PROSECUTION TEAM ACL FACTUAL REBUTTAL

	Abbreviations Used
ACL	Administrative Civil Liability
Basin Plan	San Francisco Bay Basin Water Quality Control Plan
Bazel	Lawrence S. Bazel, counsel for John D. Sweeney and Point Buckler Club LLC (Club)
BCDC	San Francisco Bay Conservation and Development Commission
CAO	Cleanup and Abatement Order
CDFW	California Department of Fish and Wildlife
CDO	Cease and Desist Order issued by BCDC, effective April 22, 2016 (Exhibit 10a.)
Certification	Clean Water Act Section 401 Water Quality Certification
CWA	Clean Water Act
Dischargers	John D. Sweeney and the Club
Corps	U.S. Army Corps of Engineers
DWR	California Department of Water Resources
EPA	U.S. Environmental Protection Agency
ESA	Endangered Species Act
HTL	High Tide Line
IMP (also Club Plan)	1984 Individual Management Plan for Annie Mason Point Club or Club 801 (Ex. 3a. and Ex. 26a)
NOAA	National Oceanic and Atmospheric Administration
Port Chicago	National Ocean Service Port Chicago station is a nearby continuously operating tide gauge.
Prosecution Team	Water Board Prosecution Team
Rebuttal Report	"Expert's Response to July 11, 2016 Evidence Package" (PT Exhibit 22)
RGP3	Regional General Permit issued by the Corps, dated July 8, 2013 (Ex. 2b.)
SRCD	Suisun Resource Conservation District
Technical Report	"Point Buckler Technical Assessment of Current Conditions and Historic Reconstruction since 1985" Report, dated May 12, 2016 (Ex. 11)
Water Board	San Francisco Bay Regional Water Quality Control Board

Ref.	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
	Island Was High and Dry/No Jurisdiction	
1	Most of the island was high and dry, except for a few channels and ditches, before the levee repair, and the prosecution team now concedes this point. (Opp., pp. 1 and 14.) The interior of Point Buckler is not subject to daily tidal action, and is therefore not tidal marsh. (*Id.* at p. 15.)	The Prosecution Team does not concede this point. In the briefs and evidence submitted regarding the CAO, the Prosecution Team refuted claims that the island was "high and dry" and established that the vast majority of Point Buckler is jurisdictional wetlands (Factual Rebuttal, Ex. 45, Ref. 5, 12, 22, 26, 28, 29, 31, 33, 35, 48, 53, 58, 61, 66). Based on expert reports and technical data, including a topographical survey of the island and five separate methodologies of establishing the high tide line, the Water Board concluded in the CAO that "approximately 38.3 of the approximately 39 acres of the Site are below the high tide line, fall under CWA Section 404 jurisdiction, and therefore are waters of the State and United States (CAO, Ex. 32a, Finding 10). Evidence establishing Point Buckler was tidal marsh, with hydric soils, wetland vegetation, and tidal hydrology was provided by the Prosecution Team's experts (Expert Report, Ex. 11, App. H and G; CAO Expert Response, Ex. 22) and has been conceded by the Dischargers' experts (Mayer Decl., p. 2 line 12; Huffman Decl. p. 4 lines 16-17; ACL Expert Response, Ex. 46, § 1.1). The Dischargers incorrectly conclude that the interior of the island is not tidal marsh because the upper intertidal marsh plains do not have daily tidal flooding. However, prior to unauthorized activities, the island's marsh plains were subject to periodic high tide flows and as such are subject to CWA jurisdiction (CAO Expert Response, Ex. 22, § 2; ACL Expert Response, Ex. 46, § 1.6). The Board has already established these facts in the CAO (CAO, Ex. 32a, Findings 4-13).
2	"There were ponds on the island in 1948. A pond is visible in an aerial photograph taken in 1981. These ponds apparently silted in, perhaps when storms and wave action breached the levee. After 1981, there is no sign of any pond in any aerial photograph until two small ponds were dug in 2012. By the early 1980s, therefore, the island was high and dry" (Opp., p. 5.)	Three ponds of fairly significant size (estimated at approximately 3 acres) were present at the island in a 1948 aerial photograph. We agree that the ponds filled naturally and were unlikely to have been intentionally filled. The Dischargers failed to explain how the island was "high and dry" and ponds located at the center of the island were able to be naturally filled with sediment. We estimate that over

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		approximately 5000 cubic yards (assumes one-foot depth of ponds) of sediment had to be transported to the center of the island and deposited to fill these ponds (ACL Expert Response, Ex. 46, App. E). The capacity of a couple of anastomosing channels to transport that sediment load, without choking the channels, and the hydraulic capacity of flow through the channels to completely fill the ponds requires scientific explanation. Alternatively and consistent with the Prosecution Team's assessment of high tides at the island (ACL Factual Rebuttal, Ref 1.), the storms and wave action that breached the levee caused occasional flooding of the island and facilitated transport of sediment directly into the ponds. Tidal connection to the island was restored by 1988 (CAO Expert Response, Ex. 22; CAO, Ex. 32a).
3	Claims regarding presence of DWR pump and mitigation. (Opp., pp. 5-6.)	We have previously briefed the unsubstantiated claims of use of the island as mitigation and DWR's installation of a pump (2015 CAO Submittal Response, Ex. 13e; DWR Confirmation, Ex. 13l; Factual Rebuttal, Ex. 45, Ref. 56-58.)
4	Statements regarding Mr. Sweeney's observations and aerial photographs of brown, dry vegetation including "In May 2012…the vegetation was brown and brittle, and appeared dead. Photographs taken from that time show the brown vegetation"; ability to drive a bulldozer across the island, lack of water inside the island except for channel network, etc.; intended to show island was "high and dry." (Opp., p. 6-7.)	See ACL Factual Rebuttal, Ref. 1 We have previously briefed the Dischargers' unsubstantiated claim that tidal marsh vegetation did not die back (Factual Rebuttal, Ex. 45, Ref. 40); explained that mature tidal marsh at the island has soil sufficient to bear loads such as vehicles and equipment (Equipment Photographs, Ex. 30b; Factual Rebuttal, Ex. 45, Ref. 66); and why tidal inundation of the interior may not be visible (Factual Rebuttal, Ex. 45, Ref. 64). Tidal marshes turn brown in the winter when vegetation goes dormant and turn green in the summer when vegetation grows new biomass. May 2012 was the beginning of the growing season during the first year of the drought which explains observations of brown vegetation in May 2012 (CAO Expert Response, Ex. 22, p. 27).

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5	The Staff Summary Report does not present any evidence on jurisdiction; the Technical Report and Rebuttal Report are inadequate. (Opp., pp. 44-46, 50.)	See ACL Factual Rebuttal, Ref. 1
6	The Prosecution Team should have installed a tide gage to survey the tidal elevation. (Opp., p. 45.)	We have previously briefed the Water Board on how the installation of a temporary tide gauge was not possible because of (1) the unwillingness of the Dischargers to provide timely access to Point Buckler Island, and (2) the inspection warrant limited the Prosecution Team's ability to obtain information from Point Buckler Island (Factual Rebuttal, Ex. 45, Ref. 75). The lack of a tide gauge is irrelevant here, as the Prosecution Team established five independent estimates of the high tide line (HTL) to determine CWA jurisdiction with certainty. These assessments include (1) use of HTL data at nearby Port Chicago; (2) field observations of a wetted board to provide an adjustment estimate between Port Chicago and Point Buckler; (3) topographic data of observed debris wrack lines; (4) applying the NOAA adjustment factor for predicting high tides at Point Buckler; and (5) the McAteer-Petris Act upper limit of tidal wetland jurisdiction (Expert Report Ex. 11, App. I; CAO Expert Response, Ex. 22, § 4; ACL Expert Response, Ex. 46, § 1.6). The nearby Port Chicago station is located 3 miles south-southwest of Point Buckler. Port Chicago is one of five continuously operating tide gauges in the SF Estuary providing the highest quality tidal datums that the federal government establishes (CAO Expert Response, Ex. 22). The maximum interior elevation surveyed at Point Buckler is 1.5 feet below the most conservative HTL of the five independent estimates discussed above, thereby establishing that approximately 38.3 of the approximately 39 acres of the Site are below the high tide line and subject to CWA Section 404 jurisdiction, as waters of the State and United States (CAO Expert Response, Ex. 22, § 4; ACL Expert Response, Ex. 46, § 1.6).

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		The wetted board method and the NOAA adjustment factor indicate that high tides at Point Buckler are typically higher than those observed at Port Chicago. Therefore, the well-established Port Chicago HTL value is a conservative estimate of HTL at Point Buckler (ACL Expert Response, Ex. 46, § 1.6).
7	The "wet board method" was inaccurate, producing an elevation 9 inches higher than actual elevation. (Opp., p. 46.)	See ACL Factual Rebuttal, Ref. 6. The wetted board method is field evidence of a water line that is included in the U.S. Army Corps of Engineers Jurisdictional Delineation Manual. The wetted board method is one piece of empirical evidence used as part of an approach involving multiple lines of evidence to establish a HTL at the island (Expert Report, Ex. 11, App. I; ACL Expert Response, Ex. 46, § 1.6).
8	The NOAA adjustment factor is not correct because it is higher than the elevation observed using the board method. (Opp., p. 46.)	See ACL Factual Rebuttal, Ref. 6. NOAA provides tide predictions for 12 stations around Suisun Marsh, including Point Buckler. For each station, NOAA established a "height offset" multiplier for generating its tide height predictions, to be applied to its high precision tide predictions for Port Chicago. NOAA does not assert that their multiplier is an exact and static value applicable with certainty on every tide cycle (CAO Expert Response, Ex. 22, p. 9; ACL Expert Response, Ex. 46, § 1.6).
9	High tide cannot be determined from Port Chicago data because another photograph by the Prosecution Team shows elevations below 6.0 feet. The only legitimate scientific conclusion is that the actual high-tide line cannot be determined from Port Chicago at this time because the conversion factor is uncertain. (Opp., p. 46.)	See ACL Factual Rebuttal, Ref. 6. The photographs referenced are (1) a photograph taken by the Prosecution Team of the wetted board on the Island perimeter during the February 17, 2016, boat survey (Boat Survey, Ex. 30a), and (2) A separate photograph of a different part of the island taken about 5 minutes later, also taken by the Prosecution Team during the boat survey. The Dischargers' attorney then attempts to estimate the water level in each photograph by comparing the photographs with data points and related elevations from the March 2, 2016,

