Administrative Civil Liability Complaint
No. R2-2016-1008

John D. Sweeney and
Point Buckler Club, LLC

Description of Exhibit Previously Provided by the Prosecution Team
(CAO Factual Rebuttal)

Exhibit 45

Prosecution Team's Revised Factual Rebuttal to Discharger's CAO Initial Evidence Submittal, August 4, 2016

PROSECUTION TEAM FACTUAL REBUTTAL

Abbreviations Used

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

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

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

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

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

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

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

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

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

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38	BENEFICIAL USES - For salmon, there is no real conclusion about what is good or bad. Small shallow channels can be detrimental because of the dangers of predation, as well as stranding and temperature. A similar discussion could be had about the life strategies of the listed species other than salmone, but unfortunately with much less scientific knowledge at scientists' finger tips and a lot more educated guesses than proven fact. (p. 27.)	Studies of west coast salmonids broadly demonstrate the use of shallow water habitat by juvenile salmon, and shallow water habitat has historically supported salmon food webs. Scientific consensus has concluded that tidal wetland loss constrains the growth and survival of juvenile salmonids (Experts' ~~Report, p. 26~~Response p.32).
39	BENEFICIAL USES - Staff have asserted that the levee repair dried out tidal marsh. The Club has protested that this assertion is not true, to no avail. (p. at p. 11.)	The Prosecution Team asserts that the Dischargers drained the island, and that dried vegetation and soil are symptomatic of a drained wetland. The Dischargers have not presented evidence to refute the scientific evaluation of conditions at Point Buckler Island presented in the Expert Report and a Water Board inspection report dated April 19, 2016. (PT Evidence, Exhibits 6 and 11.)
40	BENEFICIAL USES - The Technical Report attempts to relate past conditions and wet and dry periods to site conditions observed during March 2016 indicating that the island has been dried out. But the May 2016 photographs taken of the island contradict the report's conclusion. (p. 25.) The Technical Report asserts that the levy repair is "causally associated with mass dieback of obligate wetland plants." But there were mass diebacks of vegetation *before* the levee repair. In May 2012, for example, Mr. Sweeney observed that the vegetation on the island was brown and brittle and appeared dead. Photographs taken by Mr. Sweeney show what appears to be dead vegetation. An aerial photograph shows that the island appeared mostly brown in May 2012. Aerial photographs show that the island appeared brown throughout most of 2013 and 2014. Because the vegetation on the island was brown	Tidal marsh vegetation undergoes natural seasonal senescence, such that vegetation is green and at peak growth during the late summer and fall, and dormant in the winter. This is different from mass dieback of marsh vegetation observed during the March 2, 2016 site inspection. (Experts' Response, p. 27). This is supported by color and non-color (infrared) aerial photographs taken since the levee was constructed. These aerial photos show vegetation that is predominantly green outside of the levee and predominantly brown inboard of the levee, where wetlands have been drained. In contrast, aerial photos of nearby reference sites taken at the same time show predominantly green tidal marsh vegetation. Aerial photos from the flyover contracted on February 10, 2016, and June 29, 2016, as well as photographs taken at Point Buckler during the March 2, 2016 inspection, all tell the same story, that vegetation outside the levee is green and inboard of the levee

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

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

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

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

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

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

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

	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
		conversations with staff at BCDC and CDFW describing the results of their November 2014 site inspection (PT Evidence Exhibit 8a).
64	PARA.S 11, 12, 13, and 18 - The top of the levee is made up of dirt and peat. It has not been paved, graveled, or otherwise protected against erosion. Any substantial flow across the top of the levee would have left erosion marks. The peat in the levee is especially fluffy and weak, and is easily eroded. There are no marks of water flowing over the top of the levee. I was on the island on July 3, 2016, and observed no erosion marks or any other sign that any water had flowed over the top of the levee. During all of the time I was repairing the levee, I never saw the island under water, nor have I seen it under water before or since. During the time I was working on the island, I did not see water rise up over the top of the interior channels and ditches and spread over the land.	There has been consolidation and compaction of the levee from drying and heavy equipment use (PT Evidence, Exhibit 6, p. A8), and we dispute characterization of the levee is fluffy and weak. It is not disputed that the levee is erodible; erosion of the levee was evident during the March 2, 2016 inspection (PT Evidence, Exhibit 6, p. A1 and A13). The wrack line discussed in the Expert Report and the report for the March 2, 2016 inspection record evidence of tidal water reaching the top and back of the levee, not any substantial overtopping of the levee. A scientific analysis of tides, tidal elevations that occurred during the time when Sweeney constructed the levee, and how tidal wetlands flood is provided in various discussions within the Expert Response. In summary, high tides are brief in time, often occurred at night during the work period, and overbank inundation is shallow and hidden by the extensive cover of tall, dense wetland vegetation.
65	PARA. 15 – The white line along the shore of the island consists of debris, included dead vegetation and whitened wood, along with some other detritus including syrofoam. Attached as Exhibit 2 are accurate copies of photographs I took of the debris line at Point Buckler.	The debris line documented by Sweeney is a drift line that forms along the first barrier, often along the outer tidal marsh edge, that intercepts and traps floating tide-deposited or wave-deposited debris (Experts' ~~Report, p. 14~~Response, p.29); it is not the high tide wrack line documented in the report for the March 2, 2016 inspection (PT Evidence, Exhibit 6) and Expert Report. The white debris or drift line is evident in front of the levee in the aerial photograph taken on February 10, 2016, and marsh in front of the levee was underwater on February 17, 2006 (Exhibit 30a).
66	PARA. 19 - When I drove a bulldozer across the island, the island was dry. To repair the levee, I used an excavator that weighs about 60,000 pounds. If the island had been tidal marsh, the excavator would have gotten	Mature tidal marsh at Point Buckler has soil sufficient to bear loads such as vehicles and equipment (Experts' Response, p. ~~13~~28). Sweeney states that, "my father in law Mike Frost can attest to the quality and practices I used in restoring buckler as

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

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

	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
	flowing with substantial velocity is powerful, and readily erodes unstabilized dirt. Water flowing over the Point Buckler levee at a depth of 1.5 feet would deeply erode the levee. When I was at the island, I did not see any sign that water flowed completely across the levee. I have observed a debris wrack line at the island…..I have also observed finer debris and other debris above that line….The Technical Report selected debris along the margin of the re-established levee when assessing the wrack line, and therefore may have based its determination on debris that was affected by wave run up.	about what wrack line he observed, and it is surprising that he only observed a wrack line. There are often multiple tide lines including the debris line observed by John Sweeney (rebuttal to Sweeney Declaration Para. 15) and the wrack line associated with a recent high tide documented by the Prosecution Team (Expert Report and Experts' Response). What is lacking is any evidence and scientific evaluation of a high tide wrack line, such as a wrack line that would have been associated with the high tide documented during a boat trip on February 17, 2016 (Exhibit 30a).
73	PARA. 5 - The report fails to provide evaluation of the debris line alone [along] the more protected areas on the eastern side of the island.	No debris wrack line was observed on the eastern shoreline during the March 2, 2016 site visit. The eastern shoreline is characterized by a steep bank to the upland levee crest lacking depositional settings for wrack to accumulate (Experts' ~~Report, p.16~~Response, p. 20).
74	PARA. 6 - The Technical Report does not report the presence of any wrack lines, debris wrack line, or fine debris within the interior, even along the former tidal channels where the levee was breached.	No wrack line was observed on the interior of the levee. The wrack line documented in the Expert Report reached the top but did not substantially overflow the levee. Further recent tides relative to the levee height are presented in the Expert Report (Appendix F, Fig. F-8) and discussed further in the Expert Response.
75	PARA. 7 (Part 1 of 2) - The Technical Report used one data point to adjust tide data from Point Chicago to Point Buckler. Standard practice would be to install a temporary recording tide gage at the Point Buckler location.	The installation of a temporary tide gauge was not possible given the unwillingness of the Dischargers to provide timely access to Point Buckler Island and limited in the inspection warrant for the Prosecution Team to obtain information from Point Buckler Island. Selection of Point Chicago as the tidal reference point was done according to accepted practices as discussed in the Rebuttal Brief and discussed further in the Expert Response.
76	PARA. 7 (Part 2 of 2) - In addition, the data point used by the Technical Report involved a wet board. The board	The wetted mark on the board provides accurate evidence of high tide. The photograph was taken at approximately 9:47

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

	FACTS PRESENTED IN OPPOSITION	FACTS PRESENTED IN REBUTTAL
	habitat of its many sloughs and channels. We assume, as does Dr. Herbold, that this habitat is good, and that more of it is better.	benefits many fish species. These benefits can be extremely important for growth and survival of desirable species including salmonids. Studies of west coast salmonids broadly demonstrate the use of shallow water habitat by juvenile salmon, and shallow water habitat has historically supported salmon food webs. Scientific consensus has concluded that tidal wetland loss constrains the growth and survival of juvenile salmonids (Experts' ~~Report, p. 26~~Response, p. 32-33).
79	PARA. 4 – But arguing that all of the Delta's sloughs and channels are good for the listed species lacks scientific certainty, in fact such an argument is hardly more than a lightly researched theory.	Same comment.
80	PARA. 5 – For salmon, there is no real conclusion about what is good or bad. Small shallow channels can be detrimental because of the dangers of predation, as well as stranding and temperature. Scientists are at the very beginning of our thinking about whether these small channels are good or bad for salmon. Point Buckler was not a salmon spawning area.	Same comment.
81	PARA. 6 – A similar discussion could be had about the life strategies of the listed species other than salmon, but unfortunately with much less scientific knowledge at our finger tips and a lot more educated guesses than proven fact.	Same comment.
82	PARA. 7 – It would be prudent to decide the site-specific goals of Point Buckler Island habitat restoration and maintenance planning with respect to each listed species and their unique life stages. I believe that in the process of assessing and developing such a set of goals and objectives, we can decide whether or not to open the Island channels and habitat, and whether the openings should be screened to keep fish out of potentially bad habitat, but allow nutrients to flow in	Same comment.

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

Administrative Civil Liability Complaint
No. R2-2016-1008

John D. Sweeney and
Point Buckler Club, LLC

Description of Exhibit Provided by Hard Copy and Electronically

Exhibit 46

Experts' Response to October 19, 2016, Evidence Package (includes attachments)

EXPERTS RESPONSE TO DISCHARGERS OCTOBER 19, 2016 OPPOSITION BRIEF AND MAYER AND HUFFMAN DECLARATIONS

POINT BUCKLER

Prepared for:

San Francisco Bay Regional Water Quality Control Board

In the Matter of Point Buckler Island

Prepared by:

Siegel Environmental

San Rafael, California

November 18, 2016

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Experts' Response to October 19, 2016 Evidence Package

November 18, 2016

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ATTACHMENTS

Attachment A. Comparison of Marsh Vegetation Before and After 2014 Diking at Point Buckler, and References Sites of Nearby Freeman, Snag and Simmons Islands and Rush Ranch
Attachment B. September 21, 2016 Experts Letter to BCDC Regarding Role of Daily Ebb and Flow of the Tides in Establishing Tidal Marsh
Attachment C. Invalid Huffman Water Quality and Tide Stage Data
Attachment D. Summer and Fall 2016 Aerial Photographs of Point Buckler, Freeman Island, and Snag Islands and Summer 2016 Rush Ranch
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Introduction

This Experts Response addresses the Opposition Brief prepared by Larry Bazel, Declaration prepared by David Mayer, and Declaration prepared by Terry Huffman, all dated October 19, 2016.

This Experts Response is prepared by:

- Stuart Siegel, PhD
- Peter Baye, PhD
- Bruce Herbold, PhD

1 Response to Bazel Opposition Brief

1.1 Item II.C – Island Was Tidal Marsh

All claims made in the Opposition Brief to support the assertion that Point Buckler was "high and dry" before the 2014 levee construction have been established as without merit. Before the levee construction, Point Buckler was a tidal marsh.

The October 2016 Opposition Brief claim that Point Buckler Island was "high and dry" contradicts the following undisputed facts:

- There is no dispute that the soils on the island were mapped by the Soil Conservation Service in 1977 as hydric (wetland) soils units "Joice Muck" and "Tidal Marsh" (May 2016 Technical Assessment, Figure H-4 [Siegel Environmental 2016a]).
- There is no dispute that Point Buckler Island vegetation was dominated by "obligate" marsh plants, including tule, bulrush, and cattail marsh vegetation, on hydric (wetland) soils (a) at the time of diking, and (b) during the decade prior to 2012 when the California Department of Water Resources and Department of Fish and Game mapped the vegetation of the island (May 2016 Technical Assessment, Figure H-2). Tule, cattail and bulrush species at Point Buckler are listed as "obligate" wetland plants in the Arid West 2016 Regional Wetland Plant List maintained by the U.S. Army Corps of Engineers http://wetland-plants.usace.army.mil/.
- There is no dispute that "obligate" wetland plants are defined by the Corps of Engineers as those which almost always occur in wetlands (99% of the time).
- There is no dispute that tule, bulrush and cattail vegetation dominated the vegetation sampling points on the island during Dr. Huffman's October 2016 site investigation long after diking and drainage ditches were completed (Huffman October 2016 Declaration at (3)), and during operation of heavy equipment before diking (July 11, 2016 Sweeney Declaration exhibits 3 and 4, showing photographs of tule, cattail, and bulrush marsh vegetation exclusively dominating the portions of the island where his equipment was operating).

- Evidence establishing that Point Buckler was not merely marsh, but tidal marsh (wetlands subject to tidal hydrology, below high tide line) prior to the 2014 levee construction is irrefutable, is presented in the May 2016 Technical Assessment Appendices H and G and July 2016 Experts Response Section 1 (pp.1-2) (Siegel Environmental 2016b), and has been conceded by the Discharger's experts (Mayer Declaration October 19, 2016 p.2 line 12, Huffman Declaration October 19, 2016 p.4 lines 16-17).

"High and dry", which is an informal term used in the Opposition Brief, and not a scientific or regulatory definition, is a description that is incompatible with marsh composed of dominant obligate wetland plants and all hydric soils. "High and dry" is a description consistent with the meaning of "upland" or "non-wetland", which requires soils that are not hydric or vegetation not dominated by obligate wetland plants, or both. Neither the Opposition Brief nor the Huffman declaration explain the contradiction between the claim that the island was "high and dry" and the fact (acknowledged in Huffman October 2016 Declaration, p. 3 lines 1-3) that the island supported dominant obligate wetland plants at all locations sampled by Dr. Huffman.

Regardless of whether the interior island marsh was inferred to be tidal or non-tidal at the time of diking, all evidence submitted by the Discharger, including expert declarant Terry Huffman, indicate that soil and vegetation conditions that prevailed in the island interior before and after diking were consistent with "wetlands" and inconsistent with "high and dry" conditions, notwithstanding degradation of wetland quality and hydrology after diking and ditching. Dr. Huffman presented no expert evidence supporting any "high and dry" or upland vegetation or soil conditions at the time of diking or before diking. This "high and dry" claim of pre-diking island conditions was made only by the Discharger and the Opposition Brief, without the benefit of any supporting substantial evidence or expert opinion. Neither Dr. Huffman nor the Opposition Brief disputed the unequivocal Soil Conservation Service soil mapping of the island showing only hydric "Tidal Marsh" and "Joice Muck" soil types at Point Buckler Island, Figure H-4 in the May 2016 Technical Assessment.

In addition to the facts above that establish Point Buckler as tidal marsh prior to Mr. Sweeney diking the island in 2014, the Opposition Brief makes claims that have no bearing on site conditions. First, observations made in May 2012 regarding no surface inundation when Mr. Sweeney began mowing and bulldozing vegetation on the site may be correct yet are of no relevance. As shown in Figure 1 below and similar figures in July 2016 Experts Response, the higher high tides that would result in water on the marsh surface all occurred late at night and so Mr. Sweeney's observations, like those of other kiteboarders present during the late spring and early summer months, were of lower high tides when high tides were too low to result in water on the marsh surface.

Second, the Discharger observation of green vegetation in May 2016 (Figure 3 in Section 3.3 below) is demonstration that in spite of diking and draining the marsh, marsh vegetation persisted in trying to re-establish new growth following the wet 2015-2016 winter. However, as aerial photographs collected monthly from June to September 2016 illustrate (Attachment D), much of this diked, non-tidal wetland

at interior Point Buckler Island failed to continue to support productive live, green above-ground perennial marsh vegetation cover through the dry summer, during the same time when live green above-ground tidal marsh vegetation cover was sustained in summer at the two nearby naturally restored reference tidal marshes, Freeman and Snag islands. This is strong direct evidence of a direct impact of diking on perennial marsh vegetation, compared with tidal marsh. In tidal marshes, live green perennial marsh cover by bulrush, tule, and cattail vegetation does not naturally die back in summer, as shown in the reference sites. The summer dieback of perennial marsh vegetation at interior diked Point Buckler marsh is a qualitative and sharp difference with continuous summer vegetation growth of the same perennial marsh vegetation occurring in adjacent tidal marshes. Regardless of whether the non-tidal summer dieback of diked marsh vegetation at Point Buckler is caused by physiological stress-induced senescence (seasonal above-ground dieback during the dry season) or actual mass mortality (mass dieback below and above-ground), or a combination of both, it indicates a **significant impact relative to pre-diking tidal marsh conditions, and relative to adjacent reference tidal marshes**. This summer dieback of marsh vegetation at diked Point Buckler marsh indicates significant loss of summer marsh productivity and associated ongoing loss of tidal marsh beneficial uses.

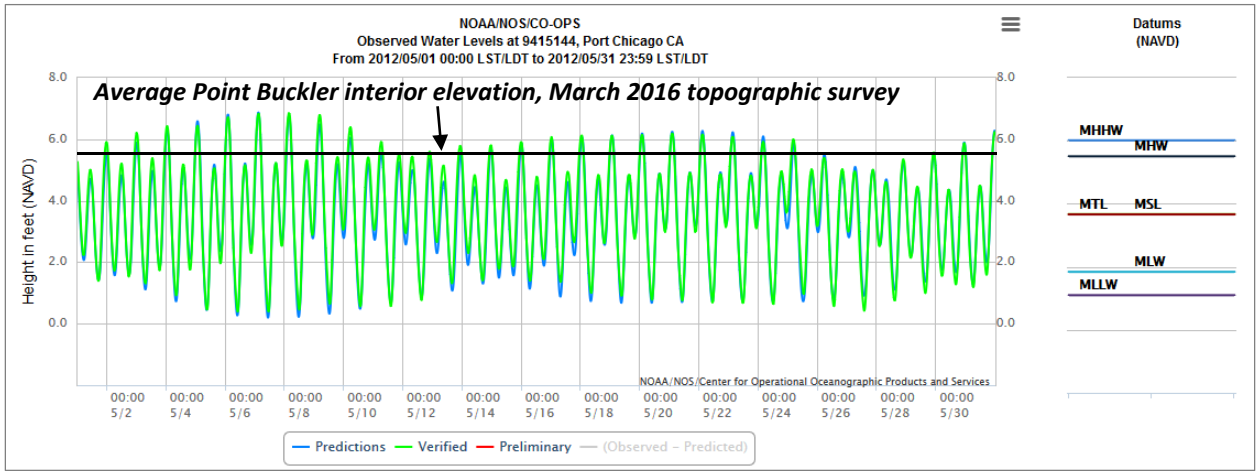

Figure 1. Port Chicago Tides May 2012

During May 2012, all daytime high tides were the lower of the two daily high tides, so no tidal inundation onto the Point Buckler tidal marsh surface would have occurred during daytime hours when Sweeney photos taken. All high tides that may have extended above the interior marsh elevation occurred at night. Source: www.tidesandcurrents.noaa.gov.

