminal in nature and promotes retribution and deterrence. (Brief, Section III.C., p. 49.) The introduction to the Enforcement Policy explains that it is to provide guidance to staff to spend its resources in a manner to "address the greatest needs, deter harmful conduct, protect the public, and achieve maximum water quality benefits." (Enf. Policy, Ex. 1.e., p. 1.) The Policy further explains the purpose of Water Boards enforcement: "Enforcement is a critical ingredient in creating the deterrence needed to encourage the regulated community to anticipate, identify, and correct violations. Appropriate penalties and other consequences for violations offer some assurance of equity between those who choose to comply with requirements and those who violate them." (*Id.*) The statutory scheme for Water Code section 13385 is not so punitive that it becomes criminal. Imposing an administrative civil liability pursuant to Water Code section 13385 is within the Regional Water Board's purview, authority, and obligation to enforce water quality standards. The Hearing Procedures administered by the Advisory Team are consistent with the Administrative Procedures Act (Gov. Code § 11400 et seq.) in establishing how the hearing will be conducted. This is an administrative hearing that may result in the imposition of a monetary civil liability. This is not a criminal trial that may result in a person losing his personal liberty.

The recommended penalty is only about 11% of the statutory maximum, which is $39,211,860. The Enforcement Policy penalty methodology recommendation is $11,226,468. The liability amount recommended by the Prosecution Team is $4,600,000, which is well under the statutory maximum and less than half of the Enforcement Policy methodology recommendation. Therefore, imposing the recommended penalty is not criminal in nature and does not warrant any different treatment.

Constitutional protections provided in criminal cases are simply inapplicable here.

V. The Penalty Does Not Violate the Suisun Marsh Preservation Act

The Dischargers reiterate extensive arguments construing the Suisun Marsh Preservation Act (SMPA) (Brief, pp. 58-62), which is almost entirely irrelevant to this proceeding. The applicability of the SMPA was briefed extensively in the Prosecution Team Rebuttal Brief in support of the CAO. (¶ IV.) The CAO Factual Rebuttal and ACL Factual Rebuttal both address the "facts" presented in the Brief. (CAO Factual Rebuttal, Ex. 45, ¶¶ Ref. 1-4, and ACL Factual Rebuttal, ¶¶ 11-16.) The only relevance this argument has to the assessment of a penalty is 1) the Dischargers claim that a managed duck club is a beneficial use; and 2) Mr. Sweeney claims that he thought he conducted activities in accordance with the Point Buckler IMP. The substance of these arguments is addressed in Section II.a., Harm or Potential Harm to Beneficial Uses and Section II.c.i., concerning Culpability.

VI. A *Daubert* Hearing is Not Necessary To Determine the High Tide Line

The Dischargers request that the Regional Board hold a *Daubert* hearing before accepting the conclusion about the high tide line set out in the Technical Report and Rebuttal Report. (Brief, p. 46.)

A *Daubert* hearing is conducted pre-trial, before a judge, when the validity and admissibility of an expert witness is questioned. The factors that may be considered in determining whether an experts methodology are valid are: 1) whether the theory or technique in question can be and has been tested; 2) whether it has been subjected to peer review and publication; 3) its known or potential error rate; 4) the existence and maintenance of standards controlling its operation; and 5) whether it has attracted widespread acceptance within a

relevant scientific community. (*Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 590-593 [113 S.Ct. 2786].)

A *Daubert* hearing is not necessary because the methodology and the reasoning of the Prosecution Team's consultants and technical reports are scientifically valid and are applicable to the facts. The methodologies used to derive evidence against the Dischargers are widely used tests that are time tested and applicable to the facts. The Army Corps codified the "high tide line" methodology for topographical surveys used by the consultants in 33 C.F.R. section 328.8, subdivision (c)(7). Additionally, the Dischargers rely on the "wet-board method" used by the consultants to determine the elevation of the water at Point Buckler to support their argument that the water level should be lower. (Brief, p. 46.) The above show these methodologies are accepted within the scientific community, widely used by consultants, and are applicable to the facts. Thus, a *Daubert* hearing is unnecessary.

VII. Conclusion

Despite the egregious facts underlying this case, the Prosecution Team has applied the Enforcement Policy penalty methodology in an even-handed and fair manner, assessing a penalty that is appropriate, based upon the numerous factors evaluated. None of the arguments pertaining to Constitutional violations, the Suisun Marsh Preservation Act or jurisdiction undermine the Board's authority to assess a penalty. For these reasons, the Prosecution Team respectfully requests that the Regional Water Board approve a penalty of $4.6 million.

Dated: November 18, 2016

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