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		topographic survey (Bazel Ex. 35, CAO Proceeding). We disagree that the photographs show different water elevations, and the Dischargers have not presented evidence as to how their purported difference was determined. That is, there is no scientific method supporting the statement that there is a difference. By comparison, the tidal elevation on the wetted board was clearly established as described in the Expert Report (App. I), which documents confirmation of the board's elevation and the water line's elevation in subsequent survey work on the Island on March 2, 2016. The wetted board method was one of five lines of evidence to support the HTL determination of Point Buckler Island (ACL Factual Rebuttal, Ref 6). Additionally, regardless of what HTL estimate or adjustment value between tides at Port Chicago and Point Buckler is used, Point Buckler is well below local HTL and thus is entirely within Clean Water Act jurisdiction, with possible exception of the eastern remnant levee (ACL Expert Response, Ex. 46, p. 11).
	Step 1 – Potential for Harm for Discharge Violations	
	Factor 1 - Harm or Potential Harm to Beneficial Uses	
	Beneficial Effects on Wildlife (Suisun Marsh Preservation Act and Individual Management Plan)	
10	In 2014, the levee was repaired. That repair is the subject of this dispute. (Opp., p. 1.)	The CAO establishes that work performed by the Dischargers was not maintenance or repair. From May 2012, to October 29, 2014, Mr. Sweeney placed approximately 8,586 cubic yards of material on top of tidal marsh, tidal remnant levee, and tidal waters to construct a new 4,700-foot levee. The fill material came from excavating approximately 4,430 feet of borrow ditch from tidal marsh and tidal waters (Expert Report, Ex. 11, App. K; CAO, Ex. 32a, Findings 20-28).
11	The beneficial effects to recreation and wildlife provided by restoring the duck ponds on Point Buckler should offset other harm. (Opp., p. 24.)	The CAO establishes that unauthorized work conducted by the Dischargers adversely impacted beneficial uses including estuarine habitat, fish migration, preservation of rare and endangered species, fish spawning, and wildlife habitat. The fill remains in waters of the United States, blocking tidal action and resulting in long-term restrictions on these beneficial uses (Expert Report, Ex. 11, Apps. P

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		and Q; CAO, Ex. 32a, Findings 60-70; Factual Rebuttal, Ex. 45, Ref. 42). Point Buckler is designated as Critical Habitat under the federal Endangered Species Act (ESA) for Delta Smelt, Green Sturgeon, Steelhead, and two runs of Chinook Salmon. Under the ESA, alteration to designated Critical Habitat is defined as Take of federally listed species, thereby establishing harm to wildlife (ACL Expert Response, Ex. 46, § 1.5). Further, the Dischargers' activities on the island are inconsistent with Suisun Marsh duck club management prescriptions or objectives for water or habitat management and have degraded waterfowl habitat (Inspection Report, Ex. 6; CAO Expert Response, Ex. 22; Factual Rebuttal, Ex. 45, Ref. 62).
12	The Suisun Marsh Preservation Act protects duck clubs and duck ponds because they provide food for waterfowl. Duck ponds provide food and habitat that natural tidal marsh does not. (Opp., pp. 1, 16-17.) Preservation of duck clubs is consistent with beneficial uses in the Basin Plan. (*Id.* at p. 18.)	See ACL Factual Rebuttal, Ref. 11. We note that the Suisun Marsh Preservation Act also protects tidal marsh because it "provides critical habitat for other wildlife forms, including such endangered, rare, or unique species as…California clapper rail, black rail, salt marsh harvest mouse, and Suisun shrew" (Marsh Act, Ex. 24). It seeks to restore at least 5,000 acres of diked marshlands to tidal marsh (ACL Expert Response, Ex. 46, § 1.3). The Water Board's Basin Plan also designates the following beneficial uses to wetlands in the Suisun Marsh: estuarine habitat, fish migration, preservation of rare and endangered species, and fish spawning. Therefore, protection of the tidal marsh habitat that existed on the island prior to unauthorized activities is consistent with the Basin Plan (Basin Plan, Ex. 1b).
13	Duck clubs must comply with their individual management plans. Point Buckler has been managed as a duck club since at least the 1940s. In the 1980s, in accordance with the Suisun Marsh Preservation Act, an individual management plan was prepared for Point Buckler (the "Club Plan"). (Opp., p. 1. See	See ACL Factual Rebuttal, Ref. 11. SRCD records also show that no maintenance or management activities have been implemented on the island consistent with the IMP since as early as 1994 (CDO, Ex. 10a).

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	also pp. 4-5 [additional history] and pp. 58-59 [conformance with the individual management plan].)	Further, BCDC (the regulatory agency that certified the IMP) determined that the IMP no longer applied at the time Mr. Sweeney purchased the island in 2011 (CDO, Ex. 10a).
14	The Club Plan called for a tight levee. Tight levees are needed for duck ponds because they allow water to be maintained at a constant level, rather than rising and falling with the tides. Nevertheless, breaches in the levee appeared in the 1990s and 2000s. (Opp., p. 1. See also p. 9.)	See ACL Factual Rebuttal, Ref. 2, 11, and 13. Tight levees are not a necessity for duck hunting. During a June 9, 2016, meeting with the Dischargers, BCDC staff explained that not all hunters use managed wetlands and duck hunting occurs in tidal wetlands of Suisun Bay (June Minutes, Ex. 13k, § III.B.4).
15	The individual management plan is still in effect. (Opp., pp. 60-62.)	See ACL Factual Rebuttal, Ref. 13.
16	There is no evidence of harm to wildlife. (Opp., p. 25.)	The CAO established that the unauthorized activities on Point Buckler caused harm to tidal marsh, endangered species, and wildlife habitat. (CAO, Ex. 32a, Findings 59-70; CDFW Review, p. 1; Expert Response, Ex. 46, § 1.3 and 1.5)
	No Harm to Vegetation/Habitat/Endangered Species	
17	There was no mass dieoff of vegetation. Dr. Stuart Siegel acknowledged the vegetation on the island is "senescent" (turns brown and dies off in the winter; grows back in the spring). Dr. Terry Huffman confirmed that vegetation on the island is alive and will grow back next spring. In May 2016, two years after the levee repair, the island turned very green. The levee repair did not harm the vegetation on the island. (Opp., pp. 1-2. See also pp. 25, 43-44 and 50.) Assertions that the island is now dominated by pickleweed are simply wrong, as Mr. Sweeney's consultants have now established beyond any doubt. (Opp., pp. 15 and 25.)	The Water Board has already found that the Dischargers' unauthorized activities led to the mass dieback of tidal marsh vegetation on the island (CAO 32a, Finding 62). We have previously briefed the Dischargers' unsubstantiated claim that tidal marsh vegetation did not die back (CAO Factual Rebuttal, Ex. 45, Ref. 40). The Water Board's experts continue to assert that mass dieback of vegetation occurred and describe the related impacts to beneficial uses. (CAO Expert Response, Ex. 22.)The mass dieback (mortality) of wetland vegetation that occurred after the Dischargers' unauthorized activities is not the same as normal seasonal senescence (when plants are dormant) that occurred prior to unauthorized activities. (*Ibid.*) The Prosecution Team provided aerial photographs of Point Buckler and two nearby reference sites (Freeman Island and Snag Island) taken in February 2016 during the non-growing season when plants are

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		senescent, and aerial photos taken in June 2016, July 2016, and August 2016 during the growing season. Aerial photos of Point Buckler and two nearby reference sites taken in February 2016 show brown vegetation. The June 2016 through August 2016 aerial photos show live green vegetation at nearby reference sites. In comparison, the June 2016 through August 2016 aerial photos show brown dead vegetation inboard of the levee and green vegetation outboard of the levee on Point Buckler. This is consistent with photographs taken at Point Buckler during the Water Board's March 2, 2016, site inspection (Inspection Report, Ex. 6; Aerial Photos, Ex. 12d; CAO Expert Response, Ex. 22; Aerial Photos, Ex. 37). Dr. Huffman failed to provide conclusive evidence that marsh vegetation was alive. Standard field methods expose the interior of plant roots, shoots, or rhizomes to show living tissue that is clearly visible in cross-section. However, Dr. Huffman only described and photographed the exterior surfaces of plant roots and shoots and did not show cross-sections of interior living tissue. As such, Dr. Huffman's observations do not provide conclusive evidence on whether plants were alive, dead, or senescent (ACL Expert Response, Ex. 46, § 3). Dr. Huffman also failed to refute the prevalence and spread of perennial pepperweed on the island. His conclusions are based on observations during his October 2016 site visit, when perennial pepperweed naturally withers down to negligible cover. The Water Boards' experts characterized the prevalence and spread of perennial pepperweed based on observations during a March 2016 site inspection, during the early part of its growing season. As such, the Water Board experts likely underestimated the abundance of perennial pepperweed, which peaks between May and June (ACL Expert Response, Ex. 46, § 3).
18	The Prosecution Team has had nothing to say about the	See ACL Factual Rebuttal, Ref. 17.