Finally, the long series of aerial photographs documenting tidal conditions at Point Buckler between 1985 and 2014, presented in the May 2016 Technical Assessment Appendices G and J, do not show signs of "water in the interior of the island, other than the channels and ditches" as correctly noted in the October 2016 Opposition Brief (p. 7 lines 3-4). In order for water to be visible in such aerial photographs on the interior tidal marsh, the following two conditions must be met:

1) Aerial photographs must be taken during a daytime spring high tide. Air photos are flown only in the daytime. Water on the surface can only be observed when tides are high enough to flood the surface.

2) Vegetation must be low enough that surface flooding substantially submerges the vegetation in order that the water is visible around the vegetation.

Point Buckler vegetation was dominated by dense, tall bulrush, cattail, and tule vegetation (mapped by CDFW and CDWR 2000-2012; Technical Assessment Appendix H), and prior to diking and mowing would have supported a closed canopy significantly more than 5 feet above marsh ground surface elevations. This canopy structure condition is prevalent in both tidal and non-tidal managed brackish marshes composed of tule, cattail, and bulrush in Suisun Marsh. This canopy would completely obscure any surface flooding of the marsh plain surface at any tide, precluding all views of surface flooding by high marsh-flooding tides (see the July 2016 Experts Response, Photo 2). Thus, the Opposition Brief's comments bear no relevance to explaining baseline Point Buckler conditions as tidal marsh.

1.2 Item II.J – Consultants Concede No Technical Issues, Including in Regard to "High and Dry" and "Draining and Drying Out"

The Opposition Brief claims (p. 14 lines 1-16) that the consultants have conceded on the technical issue of diking of Point Buckler caused "draining and drying out" of Point Buckler Island and that the island was "usually dry". No such concession has been made.

The winter-wet and summer-dry conditions of California's Mediterranean climate in combination with the winter and summer solstice "king tides" generate seasonal variations in how "wet" or "dry" a tidal marsh appears on the surface. The May 2016 Technical Assessment concluded and the July 2016 Experts Response reaffirmed that that the diking of Point Buckler caused <u>conversion of tidal wetlands</u> (subject to flooding by tides all year) <u>to non-tidal seasonal wetlands</u> (saturated or flooded only in the rainy (fall-winter-spring) season and drained or dry in summer and early fall). This conclusion is fully consistent with these natural climate and tidal processes. In contrast, this conclusion is incompatible with the July 2016 Opposition Brief's incorrect assertion of year-round "draining and drying out" of the island interior prior to its diking in 2014.

The Opposition Brief and Sweeney Declaration claim that the absence of soft, wet soils on Point Buckler Island at certain times indicates that the island cannot be tidal marsh and must be "high and dry" (upland). This theory is entirely false. Mature tidal marsh plains surfaces of the San Francisco Estuary naturally grow to elevations approaching the higher average high tides, at which point they are tidally flooded and saturated only during the highest tides of the month (spring tide series around the full moon). During neap tide series, mature tidal marsh plains with natural tidal drainage channel patterns are generally <u>not</u> flooded or saturated at the surface at neap high tides. This does not indicate non-wetland or upland conditions. The occurrence of firm tidal marsh soils with significant shear strength provided by dense marsh sod (root mats), and absence of surface saturation for many consecutive days or weeks, is a typical, prevalent and natural feature of mature tidal marsh plains in the San Francisco Estuary, and not evidence of "high and dry" uplands. There is no scientific basis to expect a tidal marsh plain with internal tidal channels to exhibit daily surface saturation all month or all year. Nor do mature

tidal marsh soils generally have low load-bearing capacity. Daily surface saturation is a feature of low intertidal marsh zones and poorly drained interior marsh plains that lack surface connections to tidal channels. Point Buckler Island had interior tidal channels before diking.

The July 2016 Experts Response provided an explanation of the global relationship for tidal marshes: high tides inundate the tidal marsh surface on a less than daily basis because the elevation of tidal marsh surfaces are above the lowest high tide elevation. As we explained further in our September 21, 2016 letter to the Bay Conservation and Development Commission (Attachment B), the daily ebb and flow of the tides into and out of tidal marsh channels and less than daily tidal inundation of the high marsh surface together act to establish wetland soils that in turn limit vegetation to those species with physiological tolerance to periodically saturated soil conditions at or near the marsh surface. We further supported this analysis in the July 2016 Experts Response (pp. 28-29) by describing the ability of tidal marsh soils in settings like Point Buckler to be able to support the weight of low ground pressure vehicles and construction equipment. We also noted in the July 2016 Experts Response (Figure 3, p.6) that Mr. Sweeney's field observations of "high and dry" were made during times when the higher high tides occurred in the middle of the night, not during daylight hours.

Conclusion: Point Buckler was not "high and dry" before being diked in 2014, and the diking did increase drainage of island's hydric (marsh) soils which in turn leads to increased frequency and intensity of *drying* of the upper soil horizons during the "dry" (rainless) season in diked, non-tidal conditions. This "drying" in context of diking and drainage is a relative and not absolute condition: "drying" means to reduce soil moisture content, which has occurred since regular tidal action was excluded by dikes. Tidal flooding, especially during spring tides (highest tides of the month around the full and new moons) maintains year-round recharge of marsh soil moisture that contrast with seasonal "drying" and wetting of soils in non-tidal wetlands in the Mediterranean climate of coastal California. Summer soils of diked non-tidal marsh undergoes seasonal drying; tidal marsh soils in summer do not. "Dry" means the absence of soil moisture, a condition never asserted by the Experts nor by Board staff.

1.3 Item IV.A.2 – Conversion of Tidal Marsh to Diked Duck Ponds is Harm

The Opposition Brief (p. 24 lines 23-28) argues that the prosecution team failed to take into account the purported benefits of constructing the new levee to restore duck ponds, and it references USGS reports regarding waterfowl use in Suisun Marsh (Opposition Brief Exhibits 27 and 28).

History of Tidal Marsh Conversion in Suisun Marsh

Diking of tidal marsh in Suisun last occurred in the late 19th century and early 20th century (Moyle et al. 2014). As the USGS study cited in the Opposition Brief describes well, Suisun Marsh supported a major waterfowl harvesting industry to support San Francisco markets *long before* conversion of any tidal marsh to diked lands for any purpose. This market source of waterfowl is the reason the railroad was initially constructed through Suisun Marsh. In other words, *tidal marshes* of Suisun supported a very abundant waterfowl population. The USGS study goes on to describe diking in Suisun to be for the

purpose of agricultural production, and only after those agricultural endeavors failed were these diked lands converted to waterfowl hunting use. Thus, it is an invalid argument to state that tidal marshlands in Suisun do not provide beneficial uses for waterfowl, even if under modern highly managed conditions the diked marshes are able to produce greater waterfowl abundance.

Beneficial Use Harm of Tidal Marsh Conversion to Any Other Land Use

Conversion of tidal marsh to *any* other land use impacts beneficial uses of those tidal marshlands. The 1977 Suisun Marsh Preservation Act, the 1984 Suisun Marsh Management Plan, and the 2011 Suisun Marsh Habitat Management, Preservation, and Restoration Plan (Suisun Marsh Plan) all recognize the critical value of tidal marsh in Suisun and establish as policy the preservation and restoration of tidal marsh where possible. The Suisun Marsh Plan establishes as one of its primary goals to enhance waterfowl beneficial uses on *existing* diked marshlands, alongside *restoring* between 5,000 and 7,000 acres of diked marshlands to tidal marsh. This tidal marsh restoration target is based on the importance of tidal marshlands to support a wide range of plant, fish, and wildlife species, including listed species. This target also is based on the importance other beneficial uses of tidal marshlands, including water quality enhancement, flood attenuation, carbon sequestration, and the like. Therefore, the prosecution team has not failed to take into account any purported beneficial uses.

Beneficial Use Harm of New Levee Construction

Building the new levee atop tidal marsh and filling in tidal waters at the breaches and in the interior tidal channels caused harm to beneficial uses through:

1) Short duration high turbidity (suspended sediment) conditions in the water column of breaches and tidal channels being filled,
2) Short duration high turbidity (suspended sediment) conditions in the water column of tidal channels stirred up when excavating soils from existing tidal channels, and
3) Physical covering of habitat.

The October 2016 Opposition Brief (p. 31, lines 24-25) argues that "except at the seven breaches, there was no water column and therefore no possibility of suspending sediments in the water column". In that argument, Discharger accepts that the breaches had water columns into which sediments could be suspended. Those areas accounted for 0.017 acre. However, a total of 0.157 acres of tidal channels, and their associated water columns, were filled. The remaining 0.140-acre fill area (89% of the total) was into interior tidal channels (May 2016 Technical Assessment, Figure K-2 and Table K-2). In addition, about 5% of excavated soil volume came from 0.224 acre of tidal channels within the tidal marsh interior (May 2016 Technical Assessment, Figure K-2 and Table K-3). The process of excavator buckets digging soils from an open tidal channel stirs up suspended sediment into the water column, and loose soil can also drop from excavator buckets during excavation and fill placement and generate water column turbidity. Any fish in the general area would have experienced increased turbidity levels and associated harm.

Field observations on March 2, 2016 showed much of the levee toe consisted of ungraded excavator bucket piles, which means the excavator simply dropped its bucket load and continued along. 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. As construction took place during nesting season for birds including listed species such as black rails, Ridgway's rails, Suisun song sparrow, and salt marsh yellowthroat, it is possible that nests were destroyed by levee construction. The field visit on March 2, 2016, so long after levee construction, would not have been able observe nest loss or evidence of prior nest loss.

1.4 Item V.A – Vegetation Mass Die-off Occurred

The October 2016 Opposition Brief (p. 25 lines 5-22) argue that there was no mass vegetation die-off because (1) the site was already "high and dry", (2) vegetation was "senescent" not dead, (3) pre-diking aerial photographs showed the island with brown vegetation, (4) vegetation currently has living roots, and (5) invasion by dominance by perennial pepperweed is incorrect.

These arguments are incorrect and in fact mass dieback had occurred by the time of the March 2, 2016 field investigations, regardless of any subsequent partial recovery of vegetation later in the spring growing season of 2016 (see Section 3.3 below). **As discussed above in Section 1.1 in response to Opposition Brief Item II.C, the island was dominated by obligate wetland plants and hydric (wetland) soils, and thus not "high and dry" prior to new levee construction.** The hydric soils and dominance of obligate wetland vegetation (plants always found in wetlands) is not disputed by the October 2016 Opposition Brief or October 2016 Declaration of expert Dr. Huffman. Furthermore, the island was also subject to tidal flooding, including monthly spring high tides, below the High Tide Line, when tidal channels and marsh plains were unobstructed prior to diking.

The October 2016 Huffman Declaration misidentified field indicators of *dead* (whole plant mortality) versus *senescent* (above-ground parts seasonally shed or dead; below-ground parts alive) vegetation. Attachment A shows that aerial photographs of tidal marsh taken in winter months of any tidal marsh show brown "senesced" vegetation and that aerial photographs of those same marshes in summer months shows them to be green with living marsh vegetation, which is the natural cyclic, seasonal changes that perennial tidal marsh vegetation undergoes throughout the temperate zone. As discussed below in Item #4 response to the Huffman declaration, Dr. Huffman mischaracterized photographs of marsh plant roots as providing evidence that they were alive, when the photographs contained no visible indicators of living plant tissues, but only non-living plant tissues. Lastly, the Fall 2016 timing of the perennial pepperweed assessment is the wrong season (long after its above-ground vegetative cover has died and dried) to assess the accurate contribution of that species cover to the overall vegetative cover. The results reported in the Huffman Declaration mischaracterize the extent of that species' extent (see Item #2 response to the Huffman Declaration, below).

1.5 Item V.B – Endangered Fish Were Harmed

The October 2016 Opposition Brief (p.44, lines 11-23) assert that no "evidence of actual harm to endangered species" has been presented and that the prosecution team relies on an unwarranted assumption that "predation is of no significance".

Point Buckler is designated as Critical Habitat under the federal Endangered Species Act (ESA) for Delta Smelt, Green Sturgeon, two runs of Chinook Salmon, and one run of steelhead (NMFS 1993, NMFS 2005a, NMFS 2005b, NMFS 2009, USFWS 1994). Discharger has stipulated that the levee it constructed in 2014 in fact cut off tidal connectivity to the tidal marsh (Mayer Declaration October 19, 2016, p. 2 lines 12-13; Huffman Declaration October 19, 2016, p. 4 lines 16-17). **Under the ESA, alteration to designated Critical Habitat is defined as Take, so Discharger actions have caused take of federally listed species. Thus, harm is established.**

Dr. Mayer's October 19, 2016 Declaration focuses on predation risk in artificial landscape settings, including artificial levee-lined water supply channels and where water control structures are present. **These human-altered settings have no bearing to the pre-disturbance conditions at Point Buckler** and are further refuted below in the Mayer Declaration Response section.

See also discussion in Section 1.3 above regarding harm to fish from short-duration high turbidity events associated with levee construction activities.

1.6 Item V.C – Jurisdiction Established

The Opposition Brief and Huffman Declaration of October 19, 2016 argue that Clean Water Act Section 404 jurisdiction is in question because new and proposed tide data collection would demonstrate that the May 2016 Technical Assessment Appendix I and July 2016 Experts Response were in error in establishing Section 404 jurisdictional extent. This argument is not correct. **The entirety of Point Buckler, except perhaps about 0.5 acres of the remnant eastern levee, is subject to Clean Water Act jurisdiction, because it falls below the elevations of the maximum spring tide elevation consistent with the relevant regulatory threshold. The Huffman Declaration and Opposition Brief erroneously identify minor high tide lines as equating to the upper tidal limit of Clean Water Act Section 404 jurisdiction defined in regulation. This false high tide line threshold significantly underrepresents the full extent of Section 404 tidal jurisdiction prior to levee construction.**

Point 1: <u>Upper Limit of Clean Water Act Jurisdiction is the High Tide Line</u>
(33 CFR Part 328.3(d); see May 2016 Technical Assessment Appendix N)

Point 2: <u>Clean Water Act definition of High Tide Line is "the line of intersection of the land with the water's surface at the maximum height reached by a rising tide"</u>
(33 CFR Part 328.3(d); see May 2016 Technical Assessment Appendix I)

The only valid determination of Clean Water Act Section 404 jurisdictional extent is the *maximum* height reached by a rising tide. Any other measured high tide is *not* the High Tide Line.

The regulatory definition of Section 404 Clean Water Act High Tide Line is not based on any high tide of any day of the year, but only on the maximum high tide line, which cannot be less than the highest spring tides of any year. Spring tides are the highest tides around the full and new moon of any month. What are commonly referred to as "king tides" are when these spring high tide heights reach their maximums in months of the winter (December and January) and summer (June and July) solstices, the annual peak spring tides. Dr. Huffman's high tide observations of October 13, 2016 were made after the fall equinox when spring tides are not at their highest, and he also observed the lower of that day's two high tides (see Figure C-2 in Attachment C below), and not on a king tide of a summer or winter solstice. The regulatory definition of the High Tide Line under Section 404 encompasses all spring high tides, and thus the maximum spring tide of any year. Thus, the date of his tidal observations and the associated photographs in the Huffman Declaration preclude any relevance to the Section 404 High Tide Line. Earth's tides operate on an 18.6-year cycle (called a "tidal epoch"), so the maximum spring height will correspond to whichever is the highest king tide in the last 18.6 years. **All tide observations provided by the Discharger in any of their submittals, such as the October 13, 2016 measurements, were not made on any solstice spring tide and thus are irrelevant to establishing local HTL.** All field evidence submitted about tidal heights from October of any year is a red herring with respect to the correct elevation of the Section 404 High Tide Line.

Point 3: We have five independent estimates of High Tide Line for Point Buckler, ranging from 7.9 to 8.8 feet NAVD88

1) **7.9 ft** NAVD88 is HTL at the nearby Port Chicago for the most recent 18.6 years (i.e., the current tidal epoch), based on continuous tide measurements at this federal tide station. (May 2016 Technical Assessment, Appendix I)
2) **8.2 ft** NAVD88 is from a field observation of a wetted board made on February 17, 2016 at high tide during no-wind conditions to provide an adjustment estimate between Port Chicago and Point Buckler. (May 2016 Technical Assessment, Appendix I)
3) **8.3 ft** NAVD88 is the average elevation of the upper extent of two debris wrack lines observed and topographically surveyed on March 2, 2016 (May 2016 Technical Assessment, Appendix I).
4) **8.8 ft** NAVD88 is applying the National Oceanic and Atmospheric Administration adjustment factor for predicting high tides specifically at Point Buckler. (July 2016 Experts Response)
5) **8.7 ft** NAVD88 is the McAteer-Petris Act upper limit of tidal wetland jurisdiction, defined in that statute as 5 feet above mean sea level. Mean sea level at Port Chicago is 3.7 ft NAVD88. This estimate may be more approximate as it was defined in law in the 1960s for the entire San Francisco Estuary. (May 2016 Technical Assessment, Appendix M)

Estimates #2 and #4 tell us that high tides at Point Buckler are, in general, higher than at Port Chicago, meaning **the well-established Port Chicago HTL value (7.9 ft NAVD88) is a *conservative* estimate of HTL at Point Buckler**. Actual tide heights at Point Buckler relative to Port Chicago are affected by local factors including Delta outflow, local bathymetry, magnitude of each ebb and flood tide cycle and the associated complex estuarine hydrodynamics that results, and wind speed, direction, and duration. On any given tide, the exact interplay of all these factors will vary from any other given tide, resulting in actual differences between Point Buckler and Port Chicago tide heights to be variable, perhaps on the order of half a foot or so, versus being a static single value for every tide.

Point 4: The *maximum* interior elevations at Point Buckler, as surveyed by 512 points of measurement on March 2, 2016, is 6.4 ft NAVD88, or 1.5 feet below the most conservative HTL estimate. The *average* interior elevations from that survey were 5.5 ft NAVD88, or 2.4 feet below the most conservative HTL estimate.

The fact that Point Buckler ground surface elevations are on average 2.4 feet lower than the most conservative estimate of local High Tide Line (see Figure 2 below and May 2016 Technical Assessment Appendix F) means that Discharger arguments over tide elevations of a few tenths of a foot result in no change to the Section 404 Clean Water Act jurisdictional determination.