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	photographs taken in May 2016, which show that the island was very green. (Opp., p. 43.)	The photographs provided by the Dischargers represent a snapshot in time and do not include scientific analysis of what the photographs represent, such as context relative to seasons of regrowth and periods of senescence and comparisons to nearby reference sites. This is provided by the Prosecution Team.
19	There is no direct evidence of harm to any endangered fish. Dr. David Mayer, has explained that the Prosecution Team's conclusion that harm was "likely" assumes the channels were entirely beneficial to the endangered species, failing to consider the effects of predation. There is insufficient information to conclude that the channels provided a net benefit. The borrow ditch is substantially wider and deeper than the preceding ditches, thereby providing improved habitat for endangered fish. (Opp., pp. 2, 15-16, 25-26, 44 and 50.)	See ACL Factual Rebuttal, Ref. 11. There is scientific consensus that (1) restoration of tidal marshes in the San Francisco Estuary/Sacramento-San Joaquin Delta benefits many fish species; and (2) tidal marsh channels with vegetated banks, such as those found at the island prior to unauthorized levee construction, provide important outmigrating habitat for juvenile salmonids (CAO Expert Response, Ex. 22). For example, 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." (CDFW Review, Ex. 48, p. 1). While there is no "body count" of the number of fish who died as a result of Dischargers' unauthorized activities, there is no question that harm occurred.
20	There is no evidence that Mr. Sweeney's activities harmed waterfowl. The prosecution team's activities harmed waterfowl because they prevented Mr. Sweeney from completing the duck ponds and planting vegetation that provides duck food. (Opp., p. 15.)	See ACL Factual Rebuttal, Ref. 11 and 12.
21	Duck ponds provide better habitat for ducks than tidal marsh. (Opp., pp. 15, 17-18.)	The USGS Study cited in the Opposition Brief describes how Suisun tidal marshes provided habitat for waterfowl and supported a very abundant waterfowl population long before conversion of any tidal

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		marsh to diked lands for any purpose (Waterfowl Ecology, Bazel Ex. 28; ACL Expert Response, Ex. 46, § 1.3).
	Factor 2 – The Physical, Chemical, Biological or Thermal Characteristics of the Discharge	
22	The material at issue is dirt, which is not toxic. The number should have been zero. (Opp., pp.31-32.)	A factor of 0 would mean that the discharged material was benign and did not impact potential receptors. The Prosecution Team characterized the earthen fill material from levee construction as a sediment concern with a moderate level of concern to environmental receptor protection. The high level of fill discharged during levee construction is at least a moderate threat to receptors due to high potential for sediment clogging fish gills, burying of habitat, and smothering of organisms (Complaint, Ex. 5, Ex. A, p. A4). "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." (CAO Expert Response, Ex. 22, § 1.3). The Water Quality Control Plan for the San Francisco Basin (Basin Plan) is the master policy document that contains descriptions of the legal, technical, and programmatic bases of water quality regulation in the San Francisco Bay region. The Basin Plan identifies discharges of "dirt" as a concern through water quality objectives (objectives for sediment, settleable material, and suspended material) and prohibitions. The discharge of silt, sand, clay, or other earthen materials in quantities sufficient to cause deleterious bottom deposits, turbidity or discoloration in surface waters or to unreasonably affect or threaten the affect beneficial uses is prohibited (Prohibition No. 9). Basin Plan section 4.20.4

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		(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." The potential for discharges of sediment is broadly regulated, demonstrating widespread concern regarding potential impacts. For example: (1) on land (e.g., National Pollutant Discharge Elimination System General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities, Order No. 2009-0009-DWQ, as amended); (2) when working along streams and dredging (reporting of activities required pursuant to Water Code sections 13260 and 13376); and (3) for levee work in the Suisun Marsh (in accordance with RGP3, the BCDC Suisun Marsh Protection Plan, and the SRCD Suisun Marsh Management Program).
23	Water naturally carries sediments. The Prosecution Team has not shown any increase in the ambient concentration of dirt. No evidence that the dirt was toxic. (Opp., pp. 31-32.)	See ACL Factual Rebuttal, Ref 22.
	Steps 2 and 3 – Per Day Assessments for Discharge Violations	
24	Mr. Sweeney worked five days a week and took a month off. Estimated time of work is 100-130 days.	The Prosecution Team assessed days of discharge from the first evidence of fill placement until the hearing date for the Administrative Civil Liability complaint. Fill material has remained in place with a daily detrimental impact due to tidal blockage to the island interior and restriction of beneficial uses (Complaint, Ex. 5, Ex. A, p. A1). Additionally, continued mobilization of levee fill from erosion was observed during both the March 2, 2016, inspection and the October 4, 2016, site visit (Inspection Report, Ex. 6; Survey Memo,

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		Ex. 52). Mr. Sweeney's and the Club's levee construction was not permitted, and fill associated with unpermitted work is resulting in discharges into San Francisco Bay.
	Step 4 – Adjustment Factors	
	Adjustment Factor – Culpability	
25	Mr. Sweeney had never heard of a 401 water quality certification before starting work on the levee. He obtained a regional general permit, known as "RGP3", from the U.S. Army Corps of Engineers (the "Corps"). RGP3 authorizes repairs of levees at duck clubs. The Regional Board did not participate in that permitting. (Opp., p. 2. See also pp. 7-10 and 40.)	The Water Board has already found that unauthorized work performed by the Dischargers was not maintenance and was not permitted or permittable under RGP3 and the Water Board's related Water Quality Certification for RGP3 (RGP3 Cert., Bazel Ex. 7, ACL Proceeding; CAO, Ex. 32a, Finding 73). The legal brief explains the authorities establishing that ignorance or mistake of law is not an excuse. In this case, there was no ignorance of the law. Mr. Sweeney had full notice of the Clean Water Act sections 301, 404, the State permitting program for levees in jurisdictional waters three years prior to starting the levee construction at Point Buckler. Mr. Sweeney has interests in five duck clubs, Chipps Island, and Spinner Island in addition to Point Buckler (Sweeney Letter to Owners, Ex. 38b, p. 2. See also News10 article, Ex. 59b [Sweeney owns three Delta islands]). In 2008, Mr. Sweeney applied for a permit through SRCD to replace floodgates on Spinner Island (Ex. 19a) In 2011, he contacted SRCD to inquire about obtaining an emergency permit for a broken levee, specifically asking which permits were in effect for maintenance and dredging on Chipps Island (June 20, 2011 e-mail, Ex. 38a). 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 (Ex. 38a). 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 (June

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		23, 2011 email, Ex. 38a). This clearly gave Mr. Sweeney notice that levee repairs may not comply with RGP3. Mr. Sweeney's past actions on other properties demonstrate that he knew that permit coverage was necessary for levee modifications, indeed modifications that are miniscule in comparison to the activities at Point Buckler. Yet despite this knowledge, he never contacted the SRCD for permit coverage for Point Buckler. Additionally, Steve Chappell, Director of SRCD, stated during the August 10, 2016, CAO hearing that "[i]n my time as a member of the Resource Conservation District and as the Executive Officer, there were no permitted activities authorized or conducted at the site, that I'm aware of." (Hearing Transcript, Ex. 32b., p. 112). Mr. Sweeney received a full description of Clean Water Act sections 301 and 404 compliance 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 (Ex. 40a). The Notice of Alleged Violation explains that when Mr. Sweeney sunk a metal shipping container into the breached portion of the levee and filled it with dredge material, those activities 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. § 1344) of the Clean Water Act." Clean Water Act Section 404, subdivisions (g) and (h) describe how states may administer their own individual and general permits, putting Dischargers on notice of a permitting program with the State of California. The Dischargers have continuously claimed that Mr. Sweeney thought that his activities on Point Buckler Island were covered by the RGP3 permit. Language in RGP3 itself clearly identifies the certification

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		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). (Dischargers' Exhibit A; RGP3, PT's Ex. 2b, p. 8) Page 2 of the Regional Water Board's June 27, 2013, letter regarding Conditional Water Quality Certification for the Regional Permit Number 3 Reissuance Project, Suisun Marsh, Solano County, states, "[w]e 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." (Dischargers' Exhibit A and Bazel Ex. 7). The RGP3 itself explains the requirement for a 401 Certification.
26	Duck clubs rarely need a 401 certification. The Prosecution Team has not identified a single 401 certification issued to a duck club.	We agree that Duck Clubs performing maintenance activities rarely need an individual 401 certification from the Board beyond the Board's Certification of the RGP3 (401 Certifications, Ex. 51). That is because many maintenance activities performed by duck clubs are regulated under the Corps RGP3 and the relate Water Board RGP3 certification. Duck club maintenance activities that require dredging in tidal areas are regulated under the Corps Letter of Permission Procedure for the Suisun Marsh Dredging Program and the Water Board's certification of the Suisun Marsh Exterior Levee Maintenance Dredging Program (Bazel Ex. 7; PT Ex. 51b). However, the activities conducted by the Dischargers far exceed those that could be considered maintenance (ACL Rebuttal Ref. 10, 25). The Water Board has also issued 401 certifications for the Blacklock

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		Restoration Project and the Tule Red Tidal Restoration Project (two duck clubs that were restored to tidal marsh) as well as the Department of Water Resources' Roaring River Distribution System fish screen sediment removal project. In all these cases, the Water Board issued 401 certifications because proposed activities in managed wetlands were not authorized under RGP3 (401 Certifications, Ex. 51).
27	The Corps visited the island and did not tell Mr. Sweeney he needed a 401 certification. Mr. Sweeney filled out an application for RGP3 and the Corps staff person took it with her. It was not produced in a response to a FOIA request and the Corps only located it in the past few weeks. The Corps did not communicate that a 401 certification was needed. Corps said "after the fact" permit could be issued. (Opp., p. 3. See also pp. 7-10 and 39.)	See ACL Factual Rebuttal, Ref 25. The Dischargers were well aware of the need for a permit and how to seek one, and the statement regarding the Corps' possible issuance of an "after the fact" permit is not relevant. This Board has already found that the Dischargers performed work without permits in violation of the Basin Plan and CWA sections 301 and 401 (CAO, Ex. 32a, Finding 72). Water Board staff is unaware of the derivation of the application or why it was not previously located.
28	Mr. Sweeney asked SRCD about permitting; SRCD observed the levee repair; SRCD did not ask Mr. Sweeney to get a permit. (Opp., pp. 2-3. See also pp. 10 and 39-40.) SRCD was aware of construction, but did not communicate any violations during construction. (*Id.* at pp. 9 and 39-40.)	See ACL Factual Rebuttal, Ref. 25 and 26. Mr. Sweeney stated he believed he needed to gain work authorization under RGP3 for the work. Due to his involvement at Spinner and Chipps Island, he was aware of RGP3. However, he chose not to follow the RGP3 authorization procedure for work at Point Buckler, and an application was never received (RGP3, Ex. 2b, p. 7; CDO, Ex. 10a, Ex. B, Paras 15-17; Spinner Work Request, Ex. 19a; Hearing Transcript, Ex. 32b, p112-114; 2011 Emails, Ex. 38a; BCDC Transcript, Bazel ex. 4, p.82-84). The first statement is hearsay (see Evidentiary Objections) and SRCD staff will be present at the December 14, 2014, hearing to address any issues raised regarding SRCD involvement with the Dischargers (BCDC Transcript, Bazel Ex. 4, p.82-84).

	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
29	Mr. Sweeney contacted BCDC and was told that Point Buckler was not within BCDC jurisdiction. (Opp. pp. 8 and 10.) BCDC was aware of construction, but did not communicate any violations for seven months. (*Id.* at p. 9.)	BCDC staff have no recollection of communicating with Mr. Sweeney that Point Buckler Island is not within BCDC jurisdiction and believe Mr. Sweeney drew false conclusions from second-hand information (Declarations, Ex. 49a and 49b; BCDC Recommended Decision, Ex. 49c, p.19). Additionally, BCDC staff contacted Mr. Sweeney to communicate violations after determining that the site was not part of an authorized restoration or mitigation project (BCDC Recommended Decision, Ex. 49c, p. 20). BCDC staff will be present at the December 14, 2016, hearing to address any questions that might be raised concerning BCDC involvement with the Dischargers.
30	The Regional Board was invited on a site visit in November 2014, but did not attend. (Opp., p. 9.) Duck clubs usually are permitted through RGP3, which does not involve communication with the Regional Board. (*Id.* at p. 10.) The Prosecution Team issued the July 2015 Notice of Violation and September 2015 CAO before touring the island in October 2015. (*Ibid*.) Mr. Sweeney met with the Prosecution Team in October and November 2015 to establish a "permitting track" for a duck club and kiteboarding club, which the Prosecution Team was not receptive to in 2015 but has now agreed to the concept. (*Id.* at p. 11.)	See ACL Factual Rebuttal, Ref. 25 and 26. Water Board staff (Agnes Farres) asked to attend the November 2014 site visit, but was not included. We previously briefed the Water Board on the findings of the 2015 CAO, which were based on sufficient information, including historical and current aerial photos; three letters from BCDC describing the nature of activities and violations; and conversations with staff at BCDC and CDFW describing the results of their November 2014 site inspection (Factual Rebuttal, Ex. 45, Ref. 63). Water Board staff met with the Dischargers in October and November 2015 to discuss unauthorized activities and tidal restoration of the island. We have previously briefed this Board on how Water Board staff have and continue to meet and work with the Dischargers to permit planned recreational uses on the island. However, any plans or permit applications may be submitted separately or in parallel with work done to comply with tasks in the CAO, namely tidal restoration (CAO, Ex. 32a, Findings 35 and 40; Factual Rebuttal, Ex. 45, Ref. 45.)

	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
		To date, Dischargers have failed to provide any detailed plans for restoration. (July Minutes, Ex. 36a; Oct. Minutes, Ex. 53a) The Interim Corrective Action Plan submitted on November 10, 2016, is similarly deficient and fails to provide a reasonable plan for restoration. The ICAP lacks significant and substantive information necessary to be acceptable. It does not provide sufficient technical justification to demonstrate that proposed corrective actions will be effective or implementable or that it will meet the goals stated above. Several of the proposed actions may result in additional harm to water quality functions and values at Point Buckler. Information missing from the ICAP includes acceptable performance and success criteria, environmental observations and analysis to support proposed restoration actions, and an acceptably detailed workplan for completing the interim restoration work. The workplan omits, for example, a schedule for obtaining the permits and other approvals necessary to complete the work. Water Board staff has been requesting some of this information for more than a year, since the September 11, 2016, issuance of CAO No. R2-2015-0038. (ICAP Recommendation, Ex. 53c.)
31	In comparison, Mr. Sweeney understood that he needed a permit (actually a lease) from the State Lands Commission for the dock at Point Buckler. He therefore applied for an obtained a lease. (Opp., p. 8.)	Mr. Sweeney did not obtain a lease for the unauthorized boat dock until *after* it was already constructed. Mr. Sweeney installed a small boat dock on the island by April 2013, and replaced this with a larger dock by February 2014. The State Lands Commission authorized his lease on February 20, 2015 (Expert Report, Ex. 11, App. K, p. K-3; Official Records, Ex. 12c). Mr. Sweeney stated during the BCDC Enforcement Committee meeting, "[y]eah, it was a massive dock so I cut it in half and wedged it into the existing pilings at Point Buckler." (Bazel Ex. 4, p.50, line 7 and 8.) However, at least two new pilings were installed as part of this endeavor (Expert Report, Ex. 11, App. K, Figs. K-5, K-18).
32	The Prosecution Team acknowledges that Mr. Sweeney obtained coverage for the work at Chipps Island under the Corps' general permit RGP3. No separate 401 certification was needed for that	See ACL Factual Rebuttal, Ref. 25. The language of RGP3 describes the limitations of that permit and the

	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
	work and the Regional Board had no involvement in the matter. The events at Chipps Island did not put Mr. Sweeney on notice of the need for a 401 certification and the Prosecution Team does not argue to the contrary. (Opp., p. 38.)	need to comply with the conditions of the Water Board's 401 Certification for RGP3. Maintenance activities authorized under RGP3 are required to comply with the Water Board's RGP3 certification, as specified by Permit Special Conditions #6 (RGP3, Ex. 2b; RGP3 401 Certification, Bazel Ex. 7). The proposed levee repair at Chipps Island was maintenance initially authorized under RGP3 and the Water Board's RGP3 certification. However, Mr. Sweeney conducted the levee repair work in violation of RGP3. (Army Corps Notice, Ex. 40a.)
33	Mr. Sweeney's levee-building activities were intended to restore the duck ponds. (Opp., pp. 7 and 19.)	See ACL Factual Rebuttal, Ref. 11. Mr. Sweeney only began to claim his intent to restore duck ponds after BCDC discovered the unauthorized levee construction, and after BCDC gave Mr. Sweeney a copy of a management plan for a duck club (IMP) during a site inspection in November 2014. Mr. Sweeney did not construct any crescent ponds on the island until January 2015. However, these crescent ponds were not consistent with how duck ponds are constructed in other managed wetlands and had degraded water quality (Inspection Report, Ex. 6; CDO, Ex. 10a, p.7; Expert Report, Ex. 11, App. K, Fig. K-31; BCDC Complaint, Ex. 26b, p.9). Mr. Sweeney has made numerous claims that the unauthorized levee construction was protected under the IMP and that his work was to restore duck ponds. Since it is not possible to know his intent or what he may have done, we refer to records and actions taken. Mr. Sweeney's early statements mention kiteboarding and his plans to develop the island without permits (Club's Facebook Post, Ex. 19b). He proceeded to construct an unpermitted levee without adequate water control structures to manage a duck club (one tide gate installed; the IMP called for two 24-inch gates to adequately manage water at the island for its duck club, IMP, Ex. 26a), and the levee is being used to protect from tidal inundation structures associated with a kiteboarding business (Club's Facebook Post, Ex. 29). Despite notices to stop work and obtain permits by BCDC in January 2015

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		(BCDC Letter, Ex. 17a) and staff at the Water Board in July 2015 (NOV, Ex. 9), the Dischargers continued to develop the island for kiteboarding activities (place unauthorized structures on tidal wetlands (structural fill)), create a website for a kiteboarding club, hold an open house for club members, and operate a kiteboarding business (NOV, Ex. 9; Club's Facebook Post, Ex. 29; Ex. 19i; Ex. 55e; Ex. 55f). While the Dischargers refer to stop work requests as an impediment to restoring duck ponds at the island, at the same time the Dischargers ignored stop work requests and continued to develop the island so that they could operate a kiteboarding business. Duck hunting was not initially mentioned on the Point Buckler Club website, and was added only after the Prosecution Team issued its tentative CAO and ACL complaint in May 2016 (Club Website, Ex. 19j). Outside of his defense against regulation and enforcement, Mr. Sweeney is "Living the Delta lifestyle to the fullest. Kite private islands and show others the secrets of adventure kiting. The ultimate retired dude lifestyle:)" (Sweeney Twitter, Ex. 55c).
34	Mr. Sweeney brought a disc and roller to plant duck food, but did not complete the work because the agencies objected. (Opp., p. 19.)	See ACL Factual Rebuttal, Ref. 33.
	Adjustment Factor – Cleanup and Cooperation	
35	Mr. Sweeney cannot be blamed for the many months the Prosecution Team took to consider a permitting track. (Opp., p. 37.)	ACL Factual Rebuttal Ref. 36 through 40 Despite Water Board staff's attempts to provide information over more than a year, the Dischargers have neither submitted permit applications nor prepared and submitted substantive information that could serve as a prelude to permitting. (June Minutes, Ex. 13k; July Minutes, Ex. 36a; Oct. Minutes, Ex. 53a.; ICAP Recommendation, Ex. 53c.) Staff from the Water Board and other regulatory agencies (BCDC and EPA) met with the Dischargers and provided input for permitting and

	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
		restoration of the island. Despite the efforts to supply ample information and time for the Dischargers to prepare relevant plans for the island nothing substantial has been provided to date. Water Board staff along with staff of EPA and BCDC met with the Dischargers three times (in June, July, and October 2016) to discuss conditions and plans for the Island and to describe the permitting process with the respective agencies. During the June 2016 meeting the Dischargers wished to clarify a permitting path forward. In response, the agencies described general permitting requirements. The Dischargers agreed to prepare a plan/proposal of current and future use of the island. In the July meeting the Dischargers provided a single draft concept drawing for the island and initial discussions included input from the agencies about permitting that would need to be considered and what the Dischargers should have for the next meeting considering the tentative CAO. In the October meeting the Dischargers provided only an inadequate draft Interim Corrective Action Plan that lacked sufficient detail and technical justification for staff to provide input (June Minutes, Ex. 13k; July Minutes, Ex. 36a; Oct. Minutes, Ex. 53a; ICAP Recommendation, Ex. 53c.).
36	No regulatory agency has ever asked Mr. Sweeney to restore the tidal flow by opening the tide gate, refuting the conclusion that it is necessary to do so. (Opp., p. 14, 37.)	Both the 2015 CAO and 2016 CAO require the Dischargers to submit a plan designed to restore tidal action. The CAO and the Water Board do not prescribe the means or methods for tidal restoration (2015 CAO, Ex. 8a, Provision 2; CAO, Ex. 32a, Provision 2). It has been up to the Dischargers to submit a plan for returning tidal flow to the island interior, which may include reopening the tide gate. Prosecution staff has asked Dischargers to take into account that any planned use of the tide gate needs to consider water exchange and potential impairments to water quality, consistent with how duck clubs manage discharges during cycles of flooding and draining wetlands. (Exs. 1.d., 2.b., 3.g., 27, 31, 53.c.).During meetings with the Dischargers, Water Board staff has emphasized the urgency and need to restore tidal action (June Minutes, Ex. 13k; July Minutes, Ex. 32a, Oct. Minutes, Ex.