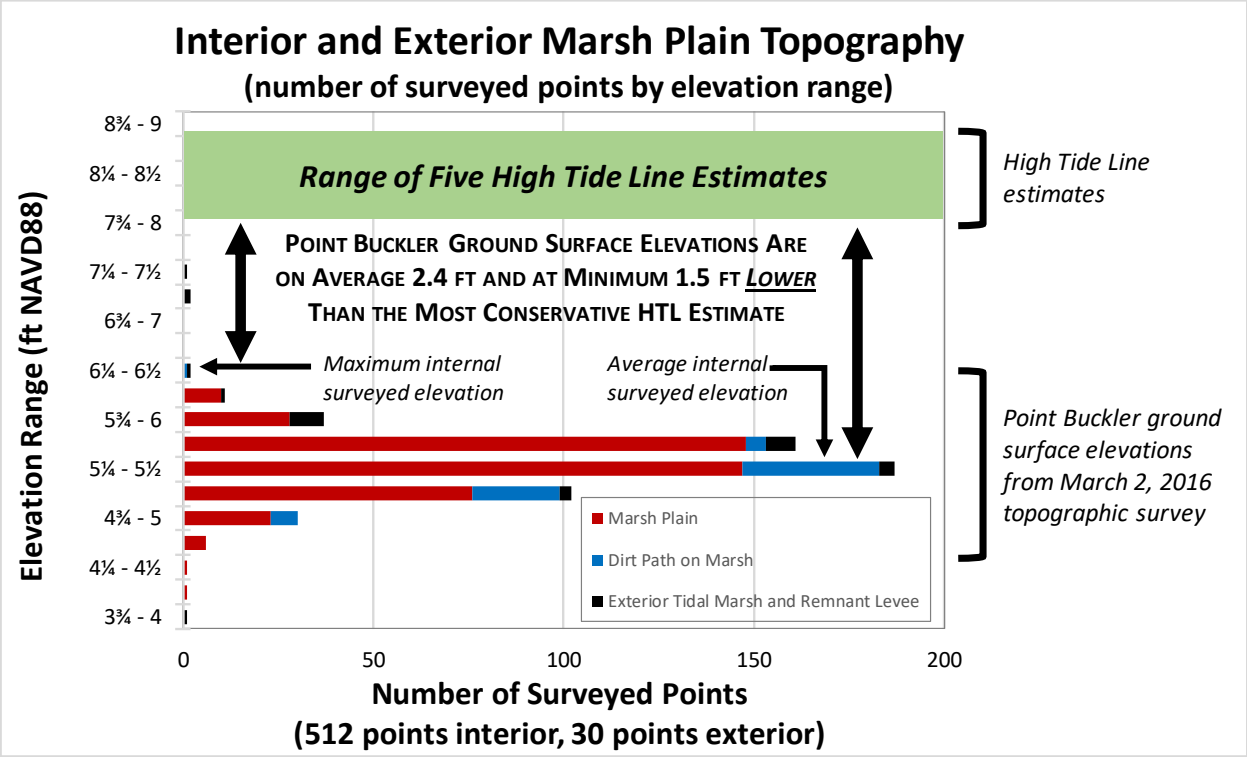

Figure 2. Ground Surface Elevations of Point Buckler Relative to High Tide Line Establishes Clean Water Act Section 404 Jurisdiction
Source: adapted from May 2016 Technical Assessment, Appendix F

Point 5: <u>The Huffman October 13, 2016 measurements are of too poor data quality for use, were not measured on a king tide or even a spring tide, and thus offer no relevant evidence regarding Clean Water Act jurisdiction</u>

The Huffman Declaration of October 19, 2016 attempts to discredit the use of a wetted board as a field indicator of water levels for establishing an adjustment value between Port Chicago and Point Buckler and presents its own version of such a measurement estimate made on October 13, 2016. First, as described above, October is not a month during which the maximum spring tides of the year ever occur. Therefore, no October high tide data can be used to infer the *<u>maximum</u>* height of rising tides, which is the threshold established in regulation for the definition of High Tide Line pursuant to Section 404 of the Clean Water Act. Moreover, previous analyses (May 2016 Technical Assessment, Appendix I and July 2016 Experts Response) established that tides are typically, but not necessarily always, higher at Point Buckler than at Port Chicago. In addition, Figure 2 above shows that Point Buckler is on average 2.4 feet below the most conservative HTL estimate. Therefore, Clean Water Act jurisdiction is present. Thus, the Huffman observations made on October 13, 2016 and presented in his October 19, 2016 Declaration have no relevance to the jurisdictional determination.

Second, the wetted board "method" is not one of the allowed broader field indicators to determine High Tide Lines under Section 404. The field indicators of High Tide Line allowed by the definition are all physical or biological that are *persistent enough* to record the elevations of the highest spring tides, such as debris lines, "scum" lines, fine shell or debris deposits, or tide gauges. Short-term wetted surfaces on dates other than those encompassing maximum spring high tides, such as Dr. Huffman's invalid and unprecedented method of High Tide Line documentation, are not allowed by the regulatory definition. The fact that Board staff and experts on February 17, 2016 were able to observe a fairly high tide event (1 foot above mean higher high water) on a very low wind day (resulting in minimal wind wave run-up) provides a strong single *<u>estimate of the difference</u>* in tide heights between Point Buckler and Port Chicago. That *difference* can be used to project Port Chicago data to Point Buckler. The measurement on February 17, 2016 is *not* a determination of HTL at Point Buckler. Since NOAA publishes that high tides in general will always be higher at Point Buckler than at Port Chicago[1] and using the most conservative HTL estimate (Port Chicago) shows that Point Buckler elevations are on average 2.4 feet below the HTL jurisdictional extent, the February 17, 2016 wetted board water level indicator remains a useful field indicator for projecting Port Chicago data to Point Buckler. It is, however, not the *only* indicator applied (see discussion in Point 3 above).

Third, the data collected in October 2016 by Huffman is of very low vertical resolution and thus cannot be used for any purpose (see Attachment C).

[1] http://www.tidesandcurrents.noaa.gov/noaatidepredictions/NOAATidesFacade.jsp?Stationid=9415227

Conclusion: <u>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, the eastern remnant levee perhaps excepted.</u>

2 Response to Mayer Declaration

Dr. Mayer generally agrees that harm to fish occurred at Point Buckler when the wetlands within the island were isolated from the waters of Suisun Bay, where fish occur. In particular, he acknowledges that blocking tidal exchange blocked habitat services.

However, in his October 2016 response, Dr. Mayer suggests that the deepening of the borrow ditches (of which no evidence is available) would improve fish habitat on the island and that simply restoring tidal flows through a tidal gate and pipe into the borrow ditches would restore the impaired beneficial uses. Open water habitat might improve conditions for fish compared to dry habitats, but not compared to tidal wetland habitat.

2.1 Predation Risk Relates Strongly to Artificial Structures

In light of the work on habitat use and predation done on smolts and smelt in this estuary and elsewhere, it is not "reasonable to assume" that the blocked beneficial uses will be restored simply by restoring tidal flow through an 18-inch tidal gate and 28-foot long pipe. It is also important to note that this tide gate was newly installed in 2014 during construction of the new levee without permits nor consultations with USFWS and NMFS as required for any new point of diversion, with the tide gate being placed into a remnant borrow ditch (Attachment E).

Artificial structures are widely seen to increase predation risk for small fish (Grossman et al. 2013). The use of a tidal gate (or pump) to reconnect wetlands inside the current levees with the surrounding fish communities poses problems. We believe that movement of food materials off the island and into the surrounding waters, where smelt feed, may be somewhat degraded by such artificial means. However, habitat value to fish onsite at Point Buckler under the scenario of opening the tide gate would likely be severely affected by the increased risk of predation associated with such artificial structures. Dr. Mayer's description of massive mortality at the water intake on the Contra Costa Canal reflects Dr. Herbold's expectation of the enhanced predation risk at any water intake structure large enough to flood the interior of Point Buckler on high tides.

Dr. Mayer refers to Dr. Larry Brown's presentation at the CABA symposium on the value of tidal wetlands, and asserts that Dr. Brown "started the job of laying out the geographical distribution and diversity of native and non-native fish (including predators" and that "Mr. Brown was alone in conference presentations that systematically included the potential effect of non-native predators on threatened species." In fact, Dr. Brown was recapping and updating the results of his seminal 2003 paper and only referred to predation as it related to Largemouth Bass predation in beds of the invasive aquatic plant, Brazilian waterweed (*Egeria dense)*. In the brief paper (Herbold et al. 2014) that

summarizes that CABA conference, predation (and the diverse work that has been done on predation since 2003) is discussed twice (emphasis added):

1) Three broad themes have emerged about fish use of restored tidal marsh:
    a. Food web pathways for fish within a marsh are largely detritus-based, rather than phytoplankton-based (Howe and Simenstad 2007, 2011).
    b. **The vegetated edge is important for small fish foraging and predator avoidance** (Gewant and Bollens 2012).
    c. Newly constructed marshes are rapidly occupied by fish and their prey; new marshes provide habitat and food web support comparable to reference sites…."
2) And Dr. Baltz brought in a more global view: "Small fish use edges of wetlands to feed and to **avoid predation** by larger fish (Baltz et al. 1993, 1998). Fish-eating wading birds enhance nursery function by preying on larger fish, thus reducing the risk of predation for small fish."

Dr. Mayer also refers to the presentation by Sean Hayes of NOAA to the SWRCB in May of 2016 to introduce the high rate of predation suffered by salmon. Dr. Hayes work and presentation was focused on the rock rip-rap-lined river channels that extend from salmon spawning grounds downstream to the Delta, with particular reference to salmon smolts tethered at the Head of Old River. Thus, Dr. Hayes' results mirror the increased predation at artificial structures discussed by Grossman et al. 2013 and in Dr. Mayer's citation of Mr. Morinaka's 1996 work at the fish salvage operations of the water export facilities. The only way in which Dr. Hayes' results pertain to Point Buckler is in his closing observation: "*[t]he real challenge for salmon and our other native species is that we changed the habitat from a way that gave them the advantage to giving an advantage to the non-native species, and until we really focus on floodplains and habitat restoration, that's going to continue be a challenge*."

2.2 Harm to Fish Was Caused by Loss and Isolation of Shallow Tidal Channel Habitats

Harm to fish, as we described in the May 2016 Technical Assessment, consists largely of two main types:

1. loss of food production from the tidal wetlands of Point Buckler into the surrounding channels where fish, especially Delta Smelt, feed
2. loss of the habitat value of shallow tidal channels within Point Buckler where Chinook Salmon smolts would feed and where Longfin Smelt would spawn.

The loss of productivity at Point Buckler is clear in the comparisons of seasonal vegetation from 2012 to 2016 as documented in the aerial photographs in Attachment E. The loss of productivity at Point Buckler occurred both as reduced primary production due to dying vegetation and loss of the invertebrates that depended upon plant growth. Blockage of the movement of marsh productivity into surrounding channels was completed when the last gap in the levee was plugged (August 2014 per Appendix K of the May 2016 Technical Report), but offsite transport was reduced as each of the seven levee breaches was filled between February and August 2014 by unauthorized levee construction. In

assessing harm, and useful restoration, it is important to keep both of these ecological processes in mind.

Unauthorized levee construction led to the loss of shallow water habitat found in the tidal channels at Point Buckler within tidal wetlands. Small tidal channels embedded within a "matrix" of emergent tidal marsh support numerous beneficial uses for fish, whereas small tidal channels without surrounding tidal marsh lack both littoral edge habitats and food web support from the adjacent tidal marsh surface. Vegetated marsh edge, maximized by small tidal channels branching within wetlands, is the primary foraging site for salmon smolts (Simenstad et al. 2000). Based on aerial photographs and Stuart Siegel's 2003 site visit and photograph (May 2016 Technical Assessment, Photo 1), Point Buckler supported just this sort of natural tidal marsh and tidal channel habitat. Such habitats have multiple benefits for small fish, particularly young salmon:

1. Shallow tidal channels with vegetated banks within tidal wetlands and the littoral edges of tidal marshes along open water edges provide refuge for small fish from larger predatory fish (e.g., Baltz et al. 1993 and Baltz et al. 1998, Chesney et al. 2000). In the San Francisco Estuary specifically, deep-bodied fish such as striped bass and largemouth bass are much more effective predators in armored channels and in areas deep enough to support submerged aquatic vegetation (Brown 2003, Nobriga and Feyrer 2007).
2. Tidal wetlands with shallow tidal channels provide foraging opportunities for piscivorous wading birds, which preferentially feed on larger fish and thereby can reduce predation on small fish (Herbold et al. 2014).
3. Shallow tidal channels in tidal wetlands provide access to a wide variety of food: insects that drop from emergent vegetation, benthic and epibenthic invertebrates, and prey attached to plant stems (Levy and Northcote 1982, Healey 1982, 1991, Miller and Simenstad 1997, Miller and Sadro 2003, Bottom et al. 2005, Roegner et al. 2010, Roegner et al. 2012).
4. Shallow tidal channels within tidal marshes may also provide refuge from storm events that can carry juvenile fish into unsuitable habitats downstream before they are ready (Rechisky et al. 2012)

Ecological processes within tidal wetlands interact and jointly affect fish in a variety of ways. Dr. Mayer points out that science in the San Francisco Estuary is only beginning to parse out how smolt survival through improved growth and ability to remain in favorable habitats is counterbalanced by the fact that more abundant fish will support more predation. It is even more difficult to assess how much production from tidal wetlands contributes to the food web in nearby channels supporting Delta smelt. However, Chinook salmon smolt survival is enhanced in tidal wetlands and riverine floodplains in every place where it has been examined, including in this estuary (Bottom et al. 2005, Brown 2003, Healey 1982, Levy and Northcote 1982, Miller and Sadro 2003, Miller and Simenstad 1997, Rechisky et al. 2012, Roegner et al. 2010, Simenstad et al. 2000). Intensive scientific work has identified that food limitation is a likely major contribution to the decline of Delta Smelt (Baxter et al. 2015). These consistent scientific

results are the motivation for the extensive effort of California's EcoRestore program to recover wetland, especially tidal wetland, habitat in this estuary.

In our original assessment of harm to fish due to unpermitted work at Point Buckler, we referred to recent studies by Dr. Lenny Grimaldo showing that very young larvae were found in and near tidal wetland channels in Suisun bay, particularly at Ryer Island adjacent to Point Buckler. Dr. Grimaldo's work is in press now, but not citable. However, Dr. Grimaldo in his public presentations on this topic has been clear that he was only reporting on Longfin Smelt, not Delta Smelt as suggested by Dr. Mayer. The best source of Dr. Grimaldo's results at present is his presentation entitled "Rearing habitat of larval and juvenile Longfin smelt in the San Francisco Estuary: A case to move into uncharted waters" at the Delta and Longfin Smelt Symposium of March 29, 2016, at UC Davis (video recording available at http://cmsi.ucdavis.edu/events/smelt-longfin/index.html).

2.3 Restoration Goal Setting Simple for Point Buckler

Located close to Point Buckler, the Tule Red 420-acre tidal wetland restoration project is converting diked wetlands to tidal wetlands. Its EIR/EIS describes how "[T]the Suisun Marsh Plan (SMP) provides a comprehensive 30-year plan for the management of activities within the Suisun Marsh (Marsh), including tidal restoration activities. The SMP was prepared by … a group of agencies with primary responsibility for Marsh management. The intention of the SMP is to balance the benefits of tidal wetland restoration with other habitat uses in the Marsh by evaluating alternatives that provide a politically acceptable change in Marsh-wide land uses, such as salt marsh harvest mouse habitat, managed wetlands, public use, and upland habitat."

Because Tule Red is completely transforming habitat type in order to improve water quality functions and values, they have faced a number of design and permitting issues as well as reaching agreement about suitable new goals for the restored site. Such in-depth design and direction issues can be invaluable (as Dr. Mayer describes at p.5 lines 23-25). However, at Point Buckler such goal-setting is unnecessary because the Water Board's Cleanup and Abatement Order established that the goal is to restore, at a minimum, the water quality functions and values of the tidal marsh that existed prior to unauthorized work at Point Buckler, including the length of channel and area of marsh that existed prior to unauthorized activities. Before Mr. Sweeney diked and drained Point Buckler, it was naturally restored tidal marsh consisting of emergent vegetated marsh and shallow channels with vegetated banks providing littoral habitat adjacent to deep sloughs and expansive areas of shallow subtidal bays, which we know to support a variety of beneficial uses. Returning the tidal wetlands at Point Buckler to their condition and connectivity prior to their loss and isolation beginning in 2012 will restore the biological functions that characterize tidal wetlands surrounding Suisun Bay. Once properly restored, the site should again serve as suitable feeding and refuge habitat for Chinook Salmon smolts, as a spawning habitat for Longfin Smelt and as a food production source for Delta Smelt. Success can easily be evaluated by reference to old aerial photographs of the site and by monitoring restoration efforts relative to nearby unaltered sites (e.g., Freeman, Snag, Ryer, and/or Roe islands).

3 Response to Huffman Declaration

There are numerous problems and errors with the information presented in the October 19, 2016 Huffman declaration, addressed below.

3.1 Water Quality Data Is in Error and Did Not Follow Board Protocols

Attachment 3 of the October 19, 2016 Huffman declaration contains water quality data for pH and conductivity measured at two interior locations and one location in Annie Mason Slough. The pH 5 values at all three stations raised a warning, as such acidic conditions in tidal waters of Suisun Marsh are out of the ordinary and do not meet water quality objectives in the Basin Plan of pH 6.5-8.5. As documented in Attachment C, these data (1) were collected with paper pH strips, more typical to classroom settings, rather than a pH meter with validated calibration information as required by the Water Board for use in water quality investigations, and (2) are inconsistent with published DWR data for its nearby water quality station located one mile to the southeast in Suisun Cutoff which has a pH value of 7.9 reported for October 13, 2016. Though the conductivity data are in the same range as that reported by DWR, there are no calibration methods described nor data presented to offer any data validation and assess whether Board data quality objectives are satisfied. Consequently, none of the water quality data presented by Huffman is of adequate data quality for use in this regulatory setting.

3.2 Assessing Invasive Perennial Pepperweed Extent in Fall Is Inappropriate and Cannot Be Compared to a Late Winter Assessment

Fall is not a feasible or appropriate time of year to assess extent of perennial pepperweed or of native wetland vegetation <u>because of natural processes of seasonal and annual changes in plant growth, development, and populations</u>. Perennial pepperweed is green and highly visible vegetation only in spring and/or early summer: by late summer, its above-ground growth withers and dies back to the ground, leaving only dead straw-colored stems. Valid vegetation surveys for estimation of perennial pepperweed cover (abundance) and distribution is only feasible in spring or early summer. The late winter assessment reported in the May 2016 Technical Assessment, though conducted much earlier than the time of its peak extent of cover, presented a fair if not slightly underestimated extent (distribution) of perennial pepperweed. Dr. Huffman's fall (October) surveys do not provide a valid sampling date for accurate estimation of live pepperweed cover or distribution at Point Buckler Island. It provides only an estimate of senescent (seasonally dead), withered perennial pepperweed straw cover in fall. Further, the May 2016 Technical Assessment findings regarding native wetland vegetation were fair and consistent with aerial photographs collected throughout summer 2016 (Attachment D).