	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
		53a).
37	Mr. Sweeney agreed to perform investigations. (Opp., p. 37.)	During a November 20, 2015, meeting, Mr. Sweeney agreed to provide additional information including (1) the extent of waters of the State on the island before and after construction activities; (2) a topographical survey; (3) a description of current and intended future activities on the island; (4) the date(s) excavation from the borrow ditch and levee construction began; (5) documentation of his claims that the island was operated as a managed wetland from 1984 until Mr. Sweeney purchased the island in 2011; and (6) documentation of his claim that the island is "mitigation." Water Board staff requested that information be provided by February 15, 2016. To date, we have not received any of this information from the Dischargers (Submittal Request, Ex. 13c).
38	Mr. Sweeney did not refuse to complete the work due in February 2016. Mr. Sweeney's attorney tried to meet with the Prosecution Team; they refused to meet until they collected the data Mr. Sweeney offered to collect.	Both the Dischargers and the Prosecution Team had agreed that onsite data would benefit all parties (Submittal Request, Ex. 13c) and inform the decision-making process, and the Dischargers agreed to provide information to assess the extent of impacts to waters of the State (Club Request, Ex. 15d). Because the Dischargers were failing to provide this information, Water Board staff requested permission to access the island and because Water Board staff was not granted timely access after four requests, staff obtained an inspection warrant from Solano County Court (Warrant Files, Ex. 7; Submittal Request, Ex. 13c).
39	In July, Mr. Sweeney submitted a conceptual proposal to restore some tidal flow, retain a duck pond, and use a small area for kiteboarding. (Opp., p. 18.)	The Dischargers submitted a conceptual sketch consisting of a single annotated aerial image of the island during the July 22, 2016, meeting, depicting a duck club and kiteboarding facilities on the island. The Dischargers proposed four breaches in the levee, but provided no scientific basis for the proposed breaches, such as hydraulic analyses. The Dischargers' proposal did not demonstrate that sufficient tidal flow would be restored or how much tidal restoration would be achieved. Further, the Dischargers were generally opposed to any discussions regarding mitigation (July Minutes, Ex. 36a; Draft Concept, Ex. 36b).

	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
40	Mr. Sweeney will be submitting a draft interim corrective action plan for a meeting in October, as called for in the CAO, along with additional materials. (Opp., p. 19.)	During an October 25, 2016, the Dischargers' representatives submitted a draft interim corrective action plan (draft plan) for discussion. Water Board staff noted that the draft plan proposed interim corrective measures and recreational uses that were not compatible with tidal restoration. Water Board staff said the draft plan did not provide sufficient detail and technical justification, specifically noting that (1) proposed application of herbicides was not appropriate or approved for use at aquatic sites; and (2) no hydraulic analysis was provided to demonstrate that proposed corrective actions will provide sufficient tidal flow. Water Board staff expressed frustration regarding the failure to provide this data after the explicit request to do so at the July 22, 2016, meeting (July Minutes, Ex. 36a.; Oct. Minutes, Ex. 53a). The Dischargers subsequently submitted a modestly-revised Interim Corrective Action Plan (ICAP) on November 10, 2016. However, the revised ICAP did not include necessary detail, including hydraulic and water quality analyses, necessary to determine if it would meet the tidal restoration goals, and some proposed actions, including application of an herbicide, proposed tide gate operation, and discharge of ponded water potentially low in dissolved oxygen, seemed likely to result in further harm to beneficial uses. Additionally, the revised ICAP lacked an acceptably detailed implementation plan. For example, its implementation plan did not include a proposed schedule for obtaining permits or consulting with the relevant agencies. (ICAP Assessment, Ex. 53c.)
	Step 6 - Ability to Pay and Ability to Continue in Business	
	Ability to Pay	
41	The Prosecution Team has miscalculated Mr. Sweeney's net worth, and not given enough weight to Mr. Sweeney's inability to pay. Mr. Sweeney has no income, and very little in the way of cash and liquid assets. His net worth is zero or negative. He does not have enough money to pay a six-figure fine. (Opp., p. 1.) • Assets include landing craft valued at less than $895,000	As Baykeeper told the Water Board, "[t]his is the most egregious illegal fill of tidal marshland in the Bay's recent history." (Nov. 2015 Transcript, Ex. 20a). The proposed penalty is, accordingly, the highest proposed by staff for illegal fill activities. The proposed penalty calculation includes an ability to pay analysis that is based upon diligent efforts by the Prosecution Team to search information that is

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	(has been for sale for three years). • Net worth of $4.2 million is not enough to pay a penalty of $4.6 million, permits for and implementation of restoration, and BCDC penalty of ~$1 million. • Robert Bucci declaration • Mr. Sweeney has no income and almost no cash. • Point Buckler Island has a negative value, considering cost of restoration. • Property purchased in July 2015 has a residual value of $160,000. • Second home was sold and should not factor into calculations. • Proceeds from the Tiburon property were invested in Point Buckler Island and other activities are not in cash form. • Mr. Sweeney's assets are no greater than $3.4 million. (Opp., pp. 3-4, 19, 32-36.)	publicly available for the Dischargers. Most financial information is not publicly available, and it is therefore the Dischargers' burden to disclose financial records if there is a claim of inability to pay the proposed liability. Not only has Mr. Sweeney not provided any evidence of income and assets, other than unsupported declarations, he has also failed to provide any evidence of Point Buckler Club's finances. On May 17, 2016, the Dischargers received notification of the ACL complaint and an attached ACL fact sheet that lists the kinds of information that would be used for establishing ability or inability to pay a penalty (e.g., tax returns, living expenses, bank account statements, investment statements, real estate documents, vehicle ownership, credit card statements, and mortgage loan statements). The Prosecution Team has advised the Dischargers that the financial information provided by Mr. Sweeney and in Robert Bucci's declaration is unsupported and discloses too few specifics to support an inability to pay defense (Nov. 2016 email thread, Ex. 54).
42	Mr. Sweeney has additional liabilities including $450,000 for a previous debt, $300,000 for consultants and lawyers, and an expected $772,000 BCDC fine. (Opp., p. 35.) Total estimated liabilities total nearly $8.5 million and net worth minus $0.2-5.1 million. (Opp., pp. 35-36.)	The claims of additional liabilities that Mr. Sweeney has concerning previous debt and consultant and lawyer fees, as well as net worth, are unsupported and unreliable. (ATP Memo, Ex. 47a.)
43	A penalty is inconsistent with restoring the island. (Opp. p. 19.)	Penalty and restoration of the Island are two different types of enforcement actions. An ACL penalty is assessed for past actions and is justified in this case to deter future harmful conduct and assure equity between those who choose to comply with regulatory requirements and those who violate them (Enf. Policy, Ex. 1e; Complaint, Ex. 5; CAO, Ex. 32a). A CAO is issued for future actions that are needed in this case to restore damaged tidal wetlands and beneficial uses at the island (CAO, Ex. 32a).
44	The cost of restoration includes:	The Prosecution Team cannot comment on costs of restoration

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	Permitting ($1.1 million) Restoration ($3-6 million) (Opp., pp. 19-20.)	because it has not received any permit application nor a plan with the necessary analyses to evaluate restoration. (June Minutes, Ex. 13k; July Minutes, Ex. 36a; Oct. Minutes, Ex. 53a.; ICAP Recommendation, Ex. 53c.).
	Ability to Continue in Business	
45	The penalty will prevent Mr. Sweeney from continuing in business. (Opp., pp. 36-37.)	The opposition brief cites to no evidence. Mr. Sweeney states that he has been retired since 2001 and has no net taxable income; however, net taxable income is not representative of cash flow as several allowable non-cash expenses and adjustments in the tax code can be used to reduce or offset tax liability, but do not affect cash flow (ATP Memo, Ex. 47a [noting that in order to obtain such large financial obligations, Mr. Sweeney must have sufficient assets]). It is reasonable to assume that Mr. Sweeney has no financial issues preventing him from securing debt. If Mr. Sweeney has no income, then it is unclear what business he will be unable to continue. Point Buckler Club, LLC has also failed to provide any evidence of finances, liabilities, or an inability to pay. The Prosecution Team has performed an analysis of publicly available information to determine the finances of the Club. Mr. Sweeney loaned the Club $1.2 million using the Point Buckler property as collateral, making the land value conservatively equal to this amount. Ten memberships to the Club were available for purchase (Club's Facebook Posts, Ex. 19i; Ex. 55e; Ex. 55f) and using 50% of land value equal to the membership value, the Prosecution Team estimated that value at $600,000 (Complaint, Ex. 5., p. A13). One member of the Club, Jeff Katka, identified himself as a partner/operator in 2014 and has been involved with seeking other members (Jeff Kafka Facebook Posts, Ex. 55a; Club's Facebook Post, Ex. 19i).
	Step 7 – Other Factors as Justice May Require	

	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
	Consistency With Prior Penalties	
46	Cedar Knolls • 14.2 acre parcel; filled two wetlands and associated streams • Only paid $85,000; $1,742,000 suspended as long as restoration occurred; $100,000 suspended as long as mitigation and monitoring occurred. (Opp., pp. 23-24.)	In the Cedar Knolls case, substantial negotiations occurred prior to the adoption of the currently effective Enforcement Policy and associated penalty calculator (adopted May 20, 2010), and is not directly comparable to the enforcement matter of John D. Sweeney and Point Buckler Club, LLC, for at least two reasons: (1) the Dischargers did not choose to pursue a settlement path to both come into compliance and resolve a penalty; and (2) the Water Board and Cedar Knolls Vineyards agreed to use the Enforcement Policy adopted in 2002 for the stipulation and enforcement order (Bazel Ex. 33, p. 6).
47	Other penalties were assessed on large corporations that can easily pay a multi-million-dollar penalty. (Opp., p. 22.)	The ability of Mr. Sweeney and Point Buckler to pay is discussed above. (ACL Factual Rebuttal, Ref. 41-45.) The Enforcement Policy does not distinguish between large corporations or private individuals.
48	The Kinder Morgan matter was more egregious, involving 123,732 gallons of oil discharged into a duck club. (Opp., p. 22.)	The Kinder Morgan case is not directly comparable. The cited document is a consent decree prepared by the U.S. Department of Justice and is not an enforcement proceeding of the Water Board. Additionally, the action predated the Enforcement Policy and associated penalty calculator (adopted May 20, 2010), which seeks to fairly and consistently implement [liability provisions of the Water Code] for maximum enforcement impact to address, correct, and deter water quality violations (Enf. Policy, Ex. 1e, p. 9).
49	The harm here is not comparable to other cases involving toxic discharge and fish kill, including 29 steelhead trout (harm level of 4). (Opp., p. 26.)	The potential for harm is far greater in this case as multiple federally and state listed species were affected as well as critical habitat for five federally listed species. Additionally, the harm in the case referred to against SFPUC (R2-2014-1003) had an acute (a one day event) effect on beneficial uses as opposed to this case, where beneficial uses have been restricted since 2014.
50	The harm here is more comparable to a discharge of millions of gallons of raw sewage and toxic substances into Corte Madera Creek, home to steelhead trout and Chinook salmon (harm level between 1 and 2). (Opp., p. 26.)	The harm to beneficial uses calculated in the cited case against California Water Service Company (R2-2016-1012) was actually a 4, not “between 1 and 2”. Additionally, the unauthorized discharge in that case was potable water and not raw sewage. The potential for

	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
		harm was calculated as higher for the Point Buckler matter because beneficial uses have been restricted since 2014 and both state and federal threatened and endangered species were affected. Additionally, critical habitat for 5 federally listed species was altered and would be considered "take" under the Endangered Species Act (ACL Expert Response, Ex. 46, § 1.5).
51	The toxicity of dirt should be a zero compared with chloramines released in the Cal Water case.	The Cal Water case involved a potable water (chloramines) release to a creek and is not directly comparable to the matter. A settlement was reached with the Water Board and the discharger. Additionally, the Enforcement Policy provides a consistent approach and analysis of factors to determine administrative civil liability and a factor of 2 for cases of dredge and fill is consistent with prior enforcement actions. 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. Also, the enforcement policy states that "…with respect to liability determinations, each Regional Water Board, and each specific case, is somewhat unique." (Ex. 1e, p. 10)
52	In October 2015, Mr. Sweeney met the first required deadline and submitted a technical report and additional information. (Opp., p. 10.) Mr. Sweeney proposed to conduct extensive additional scientific studies, including a topographic survey, in return for an extension of the second deadline, which at that time was set at January 1, 2016.	See ACL Factual Rebuttal, Ref. 35-40. We have previously briefed the Water Board on the Dischargers' October 2015 submission of a technical report entitled "Conditions at Point Buckler." This report inadequately characterized the extent of impacts to waters of the State. The report (1) erroneously assumed that mean high water correlates with the debris line; (2) made the mistaken assumption that the extent of jurisdictional waters of the State and United States are limited to areas below mean high water; (3) made no estimate of the extent of tidal marsh on which fill was placed; and (4) grossly underestimates the actual volume of fill placed within waters of the State and United States (Expert Report, Ex. 11; Expert Response; Factual Rebuttal, Ex. 45, Ref. 47).

	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
		During a November 20, 2015, meeting, Mr. Sweeney agreed to provide additional information to assess the extent of impacts to waters of the State and also requested a second extension for submittal of a Corrective Action Workplan. However, Mr. Sweeney did not propose to collect additional information in return for a second extension. Water Board staff denied the second extension request due to lack of technical justification and the urgency and need for tidal restoration (Submittal Request, Ex. 13c; Extension Response, Ex. 13d).
53	The prosecution team refused to meet until they had inspected the island, canceled a February 2016 meeting, insisted on doing the work that Mr. Sweeney had offered to do, such that there was no reason for Mr. Sweeney to do it. (Opp., p. 12.)	See ACL Factual Rebuttal, Ref. 38.
	Step 8 - Economic Benefit or Savings	
54	The levee repair was intended to restore the duck ponds; the duck ponds have not been completed; the revenue generated by the duck club was zero. The true economic benefit of the levee repair is zero; there is no revenue generated as a result of the levee repair. (Opp., pp. 40-42.)	See ACL Factual Rebuttal, Ref. 33 The opposition misconstrues "economic benefit," as that term is used in the Enforcement Policy. Economic benefit is not limited to monetary gain, but also includes the savings derived from the violation (Enf. Policy, Ex. 1e, p. 20). In this case, the actions that would have been necessary to comply with the Clean Water Act and Water Code (not to mention CEQA) include getting a permit and mitigating for dredge and fill activities. These costs have been avoided to date. The Enforcement Policy directs the Water Boards *not* to adjust economic benefit "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. 1e, p. 21). Furthermore, no information has been provided regarding revenues and finances associated with Point Buckler Club, LLC.

	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
55	The Prosecution Team did not provide the BEN model, the assumptions used for the model, or an explanation of how the calculation was done. (Opp., p. 42.)	The BEN model is publicly available on the U.S. EPA website (https://www.epa.gov/enforcement/penalty-and-financial-models) along with documentation discussing its use and assumptions (BEN Model, Ex. 47c; BEN Manual, Ex. 47d).
	Accusations of Vengeance/Retaliation/ Vindictiveness	
56	On December 23, 2015, Mr. Sweeney filed suit against Bruce Wolfe and the Regional Board in Solano Superior Court, and on December 28 moved ex parte for a stay. He argued that the prosecution team had not complied with the due process requirements applicable to a cleanup and abatement order. The Court agreed, and issued the stay.	There is nothing in the Order that indicates that there was any failure to comply with due process (Court Stay Order, Ex. 50a). The Court ultimately dismissed the litigation as moot (Court Sustain Order, Ex. 50b; Court Dismissal, Ex. 50c).
57	In Solano Superior Court, Mr. Sweeney established that Regional Board staff routinely violate the due process rights of those who are issued cease and desist orders.	See ACL Factual Rebuttal, Ref. 56 The Court litigation had nothing to do with cease and desist orders.
58	The Prosecution Team met with the District Attorney's Office in Solano County "to recruit the District Attorney's Office to join in the war against Mr. Sweeney." (Opp., p. 13.)	Water Board staff members Brian Thompson, Benjamin Martin, Agnes Farres, and Office of Enforcement attorney, Laura Drabandt, met with District Attorney (DA) representatives to provide the status of the Prosecutions Team's investigation and discuss the Water Board hearing process. The Prosecution Team and DA's office have no joint prosecution agreement, and the DA has had no involvement to date in any of the Water Board proceedings.
59	The Prosecution Team turned hostile in early January—immediately after Mr. Sweeney prevailed in court, and the Prosecution Team rescinded the Initial Order. (Opp., p. 38. See also p. 49.) Here, there is a presumption of unconstitutional vindictiveness because there was no talk of penalties by either the prosecution team or BCDC staff before Mr. Sweeney filed his suit… (Opp., p. 49)	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; (3) prepare a CAO requiring a restoration plan for the site; and (4) start an ACL case. This strategy was implemented months before Mr.

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		Sweeney filed suit and is consistent with enforcement staff's approach to addressing violation where there is significant harm. (Whyte Decl., Ex. 58) Consistent with this approach, on July 28, 2015, Water Board staff sent the Dischargers a Notice of Violation for Filling Waters of the United States and State. Under the section "Statutory Liability" it is clearly stated that the Water Board reserves the right to seek monetary penalties for the violations (NOV, Ex. 9). Additionally, in a January 2015 letter, BCDC notified the Dischargers of violations and related penalties (Ex. 17a). The Prosecution Team's priority has always been restoration of the island, with a focus on issuing a CAO to ensure prompt restoration. The Prosecution Team advised Dischargers early in the process that the issuance of a CAO was separate and not in the place of potential penalties for the violation (2015 CAO, Ex. 8a; NOV, Ex. 9).
60	The severe penalty can only be explained as a vindictive response to Mr. Sweeney's victory in Solano Superior Court. (Opp., p. 43.)	Application of the Water Board Enforcement Policy promotes a consistent approach to assess administratively civil liabilities. The penalty is consistent with liability associated with the volume of fill discharge and its associated impacts. The calculation of the penalty is transparent and each factor and multiplier has been explained.
61	On September 1, 2016, the Corps sent Mr. Sweeney a notice of violation for an issue related to Chipps Island. The Prosecution Team included a copy of that letter as part of its September 2 submission in this penalty proceeding, and BCDC staff provided another copy on September 7 as part of a submission in a different penalty proceeding. The letter was coordinated among the agencies to characterize Mr. Sweeney as a scofflaw, and so that it would chill his speech and hurt him even more. (Opp., p. 48.)	The Enforcement Policy considers culpability and history of violations as factors. The documents are relevant to these factors. Furthermore, this letter was not coordinated amongst agencies and Mr. Bazel's assertion that agencies are purposely trying to attack Mr. Sweeney is completely fabricated and unsubstantiated as discussed in the legal brief. In contrast, Mr. Sweeney has utilized Facebook as a means to attack and discredit agency staff with complete disregard of factual information (Suisun Marsh Property Owners Forum Facebook Post, Ex. 55b)
62	Dr. Siegel produced an incorrect map. Mr. Sweeney believes the errors in the 2004 map were intentional and has publicly	We have previously briefed this Board on the Dischargers' attempts to discredit Dr. Siegel (Siegel Decl. Ex. 23; Factual Rebuttal, Ex. 45, Ref