Fall (October) cover of pepperweed significantly under-represents the true extent of its relative and absolute vegetation cover in spring. Late spring or early summer is the biologically significant and standard time to measure pepperweed cover. Dr. Huffman's fall survey reporting pepperweed cover are invalid, inaccurate, and misleading with respect to its 2016 condition at Point Buckler Island.

3.2.1 Seasonality Patterns of Native and Invasive Wetland Plants

The vegetation sampling bias and error in Dr. Huffman's October vegetation surveys at Point Buckler Island apply not only to marsh weeds like perennial pepperweed, but to native wetland vegetation as well. Mid-October surveys of non-tidal brackish marsh vegetation would preclude unambiguous, meaningful data that could discriminate objectively between dead (whole plant mortality) and seasonally senescent perennial marsh vegetation (above-ground shoot dieback to the ground, with live perennial buds and rootstocks below ground). Wet spring conditions, early in the growing season, are necessary to distinguish perennial vegetation that is actually dead (failing to regenerate from viable below-ground buds, producing new green shoots) and vegetation that is merely dormant or senescent (regenerating new green shoots during the growing season, contrasting with dead standing straw or leaf litter of the previous season).

Some of the most important wetland plants at issue naturally produce their abundant live, green shoots (vegetation cover) in wet or moist conditions of spring to early summer only, and naturally wither down to negligible cover after dry summer and fall months. Perennial pepperweed, a noxious invasive wetland weed, is only one such species. Other marsh species with naturally later seasonal peak development achieve peak abundance of live, green shoots only in later spring or summer months, and maintain abundant cover even as their above-ground shoots naturally wither (senesce) in fall. Tule, bulrush, and cattail species (*Schoenoplectus acutus, S. americanus, Typha latifolia*), all native perennial brackish marsh plants previously dominant at Point Buckler, are such species. Their relative and absolute abundance in any vegetation survey necessarily varies according to the season sampled.

The May 2016 Technical Assessment documented conditions of the diked interior Point Buckler vegetation *in late winter* (March 2, 2016) *after winter rainfall, during the early growing season*, when seasonal wetland plants were breaking dormancy and commencing new "spring" growth at different rates depending on species. Dr. Huffman, in contrast, presented observations of diked interior Point Buckler vegetation *in fall* (mid-October 2016) *when seasonal wetland plants are dormant or entering fall dormancy after dry summer* conditions. This seasonal timing difference ensures that the two sets of brackish marsh vegetation observations cannot be directly compared. **This biological seasonal development pattern of pepperweed was clearly addressed in the May 2016 Technical Assessment Appendix L (p. L-6), but was ignored by Dr. Huffman's declaration.**

Dr. Huffman sampled vegetation in the fall which necessarily under-represents the live abundance (green shoots and leaves) of spring-emerging, fall-senescent perennial plant species such as perennial pepperweed. Perennial pepperweed begins senescence above-ground during seed set, after flowering in April-June. In the late summer and fall, perennial pepperweed has withered to a small percentage of its peak spring seasonal cover, and naturally persists as tiny shoots at ground level, or dormant buds below ground (May 2016 Technical Assessment, Appendix L pages L-6-7). Fall sampling also over-represents species that maintain live or partially live persistent above-ground shoots, such as tule, cattail, and bulrushes.

Thus, Dr. Huffman's assessment of diked, non-tidal Point Buckler Island wetland vegetation after a dry summer is misleading and incomparable with observations of emerging marsh vegetation early in the spring growing season, when all native and non-native perennial plant species have been detected in active growth. The May 2016 Technical Assessment documented spring emergence of all dominant native and non-native marsh plants in both tidal and diked non-tidal marsh at Point Buckler Island, and reported the visible contrast between adjacent tidal and non-tidal marsh sharing most of the same species. Dr. Huffman's October survey failed to document living above-ground growth of dominant vegetation, and failed to compare adjacent tidal and non-tidal diked marsh reference conditions which would be standard practice when trying to establish complicated environmental conditions. Therefore, his surveys are inconclusive with respect to assessment of the impacts of diking and drainage to Point Buckler Island marsh vegetation.

3.2.2 May 2016 Technical Assessment Accurately Presented Vegetation Conditions

The May 2016 Technical Assessment accurately reported March 2, 2016 observations of predominantly dead standing shoot litter left over from dominant marsh vegetation of 2015 (severe drought year), plus then-current (March 2016) growth of early-emerging live wetland plants like pepperweed, and the earliest 2016 emerging shoots of tule, bulrush, and cattail. The Technical Assessment accurately and precisely described the growth stage, qualitative distribution and abundance of **living** perennial pepperweed in active growth on the single date observed:

> The most abundant **live vegetation** of the marsh interior is composed of vigorous, discontinuous colonies of perennial pepperweed (*Lepidium latifolium*) spreading through the former bulrush and cattail vegetation. Perennial pepperweed was observed in pre-flowering growth stages and vegetative rosettes emerging through dense standing litter of dead cattail and bulrush… At Point Buckler, all observed mass dieback areas **were colonized by perennial pepperweed, either as frequent, large colonies (**advanced invasion), **or small, widely spaced colonies (incipient invasion)** (Appendix R photo R-12). Perennial pepperweed was the dominant **live** marsh vegetation type over most of the diked interior marsh observed during the March 2, 2016 inspection, even though it was only starting late winter vegetative growth (shoot height mostly 2 ft or less). (May 2016 Technical Assessment, Appendix L, p. L-6; emphasis added in bold)

The May 2016 Technical Assessment explicitly noted the relative abundance of *living* vegetation at the time of the March 2 observations. **The May 2016 Technical Assessment (p. 18) also distinguished pepperweed as the dominant *invasive* species (dominant among all invasive species present, indicating its competitive advantage) in the marsh interior, which is not a statement of *absolute* dominance including native species.** The May 2016 Technical Assessment used this "snapshot" of directly observed post-drought vegetation – the single date available for inspection - to conclude a significant change in vegetation since 2012 and earlier Department of Water Resources/California Department of Fish and Game vegetation maps of Point Buckler Island (Figure H-2 in the May 2016 Technical Assessment). Those data represented tule, cattail, and bulrush vegetation in the marsh

interior consistently across the five mapping periods from 2000 to 2012, but did not map vegetation dominated by perennial pepperweed.

At the time of the March 2, 2016 observations, bulrush, cattail, and tule vegetation in the interior seasonal marsh was overwhelmingly composed of **dead** standing shoots from the previous year, and supported only stunted, short, low-vigor, sparsely distributed live shoots. **The May 2016 Technical Assessment contrasted the widespread and highly vigorous shoots of perennial pepperweed on March 2, 2016, and the distribution and size of its colonies, with the remnants of post-drought dead standing bulrush marsh vegetation with very poor regeneration compared with robust, taller, green adjacent bulrush, cattail, and tule-dominated tidal marsh on the exterior side of new Point Buckler levees. This was the evidence for concluding substantial vegetation change since DWR/CDFW maps,** which did not identify significant stands of either dominant or mixed pepperweed at Point Buckler marsh interior sufficient in extent to record as mapped vegetation units. This conclusion was corroborated by aerial photographs (Attachment A, Figures A-3 through A-5) that showed an unprecedented significant seasonal contrast between vegetation color. Aerial photos taken in summer (Attachment A, Figure A-3 and Attachment D, Figures D-1, D-10, D-19, and D-28) show live green on the exterior of the levee in contrast to straw-colored on the interior side of the levee after levee construction was completed.

3.2.3 Distribution and Number of Young Colonies Is Necessary to Assess Pepperweed Invasion, Rather than Total Cover

The assessment of wetland weed invasions like perennial pepperweed is measured by their rate and pattern of spread (colonization, dispersal within the surrounding vegetation, and is not simply a static measure of abundance (total cover) at a point in time. Estimating the severity of wetland weed invasion requires at least qualitative assessment of the pattern, size, age-structure, and distribution of colonies (patches) within vegetation. For summer-senescent perennial species like perennial pepperweed, accurate detection of small, juvenile, non-flowering young colonies requires springtime surveys (leafy green plant stage of development) when a high rate of accurate detection is feasible. Dr. Huffman's October surveys preclude accurate, high probability of detection of small, young colonies of perennial pepperweed during the non-green "straw" stage of development in fall. His surveys therefore fail to provide a reliable estimate of the severity of pepperweed invasion at Point Buckler Island.

Young, small colonies of pepperweed produce mostly vegetative shoots, with few or no seed-bearing shoots, and often support little cover even when at peak growth in late spring or early summer. Such small, immature colonies are very difficult to detect among taller species after pepperweed withers in summer; detection of short, juvenile rosette-stage pepperweed requires ground-level search. Dr. Huffman's fall observations of pepperweed, limited to dead standing litter, also likely caused under-detection of small or short incipient pepperweed colonies, and therefore likely underestimated the full extent and pattern of pepperweed colony spread. In contrast, the May 2016 Technical Assessment observations in early March 2016 were made when small, young spreading colonies of pepperweed are most conspicuous by color contrast (green 1-2 ft tall vegetative pepperweed versus dead straw of 2015

residual bulrush litter), and were most likely to estimate accurately the full extent of young colony distribution and spread over the island.

Dr. Huffman's deferred sampling for pepperweed until mid-October cover precludes accurate, meaningful estimation of pepperweed invasion (abundance, distribution and indicators of rate and pattern of spread) in the vegetation of Point Buckler Island. The May 2016 Technical Assessment's sampling date in late winter 2016, in contrast, occurred early within the March-June optimum period for pepperweed detection (presence/absence of colonies) and observation of current-year patterns and rates of spread. The early stage of pepperweed seasonal development in March would significantly underestimate, not overestimate, its abundance, which naturally peaks between May and June most years. As Dr. Huffman was on site during the March 2016 Water Board Site Investigation, he had the opportunity at that time to collect the sorts of data collected in October. The decision to defer sampling until mid-October precludes meaningful analysis of perennial pepperweed conditions.

3.2.4 Patterns of Perennial Pepperweed Cover, Density and Spread Critical to Assessing Harm Are Not Addressed in Huffman Declaration

Most significantly, the October 2016 Huffman Declaration failed to compare the significant difference between pepperweed cover or density and spread (colonization) patterns in diked and un-diked tidal marsh (interior and exterior of new levees). **His declaration did not refute the May 2016 Technical Assessment report's findings that significant recent pepperweed invasion was limited to new disturbed levees and diked portions of Point Buckler Island, which is a key finding of diking and drainage impacts:**

> Impacts from New Invasive Plant Species Establishment. As a result of diking, disturbance and drainage of the tidal marsh at Point Buckler, perennial pepperweed (*Lepidium latifolium*) has become the dominant invasive species in the island interior, where it was previously either absent or a negligible, minor component of the former bulrush, tule, and cattail-dominated tidal marsh. The invasion is likely to result in progressively increased spread and dominance of perennial pepperweed in the diked, drained marsh dieback zones of the Island interior. (Technical Assessment p. 18)… Perennial pepperweed was not found to be frequent or abundant in any of the fringing tidal marshes around the island (outboard of the new levees) on March 2, 2016. The rapid and extensive spread of perennial pepperweed on Point Buckler island appears to be associated causally with widespread marsh drainage and disturbance, consistent with factors known to facilitate its invasion (Reynolds and Boyer 2010). (May 2016 Technical Assessment, Appendix L, p. L-6).

The Cleanup and Abatement Order (CAO) condensed the more complete, biologically nuanced qualitative description of the pepperweed distribution and abundance in the May 2016 Technical Assessment, describing pepperweed "dominance over the interior marsh", without the Appendix L qualifier of "live cover" of pepperweed on March 2. This re-description of Appendix L pepperweed estimated live cover and distribution from the "snapshot" of March 2, though less precise than Appendix

L, accurately reflects the biologically significant pattern and rate of its invasion in the diked marsh, and relative abundance in early spring. Dr. Huffman failed to interpret the CAO "shorthand" version in light of the May 2016 Technical Assessment, and constructed a straw-man argument about the CAO reference to pepperweed dominance as though it had claimed pepperweed was dominant in vegetation during all seasons. Dr. Huffman then refuted the straw-man argument by literally collecting straw evidence: measuring cover of pepperweed straw (dead above-ground standing) in fall after it has naturally died back (senesced) seasonally, leaving only seasonally minimal cover months after its seasonal peak abundance in late spring. Of course, pepperweed is not dominant in October even where it is invasive, if it occurs mixed with other species which have live cover in October. Dr. Huffman's fall 2016 sampling of dead pepperweed cover is biologically meaningless and misleading. His arguments therefore fail to refute the May 2016 Technical Assessment's conclusion that pepperweed has extensively colonized the diked interior of Point Buckler Island where mass (extensive) post-drought, post-diking dieback of bulrush-tule-cattail marsh was observed (Appendix L-6-7). Dr. Huffman does not explain why he did not sample pepperweed around the time of near-maximum seasonal live cover of both pepperweed and its associated dominant species, in late spring to early summer.

3.3 Mass Dieback Had Occurred by 2015

Dischargers fail to refute that "mass dieback" of tule-bulrush-cattail marsh occurred by 2015, because Dischargers failed to compare interior Point Buckler diked marsh with un-diked Point Buckler marsh and with nearby tidal marsh reference sites, and made observations of diked marsh after the 2016 growing season with some potential post-drought recovery of marsh after dieback.

The October 2016 Huffman Declaration also fails to provide evidence rebutting observations of "mass dieback" of tule-bulrush-cattail marsh vegetation discussed in the May 2016 Technical Assessment. He erroneously compared post-drought condition observations reported in the May 2016 Technical Assessment with fall 2016 conditions after a full growing season following a winter with significant rainfall.

Mass dieback, which refers to mortality of plants in the population, can be inferred from the contrast between relative density (plants per unit area) of persistent accumulated dead shoots from the previous year, and newly emerging live shoots of the current year. The March 2, 2016 site visit enabled the Technical Assessment field crew to directly investigate new live shoot emergence of tule, cattail, and bulrush in diked and tidal Point Buckler marshes. In the tidal marshes outside of the new Point Buckler levees, the relative density of new emerging shoots of tule, cattail, and bulrush was similar to the density of dead persistent standing shoots (from the previous year's growth) observed on March 2, 2016, as documented in the May 2016 Technical Assessment and its appendices. This rough balance of new and old dead shoot density does not indicate "mass dieback" of marsh vegetation, even though most cover observed on March 2, 2016 was dead persistent standing shoot litter from the previous year. But in the diked interior of Point Buckler, the density of dead shoots of tule, cattail and bulrush vastly exceeded the density of newly emerging live shoots on March 2, 2016, and many areas lacked any

observable living shoots. This condition did indicate "mass dieback" at the time of observation, before population change could occur post-drought.

Populations of clonal plants may recover after mass dieback from disturbance or drought. After a full growing season with at least some reduction of extreme drought stress, perennial marsh plant populations like tule, cattail, and bulrush, likely had some opportunity to at least partially recover from heavily drought-impacted seasonal wetlands conditions, as they have in much of coastal California. The October 2016 Huffman Declaration's observations and conclusions about marsh plant population sizes, even if they included accurate current-year estimates of living populations (versus residual dead cover), would include potential population recovery and growth of the post-drought 2016 growing season. The May 2016 Technical Assessment did not examine the marsh plant population changes from the subsequent 2016 post-drought growing season as it was completed prior to the 2016 growing season, and reported apparent dieback (distinguishing live shoots at the beginning of the 2016 growing season) from surviving buds of 2015 drought year.

The May 2016 photograph presented in Discharger evidence (July 11, 2016 Sweeney Declaration Exhibit 5; no location cited) showed large stands of green emergent wetland plants and Discharger has used this photograph as evidence that no mass dieback has occurred. However, aerial photographs flown in late June, July, August and September 2016 (Attachment D) reveal that this early season plant growth, likely spurred by the prior wet winter, failed to persist within Point Buckler though such plant growth did persist in the tidal marsh exterior of the new levee and on nearby reference naturally restored tidal marshes of Freeman and Snag Island. **Thus, diking and draining of Point Buckler had in fact caused a mass dieback of native tidal marsh vegetation on the island interior by the time of the March 2 2016 field investigations.** This conclusion remains sound regardless of any degree of 2016 recovery of population size later in the spring growing season while soils were still moist enough to support growth.

The vegetation shown in the Sweeney photo above reveals a canopy of extensive invasive perennial pepperweed (white flowering to seed transition) interspersed in a stand of cattail and bulrush. The interior borrow ditch and a remnant tidal channel indicate the island interior marsh location. This marsh vegetation had senesced or died by summer when the adjacent tidal marsh supported living vegetation in active growth, visible in aerial photographs (Attachment D).

The October 2016 Huffman Declaration did not compare live plant shoot densities of tule, bulrush, or cattail between diked and un-diked portions of Point Buckler Island, nor did he collect evidence about marsh plant cover during the majority of the growing season when discrimination of live versus dead plant cover of the current year would be unambiguous. Dr. Huffman's fall 2016 data sampling time fails to provide reliable evidence contrasting the impacts of diking and drainage on new levee-interior marsh, compared with new-levee exterior tidal marsh. His methodology and conclusions about marsh dieback in relation to diking are invalid.

Figure 3. May 2016 Site Photograph from Sweeney Declaration Exhibit 5
(no locations of photographs provided) with description of spring green growth: "...the island was very green. Attached as Exhibit 5 are accurate copies of photos taken of Point Buckler in May 2016."

3.4 Dischargers Do Not Provide Conclusive Evidence of Living Plants

The October 2016 Huffman Declaration's purported "morphological" inspection of plant roots to determine their live/dead status was neither morphologically sound nor valid or standard field methodology, and provides no conclusive or even suggestive evidence for whether plants were dead, dying, weakly alive, or alive and thriving.

Living buds and shoots (regenerative perennial plant parts that maintain the living population) and young roots of perennial cattails, tules, and bulrushes exhibit **conspicuous spongy, whitish (to yellowish white), firm tissues** (cortex; tissue that stores starchy plant food and maintains internal gas passageways) that are **clearly visible in cross-section**. A sharp blade is conventionally used in field methods to expose the **interior** of marsh plant rootstocks (crowns), rhizomes, shoots, or roots to determine the relative proportions of live and dead tissues or parts. In the lab, certain dyes can be used to test for living perennial marsh plant tissue. Dead and dying plants, contrasted with senescent live plants (seasonally shed, naturally died-back parts) have internal parts and tissues that lack masses of

whitish living cortex, and are usually stained warm to dark brown or blackish (depending on wetland sediment chemistry; iron or organic compounds "stain" dead tissues).

Dr. Huffman's narrative descriptions and photographs of plants roots (below-ground shoots and roots) show only surfaces of plant parts, and show no cross-sections or interior parts exposed to show diagnostic live whitish tissues. None of the photos or descriptions provide either subjective (professional judgment in absence of direct evidence) or objective evidence relevant to whether perennial marsh plants or plant parts are alive, dead, senescent or dying. His purported counter-evidence of marsh dieback (population decline in marsh plants) is misleading and inconclusive.

The May 2016 Technical Assessment's field investigation of March 2, 2016 was able to include direct observation of active emergence of new, young live shoots of tule, bulrush, and cattail plants, originating from live below-ground buds that broke dormancy. Late winter/spring observation of perennial marsh plant regeneration eliminates the need for quasi-forensic investigation of below-ground living, dead, or dying plant parts.

3.5 Huffman Misidentifies Key Plant Species and Makes Unsupported Conclusions Regarding Age or Viability

<u>The October 2016 Huffman Declaration incorrectly identifies key plant species and genera in text and figures and makes unreasonable conclusions about their morphological evidence regarding age or viability (living or dead, relict 2015 plant litter or recently dead 2016 plants).</u>

Dr. Huffman, despite his claims of expertise in wetland plant ecology and botany, misidentifies the species (and even genera) of plants he represents as tests of live versus dead "sprouts" in his declaration. In Dr. Huffman's Attachment 2, Figure 14, his caption reads "Living hardstem tule (*Schoenoplectus californicus*) roots and root / stem sprouts", but the plant shown obviously has a broad smooth blade and spongy sheath that **eliminates the specimen as possible *S. californicus* or *S. acutus*** (the two prevalent tule species of Suisun Marsh lack developed leaf blades), and identify it as a cattail, *Typha* sp.). In addition, the "sprout" is apparently a **bud with uniformly stained dark brown scales** consistent with **bud abortion and death**, rather than viable buds or shoots with live scales with a gradient of color and hue from dark to light brown or dark green. Thus, both the taxonomic identity of the specimen and the evidence of living/dead state are inconsistent with the photograph.

Throughout his declaration, he refers to "hardstem tule" as "*Schoenoplectus californicus*" (California tule). The prevalent tule species at Point Buckler Island, and in photos Dr. Huffman includes in his declaration, is *Schoenoplectus acutus,* not *S. californicus*; both species can be distinguished diagnostically in all seasons by cross-section shape of above-ground shoots, so there is no seasonal constraint on correct taxonomic identification. They can be reliably distinguished (identified) even in photos by indicators that are not always diagnostic. Not one specimen shown in Dr. Huffman's figures shows *S. californicus*.

Dr. Huffman's Attachment 2, Figure 14 (plot VP 4) claims to show an area "dominated by hardstem tule (*Schoenoplectus californicus*)". This is incorrect because the cover is composed of old (pre-2016) gray, matted, dead standing litter from vegetation prior to 2016, and not recently senesced live vegetation cover from 2016. Current-year standing litter (recently senesced shoots from most recent growing season) of tules, cattails, and bulrushes are straw-colored (pale tan, "warm" light brown hues due to residual plant pigments including anthocyanins, carotenoids), and become gray only after prolonged "weathering" (decomposition and photo-oxidation of soft tissues containing pigments). The background colors in this photo and Figure 15 of the same Attachment 2 clearly exhibit typical current-year senescent "straw" color of tule, cattail, and bulrush vegetation with erect standing litter. These erect, straw-colored residues from recent vegetation contrast with the conspicuous uniform gray, prostrate litter mats of tule in Figure 14. Again, based on field observations from March 2, the correct botanical name and identity of these tule stands is *S. acutus*, not *S. californicus*.

The plant misidentifications and erroneous nomenclature indicate substantive errors in preparation of the declaration, and uncertainty about the level of quality control, professional standards, and scientific review by its preparer(s). Even if assistants were responsible for these basic errors during report preparation or field work, the failure to correctly identify dominant plants and dead/living perennial parts represented in photographs shown as evidence in the declaration make Dr. Huffman's expert declaration unreliable with respect to wetland plant biology and ecology. Similarly, the failure to provide simple conventional macroscopic (naked eye visible) diagnostic, conclusive field morphology tests of living/dead perennial plant parts in cross-section, make Dr. Huffman's expert declaration unreliable.

3.6 Drift Debris Not Found in Island Interior Because No Major Levee Overtopping Has Occurred Since Levee Construction

The October 2016 Opposition Brief (pp. 44-46) continues to argue that jurisdiction has not been established, based in part on its argument that drift debris should be found on the island interior if it is low enough to be subject to the tides. The July 2016 Opposition Brief to the Cleanup and Abatement Order (pp. 14-16) argued that "[t]he real high tide line cannot be higher than the levee because drift-lines (tidal debris) would be deposited in the island interior, and levee erosion would be evident from overtopping by tides higher than the levee." Further, the October 2016 Opposition Brief (p.45, lines 12-17) argued that "[t]he prosecution team used bits of lightweight vegetation, not doubt through up high on the levee by wave and wind action, to assess the wrack line. (Technical Report.) And from this information concluded that the high tide line was at a level in which the entire island would have routinely been flooded. This conclusion is disproven by the absence of any debris or wrack in the interior of the island." Both arguments are negated by the Opposition brief's own account of high tides since the construction of the levees in 2014:

> This conclusion is confirmed by the tide data at Port Chicago (on which the May 2016 Technical Report relied), which show no high tides anywhere near 8.2 since the levee was repaired. (Bazel Decl., ex. 24.) The highest water level since March 2014 is less than 7.3 feet…

There are no drift debris deposits found within the interior of Point Buckler because there have been no tides high enough since 2014 diking to overtop the new levee to the extent necessary to introduce any appreciable drift debris. Some minor levee overtopping has occurred, as the few low spots of the levee are about a foot below local High Tide Line. The July 2016 Opposition Brief argument that HTL cannot be higher than the levee due to the absence of interior drift debris is false, because occurrence of tides at or near HTL heights are very infrequent events and none have occurred since levee construction in 2014.

As addressed in the July 2016 Experts Response, in order for new drift debris to have entered Point Buckler after 2014 levee construction, it would be necessary for there to be a tide high enough to overtop the levee for long enough duration to allow a considerable volume of water to enter the site and carry debris in with the overtopping event, and any debris in the water column would have to pass by the tall emergent marsh vegetation on the outboard (tidal) side of the new levee. To assess this potential, we have examined elevations of the new levee, high tides since the new levee fully enclosed Point Buckler in August 2014, the vegetation community on the outboard side of the levee, and field observations from the March 2, 2016 Site Inspection.

3.6.1 Lines of Evidence

Line of Evidence 1 of 4: Levee Elevations

The new 2014 levee has an average centerline elevation of 8.2 ft NAVD88, and only 8 of the 324 surveyed points spaced uniformly along the levee had elevations below 7.3 ft NAVD88 with the lowest elevation being 6.7 ft NAVD88 (May 2016 Technical Assessment, Appendix F).

The three sections of levee that have very little or no outboard tidal marsh and thus where little or no "filtering" of inflowing debris would occur have minimum elevations of 7.4 ft, 8.5 ft and 8.4 ft NAVD88 (May 2016 Technical Assessment Figure F-8), respectively, for stationing intervals of about 860-880 ft, 1440-1460 ft, and 2440-2460 ft (May 2016 Technical Assessment Figure F-7).

Line of Evidence 2 of 4: High Tides Since Levee Construction Closed Island Interior

August 2014 is when Mr. Sweeney completed a full levee enclosure of the island (May 2016 Technical Assessment, Appendix K). As cited in the July 2016 Opposition Brief, the highest water level since March 2014 is less than 7.3 ft NAVD88 (see also Figure 4). During this time period, excepting the period of no data available for Port Chicago (March and April 2015 when high tides are not the higher spring tides), about 6% of the high tides exceeded the lowest surveyed levee centerline elevation.

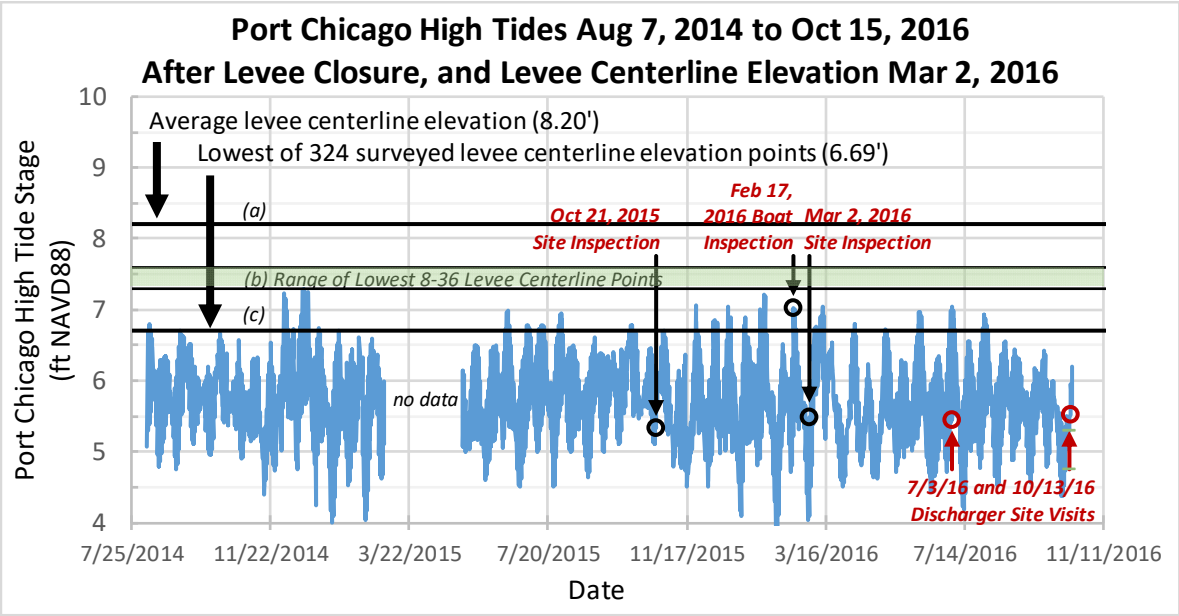

Figure 4. High Tides from Levee Construction to Present
Circles indicate high tide height during daytime hours of each of the field visits by Discharger and Water Board staff

Line of Evidence 3 of 4: Tall Emergent Vegetation Along Outboard Side of New Levee

The newly constructed 2014 levee is almost completely surrounded by fringing tidal marsh on the bay side (outboard) of the levee (see May 2016 Technical Assessment Appendix H and Appendix R). The outboard tidal marsh is composed of tall, upright, perennial tule, cattail, bulrush and rush marsh vegetation with an overall canopy height that equals or exceeds the elevation of the levee. Tall tule, cattail, and bulrush marsh vegetation traps coarse floating debris (driftwood, large tule litter) deposited by waves or currents in the bay, a short distance back from the outer edge of tidal marsh vegetation. Tules and cattail canopy height in tidal Suisun Marshes generally is significantly higher than highest tides, even with waves, and will therefore intercept onshore-transported driftwood and litter. The Discharger provided evidence of this pattern of interception and trapping of coarse litter by tidal marsh vegetation at Point Buckler Island (July 11,2016 Sweeney Declaration Exhibit 2). Only finer debris (marsh plant litter) that floats through the dense, tall tule, cattail, and bulrush marsh vegetation is deposited on levees sheltered by debris-filtering tall marsh vegetation. Most of the new levee is surrounded by variable width of tidal marsh, dominated by vegetation canopies taller than the levee, and which persist upright during winter tides.

Figure 5. Photograph of Coarse Tidal Litter Trapped by Tidal Marsh Outboard of the Point Buckler Levee

Source: July 11, 2016 Sweeney Declaration Exhibit 2

Photo shows interception and trapping of coarse tidal litter (driftwood, tule wrack) in tall tidal marsh vegetation near bay edge, outside levees. This mass wrack deposit was unavailable for transport over levees even if overtopping tides occurred.

Line of Evidence 4 of 4: March 2, 2016 Field Observations Found Evidence of Some Minor Overtopping Events

Evidence of minor levee overtopping was observed on the March 2, 2016 Site Investigation. As shown in the levee crest topographic data (May 2016 Technical Assessment Figure F-7) and noted above, short segments of the levee are lower than the tides *that have occurred since levee construction (Figure 4). The highest of these tides has been about a foot below HTL*. This overtopping showed no signs of any erosion of levee soils and minor indications of buoyant drift debris on the levee crest and interior side slope (May 2016 Technical Assessment Appendix R), indicating that the overtopping events that had occurred were small in magnitude and thus not capable of importing drift debris to the interior of Point Buckler. In addition, the May 2016 Technical Assessment noted evidence consistent with recent levee repairs at multiple locations along the levee, in March 2016. Recent heavy equipment tracks on fresh levee surfaces may indicate levee maintenance or repair that would eliminate any scour marks or levee degradation caused by overtopping. The Dischargers have made no claims that they have not conducted levee maintenance or repair after overtopping events. Unless levee maintenance and repair were ceased entirely, an absence of overtopping erosion marks would be inconclusive.

3.6.2 Conclusions

Combining high levee elevations with very few low spots including no low spots where there is little or no outboard tidal marsh vegetation to filter debris, the highest tides since levee construction not reaching levels high enough for sustained levee overtopping, presence of outboard tidal marsh vegetation to filter drift debris, and field observations of only very minor levee overtopping, there is effectively no opportunity for drift debris to reach the Point Buckler interior since the new levee was constructed in 2014.

At only a few narrow locations is the Point Buckler levee directly open to the bay, with no fringing marsh. Only at these local marsh gaps at the levees would coarse floating debris be able to clear the levee crest during an overtopping event. Only an extreme overtopping event would provide sufficient draft (water depth over the levee crest) for long enough time to allow partially submerged coarse floating debris, like heavy waterlogged driftwood, to clear the crest of the levee and transport across it without drag on the levee crest. **No such tidal events appear to have occurred since 2014 levee construction, as confirmed in the July 2016 Opposition Brief.** More buoyant coarse floating debris is trapped primarily in outboard marsh vegetation along the bay edge.

The High Tide Line is the maximum rising tide at a given location. Maximum high tides do not occur annually, but over longer periods, because tidal heights vary among years. A shallow, brief overtopping event associated with a brief peak tide less than 7.3 ft during the period following levee construction would be insufficient to transport significant loads of coarse tidal debris to Point Buckler Island's interior. Assuming maximum high tides below 7.3 ft NAVD88 (less than the High Tide Line elevation of the 18.6-year tidal epoch) since 2014, and the prevalence of fringing tidal marsh vegetation taller than the levee and surrounding most of the levee, there is no basis to predict significant transport of coarse tidal debris (especially coarse woody debris subject to waterlogging and relatively low buoyancy) to the island interior during relatively minor overtopping events.

3.7 Declaration Mischaracterizes Salinity Range in Brackish Marshes

Attachment 3 of Dr. Huffman's declaration provides "background information" for the table of salinity measurements reported in his October 13, 2016 water quality sampling. The background information provides incorrect baseline or reference salinity range for **brackish** tidal marshes anywhere in the United States or elsewhere in the world. He cites a scientifically invalid source, Wikipedia, for estuarine brackish marsh salinity ranges, and reports an incorrect brackish water marsh salinity range between 0.5 – 30 ppt. Thirty ppt is nearly full marine salinity (34-35 ppt) and does not support universal diagnostic brackish marsh plant genera in the Cyperaceae (sedges, tules, bulrushes), nor does it accurately reflect "brackish" salinity corresponding with any standard scientific conventions for salinity definitions in estuarine ecology, such as the Venice system. This is significant for assessment of salinity in water or soil at Point Buckler because prolonged exposure to 30 ppt salinity would be lethal to dominant brackish marsh plants in the bulrush, tule, and cattail genera. "Brackish" salinity in Suisun Marsh, in context of both tidal marsh and managed brackish marshes under Suisun Marsh Plan the Suisun Marsh salinity standards of the State Water Quality Control Board refers to mesohaline to oligohaline range within

"mixohaline" estuarine waters (diluted seawater), below polyhaline range in the Venice salinity classification system for marine waters, and has an upper limit of 18 ppt, not 30 ppt. Limnologists may use different salinity classifications for inland non-marine, non-estuarine salinity that do not apply to Suisun Marsh or the San Francisco Estuary.

References Cited

Baltz DM, Rakocinski C, Fleeger JW. 1993. Microhabitat use by marsh-edge fishes in a Louisiana estuary. Env Biol Fish 36:109–126.

Baltz DM, Fleeger JW, Rakocinski C, McCall JN. 1998. Food, density, and microhabitat: factors affecting growth and recruitment potential of juvenile saltmarsh fishes. Env Biol Fish 53:89–103.

Baxter, R., L. R. Brown, G. Castillo, L. Conrad, S. Culberson, M. Dekar, F. Feyrer, L. Grimaldo, T. Hunt, J. Kirsch, A. Mueller-Solger, S. Slater, T. Sommer, and K. Souza. 2015. An updated conceptual model for Delta Smelt: our evolving understanding of an estuarine fish. Draft MAST report (Management, Analysis, Synthesis Team), Interagency Ecological Program for the San Francisco Estuary.

Bottom, D.L., K.K. Jones, T.J. Cornwell, A. Gray, and C.A. Simenstad. 2005. Patterns of Chinook salmon migration and residency in the Salmon River estuary (Oregon). Estuarine, Coastal and Shelf Science, 64: 79-93.

Brown LR. 2003. Will tidal wetland restoration enhance populations of native fishes? San Francisco Estuary and Watershed Science (1)1. Available from: http://escholarship.org/uc/ item/2cp4d8wk.

Chesney EJ, Baltz DM, Thomas RG. 2000. Issues and trends in estuarine and coastal fisheries and fish habitat in Louisiana: perspectives from a fish's eye view. Ecol App 10(2):350–366.

Gewant, D. and S.M. Bollens. 2012. Fish assemblages of interior tidal marsh channels in relation to environmental variables in the upper San Francisco Estuary. Environmental Biology of Fishes 94(2): 483-499

Grossman, G.D., T. Essington, B. Johnson, J. Miller, N.E. Monsen and T.N. Peasons. 2013. Effects of fish predation on salmonids in the Sacramento River – San Joaquin Delta and associated ecosystems. Final Report from Predation Workshop, Delta Stewardship Council.

Healey, M. 1982. Juvenile Pacific salmon in estuaries: the life support system. Estuarine comparisons. Academic Press, New York:315-341.

Healey, M.C. 1991. Life History of Chinook salmon *Oncorhynchus tshawytscha*. Edited by: C. Groot and L. Margolis. Pacific Salmon Life Histories, 313-394.

Herbold, B., D.M. Baltz, L. Brown, R. Grossinger, W. Kimmerer, P. Lehman, P.B. Moyle, M. Nobriga, C.A. Simenstad. 2014. The role of tidal marsh restoration in fish management in the San Francisco Estuary. *San Francisco Estuary and Watershed Science* 12(1) http://downloads.ice.ucdavis.edu/sfestuary/

Howe, E.R. and C.A. Simenstad. 2007. Restoration trajectories and food web linkages in San Francisco Bay's estuarine marshes: a manipulative translocation experiment. Marine Ecology Progress Series 351: 65-76

_____. 2011. Isotopic determination of food web origins in restoring and ancient estuarine wetlands of the San Francisco Bay and Delta. Estuaries and Coasts 34: 596-617

Levy, D.A. and T.G. Northcote. 1982. Juvenile salmon residency in a marsh area of the Fraser River estuary. Canadian Journal of Fisheries and Aquatic Sciences, 39:270-276.