	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
	accused Dr. Siegel of scientific misconduct; Dr. Siegel is biased. (Opp., pp. 53-55.)	68-69).
	Bazel Declaration	
63	In October 2015, Mr. Sweeney's consultants and me met the first deadline set out in the Regional Board's initial cleanup and abatement order (the "Initial Order") and submitted a technical report and additional information. (Para 11)	See ACL Factual Rebuttal, Ref. 52.
64	Although the prosecution team has since agreed to the concept of permitting kiteboarding and a duck club on the island (along with the restoration of most of the island), at that time they were not receptive to permitting anything. (Para 13)	See ACL Factual Rebuttal, Ref. 30 and 35.
65	Mr. Sweeney proposed to conduct extensive additional scientific studies, including a topographic survey, in return for an extension of the second deadline, which at that time was set at January 1, 2016. (Para 14)	See ACL Factual Rebuttal, Ref. 52.
66	Regional Board staff canceled a meeting that was set for February. They insisted on doing the work that Mr. Sweeney had offered to do. As a result, there was no point in Mr. Sweeney performing the work. (Para 18)	See ACL Factual Rebuttal, Ref. 38.
67	After many e-mails, Mr. Sweeney agreed to an inspection in early March. The prosecution team wanted the inspection to be in later February, and obtained an inspection warrant. (Para 19)	See ACL Factual Rebuttal, Ref. 38.
68	Recent scientific work by the U.S. Geological Survey has confirmed that waterfowl prefer duck ponds to natural tidal marsh, and raises concerns about the loss of duck ponds and conversion of some duck ponds to tidal marsh. (Para 23)	See ACL Factual Rebuttal, Ref. 21.
69	Mr. Sweeney is proposing to open the tide gate as an interim measure. When Mr. Sweeney previously suggested opening the tide gate, BCDC staff asserted that the pipe would need to be screened—thereby preventing access to the endangered fish that were supposedly benefitting from the channels. (Para 33)	See ACL Factual Rebuttal, Ref. 36.

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70	The prosecution team did not ask Mr. Sweeney whether he would be completing the work, and Mr. Sweeney did not refuse to complete the work. (Para 34)	See ACL Factual Rebuttal, Ref. 37 and 38.
71	I was concerned that if the prosecution team became hostile, it would be difficult to resolve the matter. (Para 35) Before Mr. Sweeney filed his suit, there was no talk about penalties, by either the prosecution team or BCDC, for the repair of the levee. (Para 38)	See ACL Factual Rebuttal, Ref. 59.
	Sweeney Declaration	
72	Duck clubs do not generally use pumps because they do not need them. Duck ponds are typically below high tide levels, and can be filled simply by opening the tide gates. There is only one reason that a pump would have been installed at Point Bucker. Because the island was high and dry, water had to be pumped up onto the island. But pumping is not enough to create duck ponds. There must be a tight levee to hold the water in the place. If water were pumped onto the island before the levee was repaired, it would simply run off. (Para 2)	See ACL Factual Rebuttal, Ref. 1 and 2. The claim that water needs to be pumped up onto a high and dry island is inconsistent with topographic data and evidence of a HTL at the island and with the silting in of past duck ponds, and there is no evidence that past duck club operations required a pump to manage the inflow of water to its ponds. This is a misstatement. Duck clubs often use pumps to effectively drain water from their property because managed wetlands become subsided over time and siltation can block channels and tide gates and limit or prevent gravitational drainage (Marsh Conceptual Model, Ex. 3g; Factual Rebuttal Ref. 57). In addition, John Sweeney stated his intent to keep water in when he described inflow associated with water management at Point Buckler Island in a series of earlier emails to Stuart Siegel on May 14, 2015 (Siegel Decl., Ex. 23). He says that Point Buckler Island is a “partially muted tidal wetland” that can be managed “with flood gates and the many riser boards on each small pond inlet.” “The three small inlets to ponds had wood riser boards to trap water in…They are not there to keep water out but keep it in.” A series of flood and drain cycles

	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
		are required at the end of the season (Factual Rebuttal, Ref. 57).
73	According to the previous owner, the levee was repaired in the early 1990s, and the Department of Water Resources ("DWR") installed a pump. An old pump and a generator are still there. The pump is designed to float in the open water, and to draw water a few feet below the surface. There was a hose to carry the pumped water over the levee and onto the island, where it would have flooded a large area that could be used as a duck pond. By 2011, however, the levee fell into disrepair. When I purchased the island in 2011, the previous owner told me DWR was requiring that the levee be repaired. DWR has no records relating to the Point Buckler, and no institutional memory about installing the pump. (Para 2)	See ACL Factual Rebuttal, Ref. 3 and 72.
74	Beginning in 2012, I drove bulldozers across the island, and found dry ground except in the channels and ditches. My bulldozers did not get bogged down in wet soil, and when walking around the island I did not see any wet soil. From 2012 through 2014, I kiteboarded using the "lawn" on the western side of the island along with some others. This area is outside the levee. During this time, I never observed any wetting of the kiteboard lawn from tidal waters. (Para 6)	See ACL Factual Rebuttal, Ref. 4 Mature tidal marsh at Point Buckler has soil sufficient to bear loads such as vehicles and equipment (CAO Expert Response, Ex. 22, p. 28). Additionally, Mr. Sweeney's observations of the kiteboard lawn were during times when the high tides occurred in the middle of the night, not during daylight hours (CAO Expert Response, Ex. 22, Fig. 3, p.6).
75	My purpose in repairing the levee was to restore the duck ponds. The levee repair was not needed for kiteboarding, which had been going on since 2012 outside the levee. The levee was not needed to dry out the island, because it was already high and dry. I understood that the old pump on the island had been used to pump water into the duck ponds, and that the levees would have to be repaired in order to recreate those duck ponds. I recognized that I could also recreate ponds by digging them out, and that a levee would also be needed for that purpose. Without a levee, water would not remain in the ponds; it would drain away during low tides. (Para 7)	See ACL Factual Rebuttal, Ref.33 and 72. During a previous meeting with Prosecution Team staff and again during the CAO hearing in August, the Dischargers have expressed their concerns regarding need for levee work to prevent erosion of the Island. (June Minutes, Ex. 13k, p. 2) and at the August 10, 2016, CAO hearing, Mr. Bazel states, "[s]o, there's been a big loss of land on the Island, lots of erosion. Not surprising that the levies have needed repair." (Ex. 32b, p. 55). Regardless, whether the intended use was a duck club or kiteboarding is irrelevant in the application of the Enforcement Policy.
76	At the time I began the levee repair, I had never heard of the	See ACL Factual Rebuttal, Ref. 25.

	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
	phrase "401 cert". I was not aware I needed any permit for the levee repair. Although I had previously obtained a permit from the U.S. Army Corps of Engineers (the "Corps")—a regional general permit known as "RGP3"—I did not believe one was needed for Point Buckler. (Para 10)	
77	I spoke with SRCD, was told that Point Buckler was not a member of SRCD, and believed that RGP3 permits were used for SRCD members. I also thought that permits were not needed for non-tidal islands, and that Point Buckler was not tidal. After the levee break, the interior of Chipps Island was under several feet of water. Point Buckler was always high and dry. I also contacted the San Francisco Bay Conservation and Development Commission ("BCDC") and was told that Point Buckler was not within BCDC jurisdiction. My understanding was that other duck clubs who were not members of SRCD did not obtain permits. (Para 12)	See ACL Factual Rebuttal, Ref. 28 and 29.
78	In 2011, I worked with BCDC to remove docks from BCDC's jurisdiction. A post on BCDC's website describes that activity as a successful enforcement action in which docks were removed from BCDC's jurisdiction. Attached as Exhibit 4 is an accurate copy of the BCDC webpage that I printed. (Para 13)	See ACL Factual Rebuttal, Ref. 29.
79	In October 2014, BCDC called me and asked for a site visit. BCDC invited Regional Board staff to join in the site visit. During the November 2014 visit, BCDC staff provided me with a copy of the individual management plan for Point Bucker (the "Club Plan"), and told me that if my work was done in accordance with the Club Plan it was OK. Attached as Exhibit 5 is an accurate copy the Club Plan. (Para 14)	See ACL Factual Rebuttal, Ref. 13, 15, and 30. Furthermore, we note that attached as Exhibit 5 to Declaration of Mr. Sweeney is what is purported to be the IMP, with pagination added by the dischargers. Exhibit 5 actually contains multiple documents, is not an accurate copy of the IMP, and should not be sequentially numbered. An accurate copy of the IMP, as certified in 1984, is provided as Prosecution Team Exhibit 3a.
80	In February 2015, Corps staff visited the island and informed me that I could obtain "after the fact" permitting approval through the Corps' RGP3. Corps staff assisted me in filling out the form, which I signed and gave to Corps staff. I did not keep a copy for	See ACL Factual Rebuttal, Ref. 27.