Moyle, P.B., A.D. Manfree and P.L. Fiedler, eds. 2014. Suisun Marsh: Ecological History and Possible Futures, UC Press, Berkeley, CA.

Miller, B. A. and S. Sadro. 2003. Residence time and seasonal movements of juvenile coho salmon in the ecotone and lower estuary of Winchester Creek, South Slough, Oregon. Transactions of the American Fisheries Society, 132:546-559.

Miller, J. A. and C. A. Simenstad. 1997. A comparative assessment of a natural and created estuarine slough as rearing habitat for juvenile chinook and coho salmon. Estuaries **20**:792-806.

National Marine Fisheries Service (NMFS). 1993. Sacramento River Winter-run Chinook Salmon Federal Register: http://www.westcoast.fisheries.noaa.gov/publications/frn/1993/58fr33212.pdf and Critical Habitat Map: http://www.westcoast.fisheries.noaa.gov/publications/gis_maps/maps/salmon_steelhead/critical_habitat/chin/chinook_srwr.pdf

_____. 2005a. Central Valley Spring-run Chinook Salmon Federal Register: http://www.westcoast.fisheries.noaa.gov/publications/frn/2005/70fr52488.pdf and Critical Habitat Map: http://www.westcoast.fisheries.noaa.gov/publications/gis_maps/maps/salmon_steelhead/critical_habitat/chin/chinook_cvsr.pdf

_____. 2005b. Central Valley Steelhead Federal Register: http://www.westcoast.fisheries.noaa.gov/publications/frn/2005/70fr52488.pdf and Critical Habitat Map: http://www.westcoast.fisheries.noaa.gov/publications/gis_maps/maps/salmon_steelhead/critical_habitat/steelhead/steelhead_ccv_ch.pdf

_____. 2009. Southern Green Sturgeon Federal Register: http://www.westcoast.fisheries.noaa.gov/publications/protected_species/other/green_sturgeon/gs_critical_habitat/frn_10092009_green_sturgeon_ch.pdf and Critical Habitat Map: http://www.westcoast.fisheries.noaa.gov/publications/gis_maps/maps/salmon_steelhead/critical_habitat/greensturgeon_ch_maps.pdf

Nobriga, Matthew L.; & Feyrer, Frederick. (2007). Shallow-Water Piscivore-Prey Dynamics in California's Sacramento–San Joaquin Delta. *San Francisco Estuary and Watershed Science*, 5(2). jmie_sfews_10990. Retrieved from: http://escholarship.org/uc/item/387603c0

Pestrong, R. 1969. The Shear Strength of Tidal Marsh Sediments. Journal of Sedimentary Petrology, Vol. 39 (1), pp. 322-326.

Rechisky, E.L., D.W. Welch, A.D. Porter, M.C. Jacobs-Scott, P.M. Winchell, and J.L. McKern. 2012. Estuarine and early-marine survival of transported and in-river migrant Snake River spring Chinook salmon smolts. Scientific Reports, 2.

Roegner, G.C., E.W. Dawley, M. Russell, A. Whiting, and D.J. Teel. 2010. Juvenile salmonid use of reconnected tidal freshwater wetlands in Grays River, Lower Columbia River Basin. Transactions of the American Fisheries Society 139: 1211-1232.

Roegner, G.C, R. McNatt, D.J. Teel, and D.L. Bottom. 2012. Distribution, Size, and Origin of Juvenile Chinook Salmon in Shallow-Water Habitats of the Lower Columbia River and Estuary, 2002–2007. Marine and Coastal Fisheries 4(1): 450-472.

Simenstad, CA; Hood, WG; Thom, RM. 2000. Landscape structure and scale constraints on restoring estuarine wetlands for Pacific coast juvenile fishes Edited by: Weinstein, MP; Kreeger, DA Concepts and Controversies in Tidal Marsh Ecology, pp 597-630

U.S Fish and Wildlife Service. 1994. Delta Smelt Federal Register: http://ecos.fws.gov/docs/federal_register/fr2751.pdf and Critical Habitat Map: https://www.fws.gov/sfbaydelta/maps/delta_smelt_critical_habitat_map.pdf

Attachment A Comparison of Marsh Vegetation Before and After 2014 Diking at Point Buckler, and References Sites of Nearby Freeman, Snag and Simmons Islands and Rush Ranch

This Attachment A provides several aerial images of Point Buckler and four reference sites, in order to illustrate two points:

1) Diking Point Buckler adversely impacted wetland vegetation, illustrated by comparing tidal and diked marshes, and
2) That in the winter, tidal marsh vegetation naturally turns "brown" and thus such brown-vegetation aerial photographs do not illustrate "high and dry" conditions as asserted in the Opposition Brief but instead the natural winter dormancy of tidal marsh plants, illustrated by comparing winter and summer aerial photographs of tidal marshes.

Three types of aerial images are included here:

1) **Natural color images** – these images display the natural colors visible to the human eye
2) **Color infrared images** – these images display the color infrared (CIR) wavelengths of the color spectrum not visible to the human eye. Live green (high content chlorophyll pigment) plant tissue strongly reflects infrared wavelengths, compared with dead or dying leaves (chlorophyll pigment degraded), making CIR images very effective at detecting live wetland vegetation. Each plant species exhibits different spectral reflectance patterns with distinct "signatures", which are detected as color variations in CIR images.
3) **NDVI images, or Normalized Difference Vegetation Index images** – NDVI images are software-generated interpretations of spectral signatures from natural color and CIR imagery calculated using leaf area density and chlorophyll density. These images display NDVI color maps, with blue colors reflecting plants with high vigor (i.e., actively growing) and the yellow-red colors representing plants with low vigor (i.e., less active growth). NDVI can be used to differentiate plant species or growth types, as well as be used as an indicator of plant productivity that can be correlated with biophysical parameters such as live plant biomass[1]. In wetland settings, these color differences translate to blue areas representing actively growing wetland plants and yellow-red areas representing dormant plants.

[1] Jensen, J. R. 2000. Remote sensing of the environment: an earth resource perspective. 2nd edition. Prentice Hall, Upper Saddle River, New Jersey.

Four reference sites are included here:

1) **Freeman Island**: a nearby tidal marsh island that naturally restored from its prior diked marsh conditions. As this island breached before 1981 and had a similar diked marsh history to Point Buckler, it serves as a close approximation of Point Buckler conditions before 2014 diking.
2) **Snag Island:** a nearby tidal marsh island that naturally restored from its prior diked marsh conditions. As this island breached before 1981 and had a similar diked marsh history to Point Buckler, it serves as a close approximation of Point Buckler conditions before 2014 diking.
3) **Simmons Island:** the diked marsh directly east of Point Buckler across Andy Mason Slough. This site serves as a reference for vegetation conditions within a diked, managed seasonal marsh of Suisun Marsh. Seaward of Simmons Island levees, fringing tidal marsh also provides a contrasting local reference condition.
4) **Rush Ranch:** a mix of tidal marsh, diked perennial saturated marsh, and immediately adjacent uplands in north-central Suisun Marsh. This site serves as references for both diked marshes that are wet (saturated or flooded) year-round, and tidal marshes next to arid upland (literally "high and dry") grasslands.

KEY FINDINGS

- **Summer comparison.** The predominantly live summertime plant biomass in the tidal marshes of Freeman and Snag islands and on the exterior tidal marsh at Point Buckler contrasts strongly with the matrix of brown, dead or dormant (senescent) vegetation canopy in summer within the interior of Point Buckler.
- **Fall comparison.** Tidal marshes at Freeman and Snag islands and on the exterior tidal marsh at Point Buckler exhibit accumulation of senescent leaves and shoots (plants entering normal seasonal dormancy) but do not completely obscure live growth. In contrast, the interior of Point Buckler is predominantly dormant or dead above-ground plant biomass.

Table A-1. Comparisons of Before vs. After Wetland Vegetation in Fall and Summer at Point Buckler vs. Freeman and Snag Islands

Season	Photo Type	Description	Conclusions
Baseline (pre-diking) conditions			
Winter	Natural color	• All three tidal marsh islands exhibit prevalent or exclusively pale gray-brown/straw vegetation hues, with no green vegetation cover • Typical fall-winter senescence (seasonal dormancy and shoot dieback)	• Documents naturally occurring winter dormancy of dominant perennial marsh vegetation, with above-ground shoot senescence, consistent pattern across island vegetation gradient

Season	Photo Type	Description	Conclusions
			• No abrupt visible contrast between interior and exterior island vegetation
Summer	Natural color	• All three tidal marsh islands exhibit prevalent green vegetation during the summer growing season, and only minor patches of gray-brown senescent leaves or persistent accumulated leaf litter. • Snag Island exhibits predominantly green vegetation throughout. • Freeman Island exhibits mixed green and gray-green vegetation patterning across island. • Buckler Island exhibits deep green interior vegetation. Light gray patches occur behind south shore marsh edge.	• Documents naturally occurring summer tidal marsh green vegetation growth across entire island marsh plain on all three islands, with no significant contrast between outer and inner island green vegetation cover • Live green leaf canopy (green) dominant over persistent leaf litter (gray, gray-brown, or straw). • South shore Buckler gray patches are tidal litter deposits (wrack litter, driftwood) trapped in outer tidal marsh vegetation facing dominant wind-wave approach.
Post-diking conditions			
Winter	Natural color	• Predominant grayish cover in all three islands • Some minor gray-green gradient at outer tidal marsh edges.	• Seasonal winter dormant perennial marsh vegetation, senesced (gray to gray-tan “straw” color) shoot cover • Indistinguishable from dead marsh interior vegetation at Buckler Island.
Summer	Natural color	• Interior Buckler Island mosaic of gray to gray-brown, no significant green vegetation. • Exterior tidal Buckler Island mosaic of predominantly dark green and minority gray-green cover. • Interior Freeman and Snag Islands are mosaic of green, brown, and gray patches; little contrast between interior and exterior island gradient of green patches.	• Strong contrast between live green exterior and gray interior marsh vegetation at Buckler. • Summer vegetation dieback (senescence or death) interior within diked area. • Live biomass prevalent in exterior tidal marsh. • Post-drought accumulation of persistent leaf litter dominates Buckler interior • Mixed live and accumulated dead litter in interior Snag and Freeman.

Season	Photo Type	Description	Conclusions
Winter	Color infrared	• All three tidal marsh islands exhibit gray to pale pink/gray color patterning over whole island vegetation • Greatest pink at outer edge of islands.	• Perennial marsh vegetation mostly dormant • Dominant infrared signature is persistent gray or grayish leaf litter. • Pale pink outer island margin represents wave scour of leaf litter, increased relative exposure of youngest emerging green shoots or algal growth on exposed wet marsh soil surface.
Summer	Color infrared	• Point Buckler Island exhibits strong contrast between exterior tidal marsh (bay side of new levee, saturated red false color infrared) and interior diked marsh (predominantly gray leaf litter/dead or senescent shoot cover, with narrow minor red zones bordering wet ditches and channels), gray levee crest/road. • Snag and Freeman Island tidal marsh exhibit predominantly saturated red false color infrared associated with live vegetation cover. Discrete semi-circular discrete bright gray patches occur within matrix of red in Snag and Freeman Island, as well as dull gray to gray-red patches.	• Strong contrast between exterior live tidal marsh vegetation and diked non-tidal interior predominantly senescent or dead vegetation. • Tidal marsh outside levees supports predominant live plant biomass, green vegetation in summer, like most of tidal Freeman and Snag Island pattern in summer. • Interior diked Buckler Island marsh exhibits predominant leaf litter (senescent or dead vegetation, or both; similar to gray levee road) with minority live green vegetation in depressions or near wetted interior ditches and channels. • Bright gray patches of Freeman and Snag Islands match pattern of invasive reed colonies with persistent leaf litter. Dull gray-red patches match pattern of higher elevation marsh tidal drainage divides.
Fall	NDVI	• Buckler Island within diked areas interior exhibits predominantly brown patches extensively distributed, with minor blue (live vegetation) patches. • Snag and Freeman Islands, and exterior (tidal) Buckler Island exhibit	• Fall accumulation of senescent shoots and leaves (persistent leaf litter; seasonal above-ground dieback prior to winter dormancy) is evident in tidal marshes of Snag and Freeman Islands, and outer tidal Buckler

Season	Photo Type	Description	Conclusions
		predominantly blue (live vegetation) cover with diffuse light brown patches.	Island, but leaf litter does not fully obscure live growth in fall. • Interior Buckler Island diked marsh is predominantly senescent or dead above-ground at the same time.
Summer	NDVI	• Buckler Island exhibits strong contrast between interior diked marsh color and pattern (dominant brown matrix; blue along interior channels and ditches, depressions) and exterior tidal marsh (all blue). • Snag and Freeman Islands entirely blue vegetation; more saturated blue gradient towards outer island. • Rush Ranch tidal and diked perennial marsh entirely blue vegetation; adjacent arid grasslands entirely yellow-red summer-dormant upland grasslands	• Consistent with infrared: predominantly live biomass in tidal marshes of Snag, Freeman, and exterior Buckler islands; only interior Buckler Island exhibits matrix of brown, dead or senescent vegetation canopy in summer. • Rush Ranch tidal and diked perennial marsh consistent with tidal marshes of Snag, Freeman, and exterior Buckler islands. Rush Ranch uplands of dormant grassland vegetation canopy in summer consistent with Point Buckler matrix of brown, dead or senescent vegetation canopy in summer.

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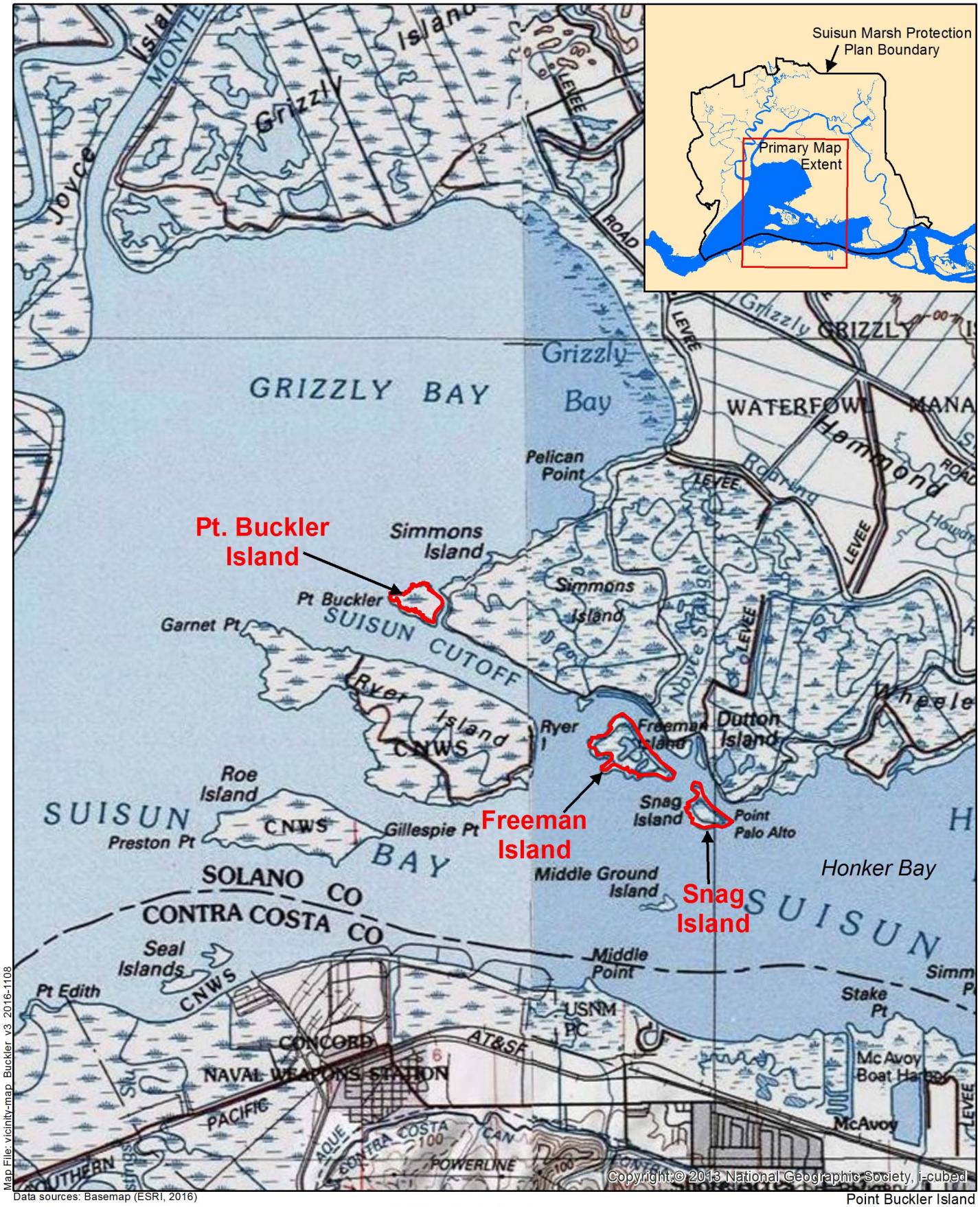


Map File: vicinity-map_Buckler_v3_2016-1108

Data sources: Basemap (ESRI, 2016)

1:63,360 (1" = 1 mi at letter size)

0 0.5 1 Miles

0 0.75 1.5 Kilometers

Point Buckler Island
Solano County, CA

Figure A-1

Vicinity Map of Point Buckler, Freeman, and Snag Islands

Map File: pre-mod-veg-compare 2016-1108

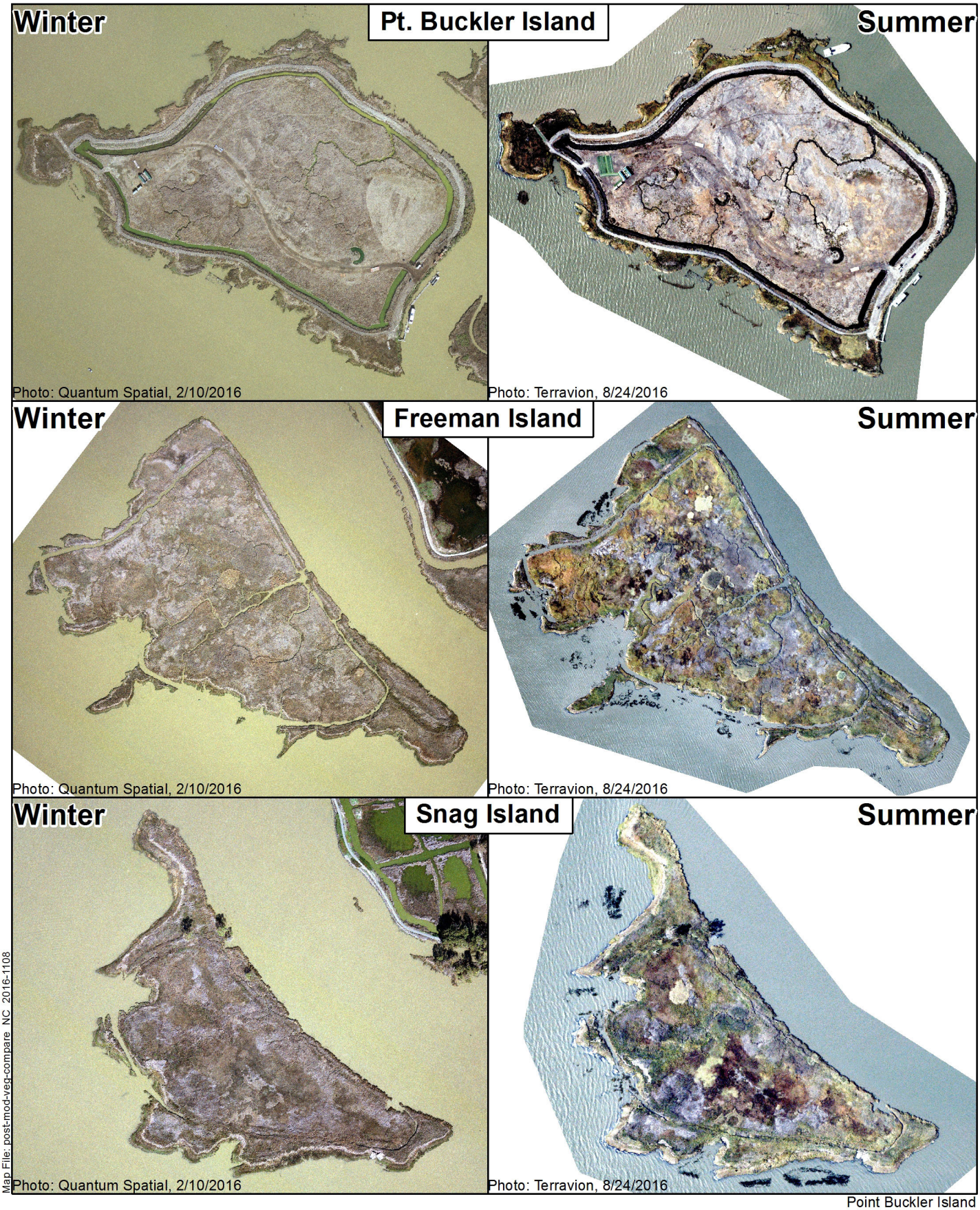
Point Buckler Island
Solano County, CA

Figure A-2

Scales Variable

Image brightness and contrast adjusted from original for visual clarity

Tidal Marsh Baseline Comparisons
Winter and Summer: Buckler, Freeman and Snag Islands



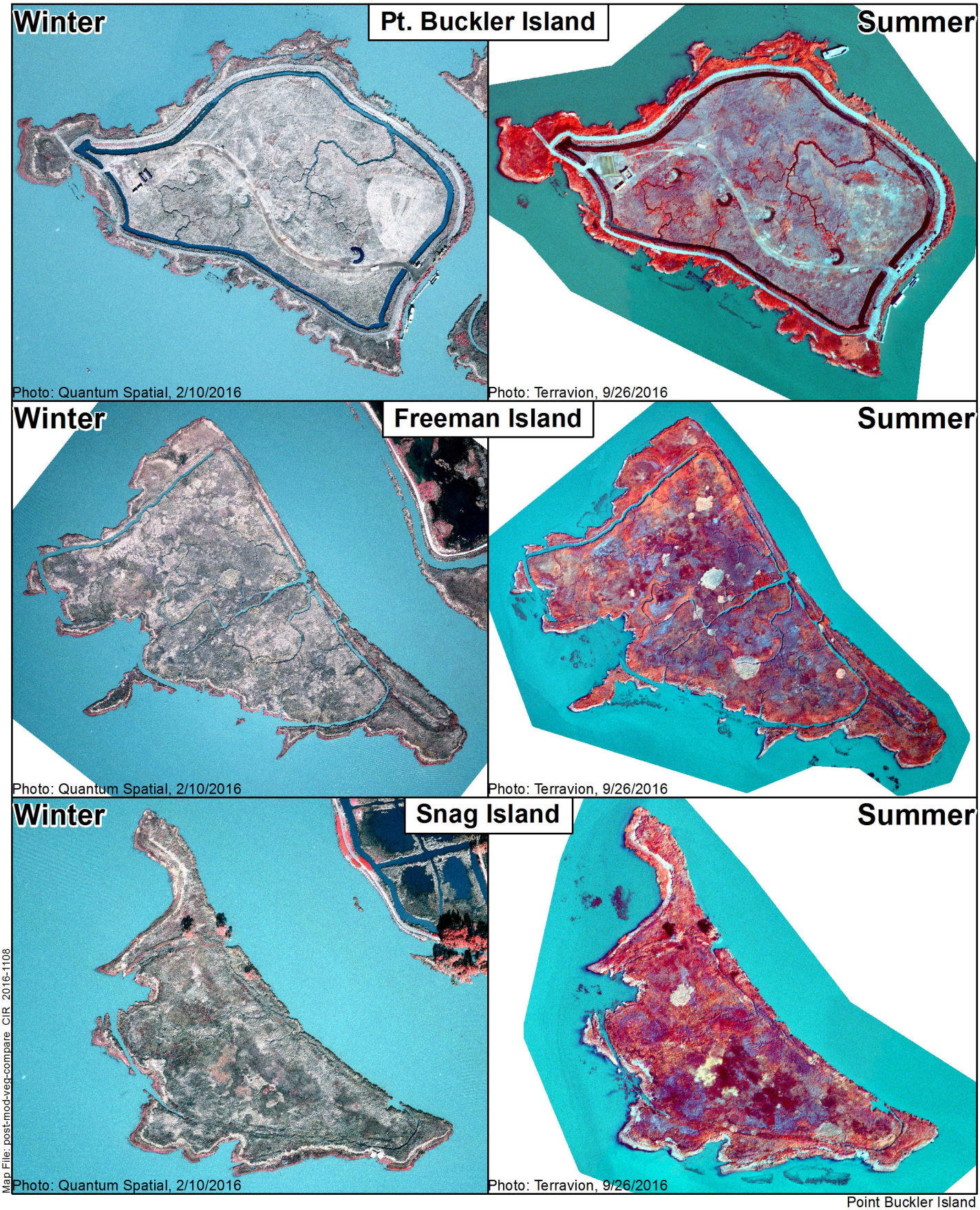
Map File: post-mod-veg-compare_NC_2016-1108

Point Buckler Island
Solano County, CA

Scales Variable

Image brightness and contrast adjusted from original for visual clarity

Figure A-3
Tidal and Diked Marsh Post-Disturbance Comparisons
Winter and Summer: Buckler, Freeman and Snag Islands
Natural Color Imagery



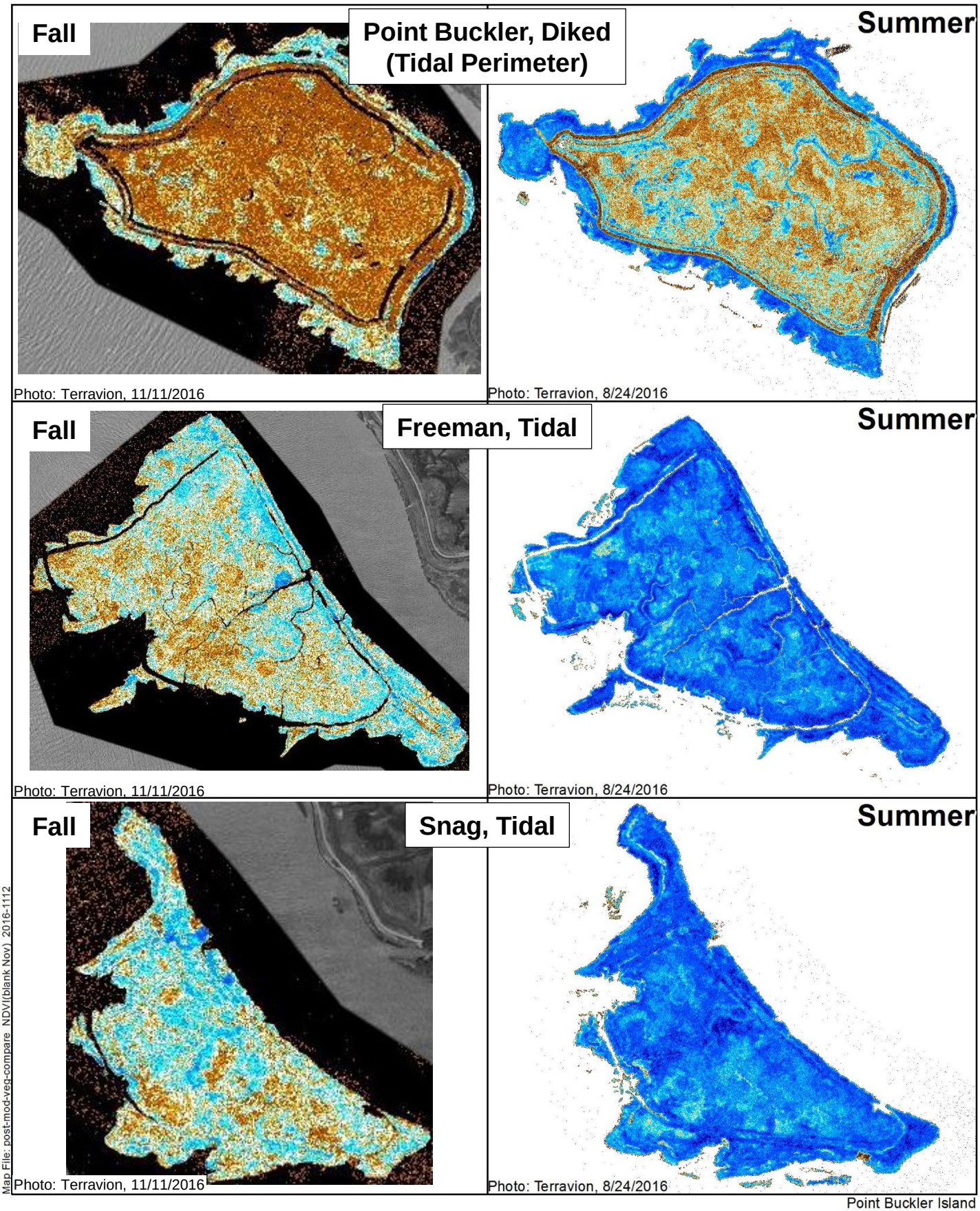
Map File: post-mod-veg-compare_CIR_2016-1108

Point Buckler Island
Solano County, CA

Scales Variable

Image brightness and contrast adjusted from original for visual clarity

Figure A-4
Tidal and Diked Marsh Post-Disturbance Comparisons
WInter and Summer: Buckler, Freeman and Snag Islands
Color Infrared Imagery



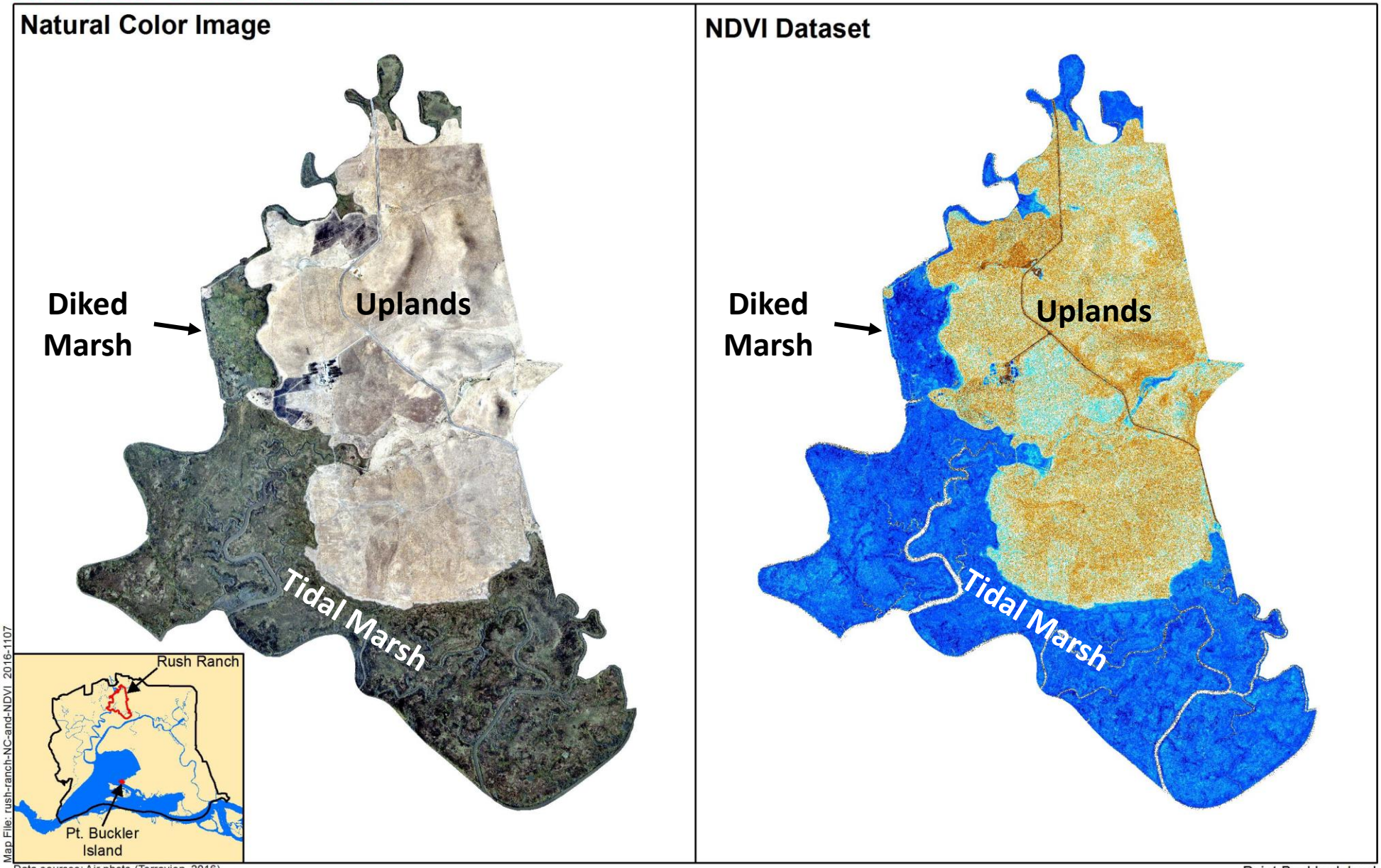
Map File: post-mod-veg-compare_NDVI(blank Nov) 2016-1112

Point Buckler Island
Solano County, CA

Figure A-5

Scales Variable

Tidal and Diked Marsh Post-Disturbance Comparisons
Summer and Fall 2016: Buckler, Freeman and Snag Islands (NDVI Map)



Map File: rush-ranch-NC-and-NDVI_2016-1107

Data sources: Air photo (Terravion, 2016)

1:36,000 (1" = 3,000' at letter size)

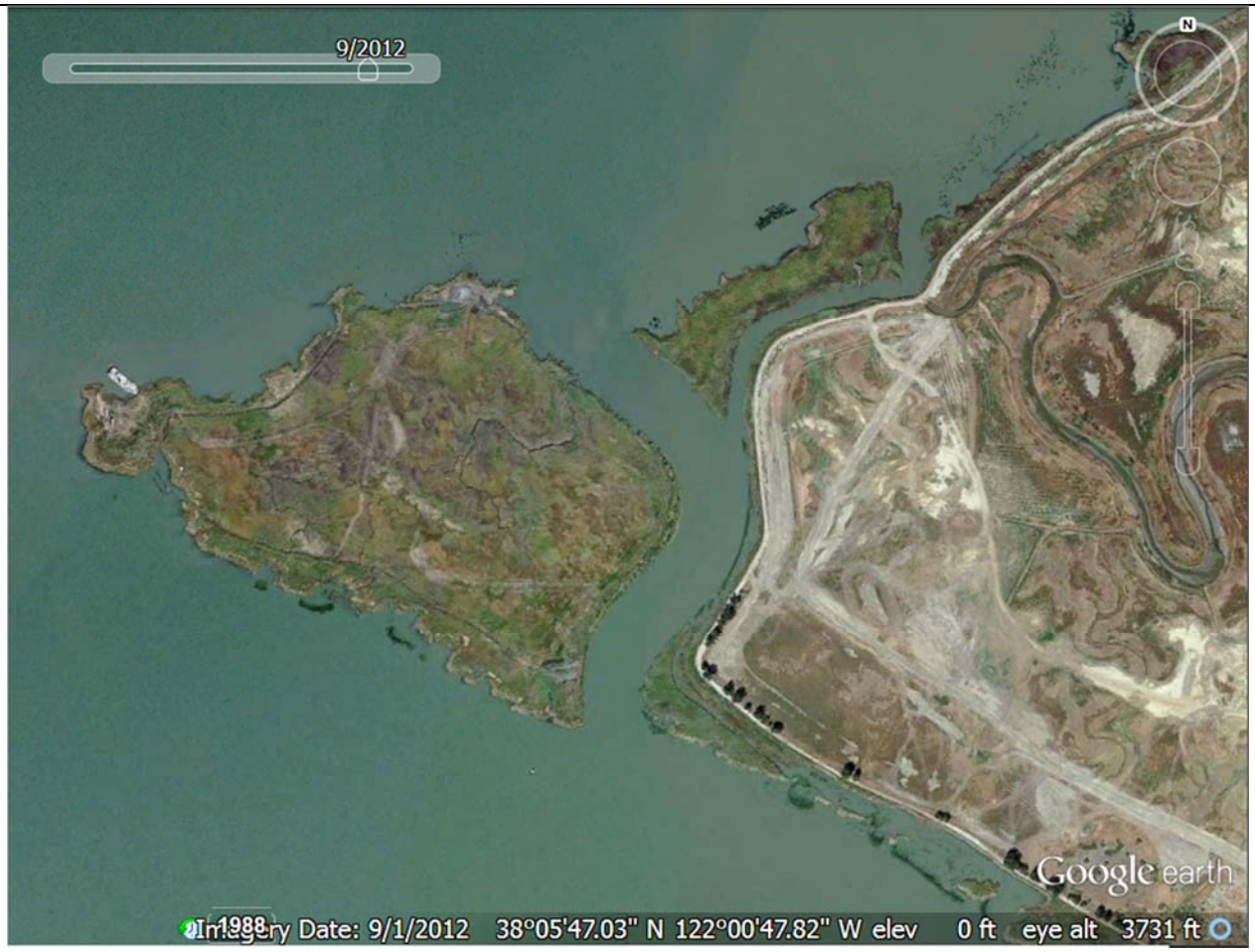
0 1,500 3,000 ft

0 450 900 m

Point Buckler Island
Solano County, CA

Figure A-6

Rush Ranch Aerial Photography and NDVI Dataset



Google Earth Image date	Growing season stage	*Point Buckler* vegetation pattern and Simmons Island fringing tidal marsh	Exterior fringing *tidal marsh* west Simmons Island	Interior *non-tidal Simmons Island* vegetation, soil, water pattern
September 1, 2012	late summer, dry (extreme drought)	Dull green-brown and brown vegetation matrix with darker brown patches and light gray zones, and circular gray-green sharp-bordered patches. Vehicle tracks and mown paths initiated; no levees or new ditches; turbid bay water in interior sinuous channels.	Dull green-brown and brown vegetation matrix with darker brown patches; no vehicle tracks or mowing tracks. Less brown and gray gradient from dull green vegetation. Very strong contrast with interior Simmons Island diked marsh.	Coarse mosaic of gray-white to gray-brown dry basin beds; greenish gray-brown and dark brown fine-grained vegetation (pickleweed) locally. Trace local green vegetation. Relict slough channel gray; darker thalweg (deepest portion); drawdown.