	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
	myself. The Corps did not make any additional requests of me, or accuse me of any violations, until March 28, 2016, when the Corps notified me that the case was being transferred to EPA for possible enforcement. The Corps did not suggest that I contact Regional Board staff or obtain approval from the Regional Board. (Para 16)	
81	I cannot restore the island if I have to pay the proposed penalty. (Para 23)	See ACL Factual Rebuttal, Ref. 41 and 42. Mr. Sweeney's statement is unsupported and discloses too few specifics to support an inability to pay defense. (ATP Memo, Ex. 47a.)
82	If I have to pay a penalty of $4.6 million, or any substantial penalty, I will not be able to pay the permitting costs, provide for mitigation, or do the work to restore the island. (Para 24)	Mr. Sweeney's statement is unsupported and discloses too few specifics to support an inability to pay defense. (ATP Memo, Ex. 47a.) See also ACL Factual Rebuttal, Ref. 41 and 42.
83	There is a second mortgage on the property I purchased in July 2016 in the amount of $160,000. (Para 27)	See ACL Factual Rebuttal, Ref. 41.
84	I sold the house the prosecution team referred to as being valued at $200,000. (Para 28)	See ACL Factual Rebuttal, Ref. 41.
85	The proceeds of the sale of my house in Tiburon have been invested in Point Buckler Island and other activities, and are no longer available in cash form. (Para 29)	See ACL Factual Rebuttal, Ref. 41.
86	I retired around 2001, and since then have not been employed by anyone. Nor have I received any wages since 2001. I currently have no net taxable income, and have not had any net taxable income for several years. I have cash in the amount of approximately $80,000. I also have cars and boats and liquid interests in the amount of approximately $85,000. I have minority contractual interests in investment partnerships that give me no managerial control and no guaranteed or minimum return, and that prohibit me from selling or assigning the interest. (Para 31)	This declaration does not provide any supporting documentation, which is necessary to demonstrate an inability to pay. (ATP Memo, Ex. 47b). Additionally, Mr. Sweeney states that he has no net taxable income; however, net taxable income is not representative of cash flow as several allowable non-cash expenses and adjustments in the tax code can be used to reduce or offset tax liability, but do not affect cash flow. (*Ibid.*) Publicly available documents suggest that Mr. Sweeney owns three Delta islands, sold a car for $400,000, and is an "avid car collector." (Sweeney Facebook, Ex. 55d; News Article, Ex. 59b; Business Wire Article, Ex. 59c). Mr. Sweeney's declaration offers an incomplete picture of inability to pay.

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87	I have several additional liabilities. I owe $450,000 for a previous debt. I owe nearly $300,000 to consultants and lawyers. I expect the San Francisco Bay Conservation and Development Commission to impose a fine of $772,000 against me. (Para 32)	See ACL Factual Rebuttal, Ref. 42.
88	I am not comfortable providing financial documents or more detailed information because I believe the agencies will use this information to lower the value of my assets. (Para 33)	The Prosecution Team has disagreed with the request for confidentiality: "Mr. Sweeney has disclosed any specific details or information of a 'highly personal nature" concerning his financial situation. He has submitted nothing that details his net worth and nothing even close to the standard information that dischargers routinely disclose in penalty matters [See ACL Fact Sheet and Individual Ability to Pay Claim Form]. We further note that Mr. Rollens does not address the concern that documents considered by the Board and forming the basis for their decision should be available to the public." (11/7/16 email from Dyan Whyte to Advisory, Ex. 54.)
89	When Corps staff visited Point Buckler in February 2015 and inspected the levee repair, that staff person did not say to me, "You need a 401 cert from the Regional Board." Instead, she said that I could be covered by RGP3. I filled out the form with her at the island and signed it. She took it with her. I did not hear back from the Corps until March 2016, when I received a letter from the Corps transferring the matter to EPA. (Para 34)	See ACL Factual Rebuttal, Ref. 25.
90	In 2011 I contacted SRCD about Point Buckler. I was told that Point Buckler was not one of SRCD's active clubs. The Executive Director of SRCD knew me, my phone number, and my e-mail address. (Para 35)	See ACL Factual Rebuttal, Ref. 28 and 29.
91	The levee repair was made to restore duck ponds. Because I was told to stop work, those duck ponds have never been completed. In 2014 the revenue generated by the duck club was zero, and they have been zero ever since. (Para 36)	Dischargers have not submitted any evidence of duck club memberships, income or liabilities associated with Point Buckler Club, LLC.
92	I would not have spent $6 million so that I could obtain $600,000 in revenues. (Para 37)	Assuming all of the proceeds from capital gains realized from the sale of a property located in Tiburon, California were reinvested in Point

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		Buckler Island (Sweeney Decl., Para 29), it is reasonable to conclude that the value of the property should reflect the investment. This would reassess the value of Point Buckler Island at approximately $3.225 million. In addition, based on Mr. Bazel's interpretation of expected return on investments, it is increasingly likely that Mr. Sweeney and Point Buckler Club, LLC expect to financially gain significantly more than the $600,000 estimate provided by the Prosecution Team (ATP Memo, Ex. 47a).
93	Before I filed his suit, there was no talk about penalties, by either the prosecution team or BCDC, for the repair of the levee. (Para 41)	We disagree. See ACL Factual Rebuttal, Ref. 59.
94	Attached as Exhibit 11 is an accurate copy of an e-mail I received from Stuart Siegel to on May 14, 2015. (Para 43)	This cited email is incomplete. A true and complete set of emails was provided in the Declaration of Dr. Stuart Siegel during the CAO proceeding (Siegel Decl., Ex. 23).
95	Attached as Exhibit 12 is an accurate copy of an e-mail I received from Stuart Siegel on May 14, 2015. (Para 44)	See ACL Factual Rebuttal, Ref. 95.
96	Attached as Exhibit 15 is an accurate copy of an e-mail I received from Christina Grosso, of the San Francisco Estuary Institute, on June 17, 2015. (Para 48)	See ACL Factual Rebuttal, Ref. 95.
97	I believe that the errors in the 2004 map were intentional, and I have made that belief known publicly. (Para 49)	There are no errors in the map and no intentional misrepresentation was made (Siegel Decl., Ex. 23, Para 11).
98	Where the existing levee was intact, the levee was maintained by placing material on top of it. On the northern side of the island, where the old levee had been eroded away, the repaired levee turn inland, and stayed inside the debris line. (Para 50)	Work performed by the Dischargers was not maintenance or repair. From May 2012, to October 29, 2014, Mr. Sweeney placed approximately 8,586 cubic yards of material on top of tidal marsh, tidal remnant levee, and tidal waters to construct a new 4,700-foot-long levee. The fill material came from excavating approximately 4,430 feet of borrow ditch from tidal marsh and tidal waters (Expert Report Ex. 11, App. K; CAO, Ex. 32a, Finding 25).
99	The levee repair work was stopped before it was complete because of regulatory objections. The Club intended to install another tide gate, and to make the slopes of the levee consistent with the Management Program. The Club also intended to disc the soil, to plant vegetation preferred by	See ACL Factual Rebuttal, Ref. 33. BCDC, the regulatory agency that certified the IMP, determined in their Cease and Desist Order that the IMP no longer applied at the time Mr. Sweeney purchased the island in 2011 (CDO, Ex. 10a).

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	waterfowl, and otherwise to create duck ponds. The Club would like to proceed to complete the work and install duck ponds. (Para 51)	The Water Board staff has not ruled out the possibility of including duck ponds on Point Buckler, but the Dischargers have failed to complete and submit the necessary analyses and related work sufficient to submit applications for it. Neither the Water Board nor the other agencies that would have to consider permits or other approvals for the work have received even draft or incomplete permit applications. (June Minutes, Ex. 13k; July Minutes, Ex. 36a; Oct. Minutes, Ex. 53a.; ICAP Recommendation, Ex. 53c.).
100	A levee is required for managed wetlands-duck ponds-because dock ponds maintain a continuous water level even as the tide rises and falls. (Para 52)	See ACL Factual Rebuttal, Ref. 72.
	Bucci Declaration	
101	This declaration describes review of statement made by staff of the Water Board concerning the net worth of John Sweeney. Additionally, it has basic analysis based on financial information provided to Mr. Bucci from Mr. Sweeney. Mr. Bucci admits that information provided to him from Mr. Sweeney has not been verified.	This declaration does not provide an analysis of net cash flow for Mr. Sweeney and Point Buckler Club, LLC. Additionally, Mr. Sweeney states that he has no net taxable income; however, net taxable income is not representative of cash flow as several allowable non-cash expenses and adjustments in the tax code can be used to reduce or offset tax liability, but do not affect cash flow (ATP Memo, Ex. 47a). The Prosecution Team pointed out that the financial information provided by Mr. Sweeney and in Robert Bucci's declaration is unsupported and discloses too few specifics to support an inability to pay defense, let alone the type of detail that normally would be considered by the Board (Nov. 11 email thread, Ex. 54). Additionally, on May 17, 2016, the Dischargers received notification of the ACL complaint and an attached ACL fact sheet that lists the kinds of information that that would be used for establishing ability or inability to pay a penalty (e.g., tax returns, living expenses, bank account

	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
		statements, investment statements, real estate documents, vehicle ownership, credit card statements, and mortgage loan statements).
	Huffman Declaration	
102	This declaration focuses on discussing vegetation, water quality, and observations of tides on October 13, 2016, at Point Buckler Island in an attempt to refute findings made by the Prosecution Team.	Dr. Huffman attempts to compare data collected on October 13, 2016, to the data collected by the Water Board on March 2, 2016. Dr. Huffman was present during the March 2, 2016, Water Board inspection of Point Buckler Island and it is unclear why the Dischargers did not have Dr. Huffman collect data concurrently to have directly comparable information. The Dischargers instead delayed data collection for seven months and provided no notification to the Prosecution Team that it would be collected. Additionally, Dr. Huffman's comparison of data collected is not sufficient due to temporal variation (it was collected during a different vegetation growth cycle). Further information regarding rebuttal of Mr. Huffman's approach is detailed in Prosecution Team Exhibit 46, § 3.
	Mayer Declaration	
103	This declaration comments on the findings from the May 12, 2016, Technical Report, specifically Appendix P that emphasizes adverse effects to beneficial uses related to listed fish species.	Information regarding rebuttal of Dr. Mayer approach to refute findings is detailed in Prosecution Team Exhibit 46, § 2.