Figure A-7. Tidal and Diked Marsh Pre-Disturbance Comparison, Late Summer, Buckler and Simmons Islands

Source: May 2016 Technical Assessment, Appendix H

Attachment B September 21, 2016 Experts Letter to BCDC Regarding Role of Daily Ebb and Flow of the Tides in Establishing Tidal Marsh

SIEGEL ENVIRONMENTAL

September 21, 2016

Marc Zeppetello
Chief Counsel
San Francisco Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600
San Francisco, CA 94102

Subject: Role of Daily Ebb and Flow of the Tides in Establishing Tidal Marsh

Dear Mr. Zeppetello,

In this letter I address briefly the assertion made by Mr. Bazel (Statement of Defense to BCDC, page 31 lines 22-28 to page 32 lines 1-3) that Point Buckler Island at the time of acquisition by Mr. Sweeney in 2011 did not meet the definition of tidal marsh as set forth in the Suisun Marsh Management Program (SMMP) prepared by the Suisun Resource Conservation District and certified by BCDC in 1980. That definition reads "[t]idal marshes are defined as vegetated areas within the PMA [Primary Management Area] which are subject to daily tidal action" (SMMP page C-1). In summary, there is no question whatsoever that Point Buckler Island was tidal marsh in 2011 within the SMMP definition of tidal marsh.

The international tidal marsh literature is unequivocal in establishing the relationship between the hydrology of a tidal marsh – the daily ebb and flow of the tide – and the soil saturation conditions that control establishment of tidal marsh wetland vegetation[1,2,3,4]. This hydrology-soils-vegetation relationship is the basis of every wetland definition, whether tidal marsh or other wetland types. For tidal marshes, the daily ebb and flow of the tides is the water source that establishes the groundwater table and its overlying saturated soil horizon.

In the case of Point Buckler Island, the daily ebb and flow of the tides through the seven levee breaches into the site's nearly 10,000 feet of interior intertidal channels and ditches provided the hydrologic regime to establish the Island's groundwater table and soil saturation conditions that drove the presence of obligate wetland plants throughout the entirety of Point Buckler Island (excepting the eastern remnant terrestrial levee).

---

[1] W. Lewis, ed., 1995. Wetlands Characteristics and Boundaries. National Academy Press, Washington, DC
[2] D. Batzer and R. Sharitz, eds. 2014. Ecology of Freshwater and Estuarine Wetlands. Second Edition. University of California Press, Oakland, CA
[3] E. Watson. 2012. Geomorphology, Hydrology, and Tidal Influences. pp.35-52 in: Palaima, A., ed., Ecology, Conservation, and Restoration of Tidal Marshes: the San Francisco Estuary. University of California Press, Berkeley, CA.
[4] W.J. Mitsch and J.G. Gosselink. 1986. Wetlands. Van Nostrand Reinhold, New York.

637 Lindaro Street, Suite 201, San Rafael, CA 94901
415.299.8746 • www.siegelenvironmental.com

The tidal marshes of Suisun Marsh including Point Buckler Island are subject to daily tidal action through this globally-ubiquitous mechanism of the tides controlling soil saturation and consequently vegetation communities. The vegetated tidal marsh "plain" is a *component* of a tidal marsh and is the land surface on which the tidal hydrology expresses itself through presence of tidal marsh vegetation. Because of the relationship between the daily tidal hydrology and soil saturation conditions, the *surface* of the tidal marsh plain itself need not be directly submerged on a daily basis for the marsh plain to be *subject* to daily tidal action. Tidal marsh plains around the globe exist at elevations above daily tidal submergence, because of this hydrology-soils-vegetation relationship.

Thank you for this opportunity to provide additional insight into conditions at Point Buckler.

Sincerely,

Stuart W. Siegel, Ph.D., P.W.S.
Principal Environmental Scientist

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Attachment C Invalid Huffman Water Quality and Tide Stage

Attachment 3 of the October 19, 2016 Huffman declaration contains water quality data for pH and conductivity measured at two interior locations and one location in Andy Mason Slough. The pH values of pH 5 at all three stations raised a warning, as such acidic conditions in tidal waters of Suisun Marsh are highly out of the ordinary. To assess these concern about the pH data, we downloaded water quality data for the nearby Suisun Cutoff DWR water quality station (see location of this station in Figure C-1) and tide stage data from the Port Chicago tide station from the day Dr. Huffman made the field measurements (October 13, 2016). These data are presented in Figure C-2.

pH data. The DWR data shows pH at about 7.9 and stable throughout the day. In contrast, Dr. Huffman used HYDRION plastic pH indicator strips to measure water quality (Huffman declaration p.8 lines 16-17). Paper pH strips are used for inexpensive, broad-range, imprecise pH tests, measuring pH in intervals (increments). They are commonly used for domestic and public school introductory science education programs and for field investigations to gain a very rough estimate of approximate pH. Any valid, accurate and precise replicable pH data must be collected with a pH meter calibrated to known pH calibration solutions. Given the large discrepancy between the Huffman data and the DWR data, the long record of DWR maintaining operational water quality stations throughout Suisun Marsh (and elsewhere), and the consistency of the DWR data with other publicly available tidal waters pH data in Suisun Bay and Marsh, we can confidently conclude that the Huffman pH data is not reliable. Consequently, all assessments, interpretations, conclusions, and recommendations from the Huffman pH data cannot be relied upon in any manner.

Conductivity data. The DWR conductivity data is in the same general range as that presented by Dr. Huffman. However, because the Huffman declaration does not provide any information regarding calibration of its YSI Model 30 handheld sampling instrument, there is no basis to assume those data are valid. Given the problem with the pH data and lack of YSI sensor calibration data or description, it is reasonable to conclude that attention to the quality assurance schedule of the Surface Water Ambient Monitoring Program[2] for collecting water quality data and procedures described in the YSI operating manual[3] for instrument calibration were not followed and thus all data presented cannot be relied upon in any manner.

Tide stage data. The method for collecting tide data at Point Buckler on October 13, 2016 is described in the Huffman declaration (p.8 line 26 through p.9 line 2) and photo documented in Attachment 4, Tide

[2] Surface Water Ambient Monitoring Program Quality Assurance Team, Quality Assurance Research Group, Moss Landing Marin Laboratories, San Jose State University Research Foundation. 2008. Surface Water Ambient Monitoring Program Quality Assurance Program Plan, Version 1.0. September 1. 108pp.
[3] YSI Incorporated. 2007. YSI Model 30, YSI Model 30M Handheld Salinity, Conductivity and Temperature System Operations Manual, Revision E. 26pp. 47pp

Photo 1. This method consisted of inserting a branch of wood into the mud and establishing its elevation based upon some measure of the levee elevation presented in the May 2016 Technical Assessment and using a carpenter's ruler and an iPhone Clinometer App as a hand level. **Such methods may yield a rough approximation of elevations and water levels, perhaps approaching a tenth of a foot at the very best, but by no means can support data presented to the one-thousandth of a foot as done so in Declaration Attachment 4.** Further, Huffman used the NOAA tide height multiplier published on the internet of tide heights at Point Buckler being 1.2 times that of high tides at Port Chicago. We used that same multiplier to assess what it would predict the High Tide Line to be at Point Buckler, which yielded a far higher value than what we estimated in the May 2016 Technical Assessment. By no means however does NOAA assert that their multiplier is an exact and static value applicable with certainty on every tide cycle. Thus, Dr. Huffman has misused the NOAA tide height multiplier for Point Buckler. Next, Dr. Huffman makes tide measurements from a wooden piling resting loose on its side in the mud (Attachment 4 Tide Photo 1). **Such a loose wooden object, unless anchored firmly in the ground which it is not stated to be nor appears to be in the photograph, is liable to moving when the tides reach it and is thus of no value in determining tide stage.**

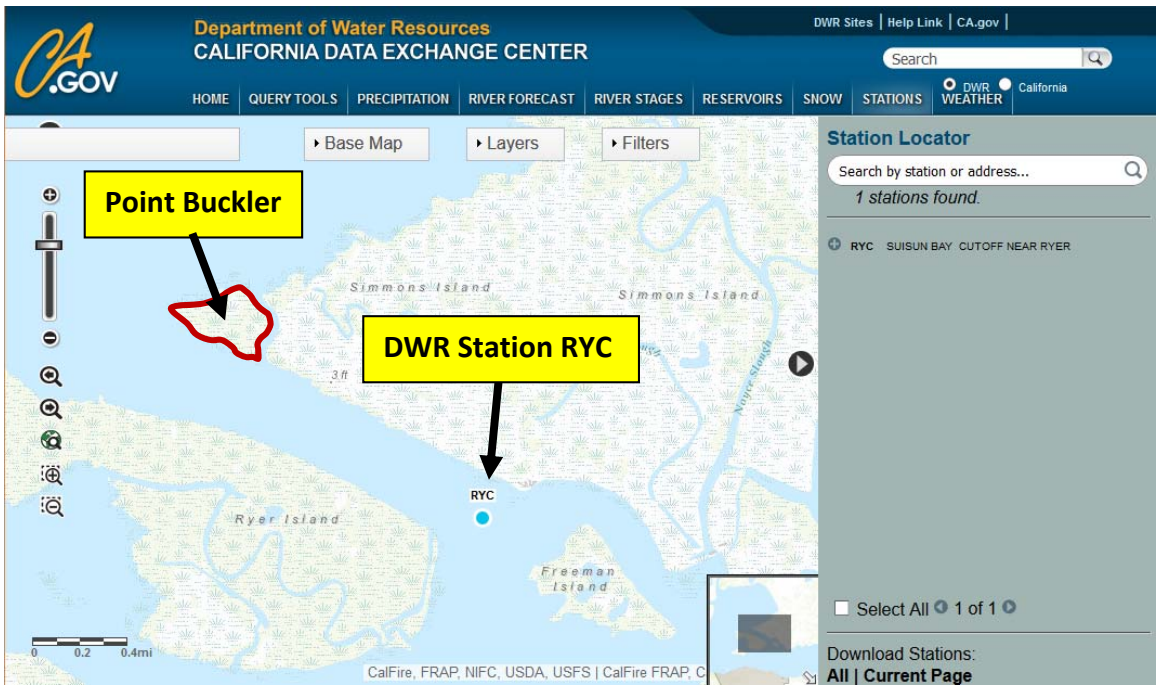

Figure C-1. Location of DWR Water Quality Station RYC, About 1.1 mile Southeast of Point Buckler
Source: cdec.water.ca.gov

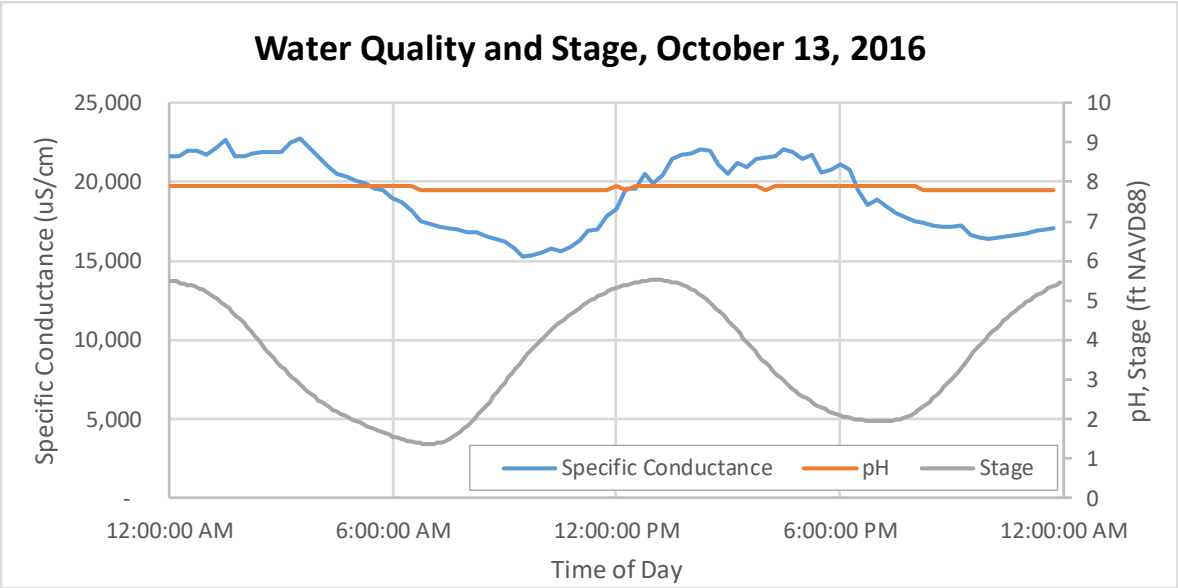

Figure C-2. Tide Stage and Water Quality on October 13, 2016 Huffman Buckler Site Visit
Source: www.tidesandcurrents.noaa.gov (Port Chicago tides), cdec.water.ca.gov (DWR Station RYC, see Figure C-1)

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Attachment D Summer and Fall 2016 Aerial Photographs and NDVI Maps of Point Buckler, Freeman Island, and Snag Island

Aerial photography in natural color and color infrared and automated generation of Normalized Difference Vegetation Index (NDVI) maps from these images were flow on June 29, July 27, August 24, September 26, and November 10-11, 2016 and are included here. Some images have the brightness and contrast adjusted for better visual clarity, which does not change the "hue" or colors of the aerial images.

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Figure D-42. November 11, 2016 NDVI Map, Point Buckler

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Figure D-44. November 11, 2016 NDVI Map, Snag Island

Map File: air-photo_2016-0629_NC_Buckler_2016-1108

Data sources: Air photo (Terravion, 2016)

1:3,600 (1" = 300' at letter size)

0 150 300 ft

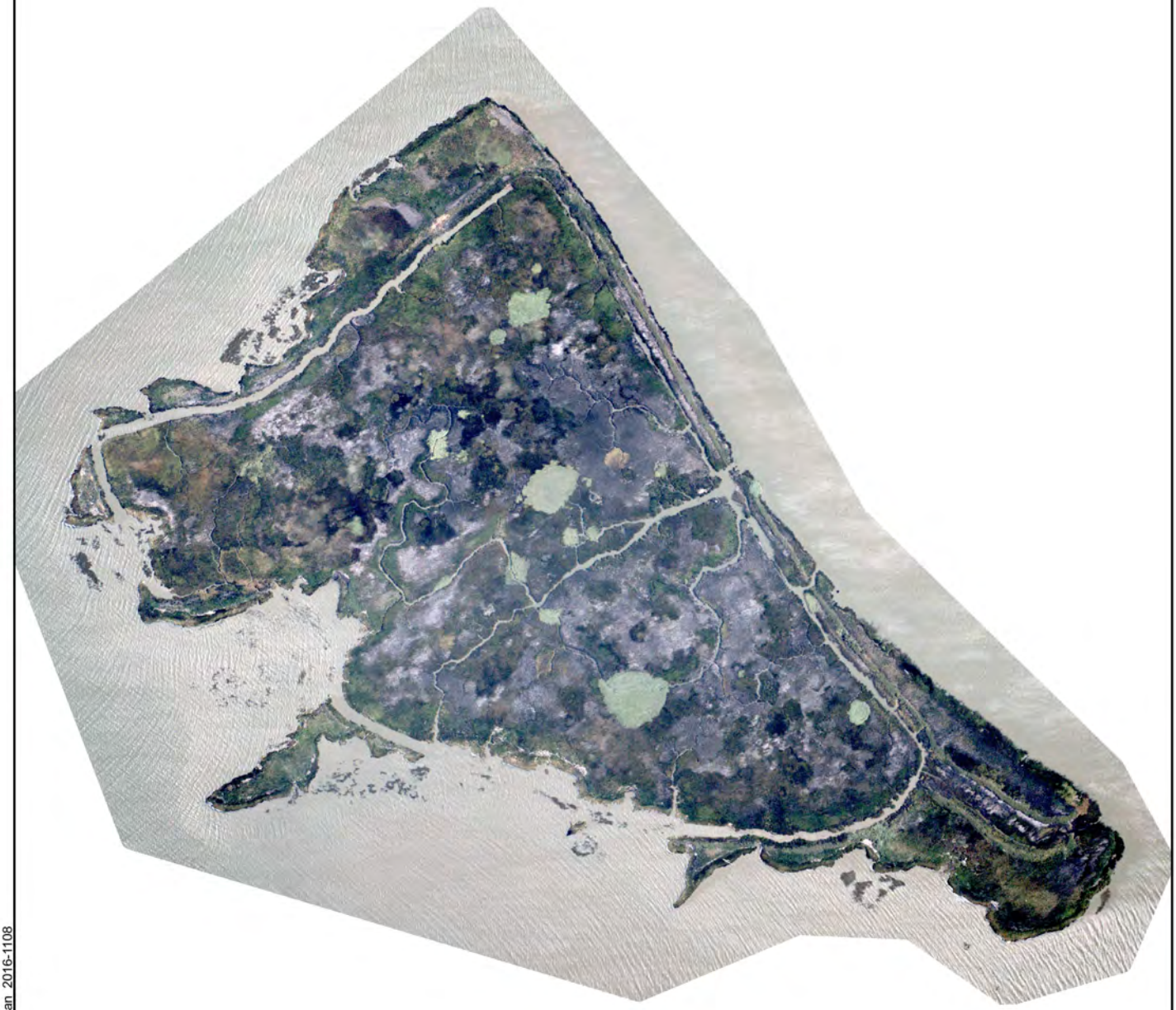
0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-1

Image brightness and contrast adjusted from original for visual clarity

June 29, 2016 Natural Color Aerial Photograph, Point Buckler



Map File: air-photo_2016-0629_NC_Freeman_2016-1108

Data sources: Air photo (Terravion, 2016)

1:6,000 (1" = 500' at letter size)

0 250 500 ft

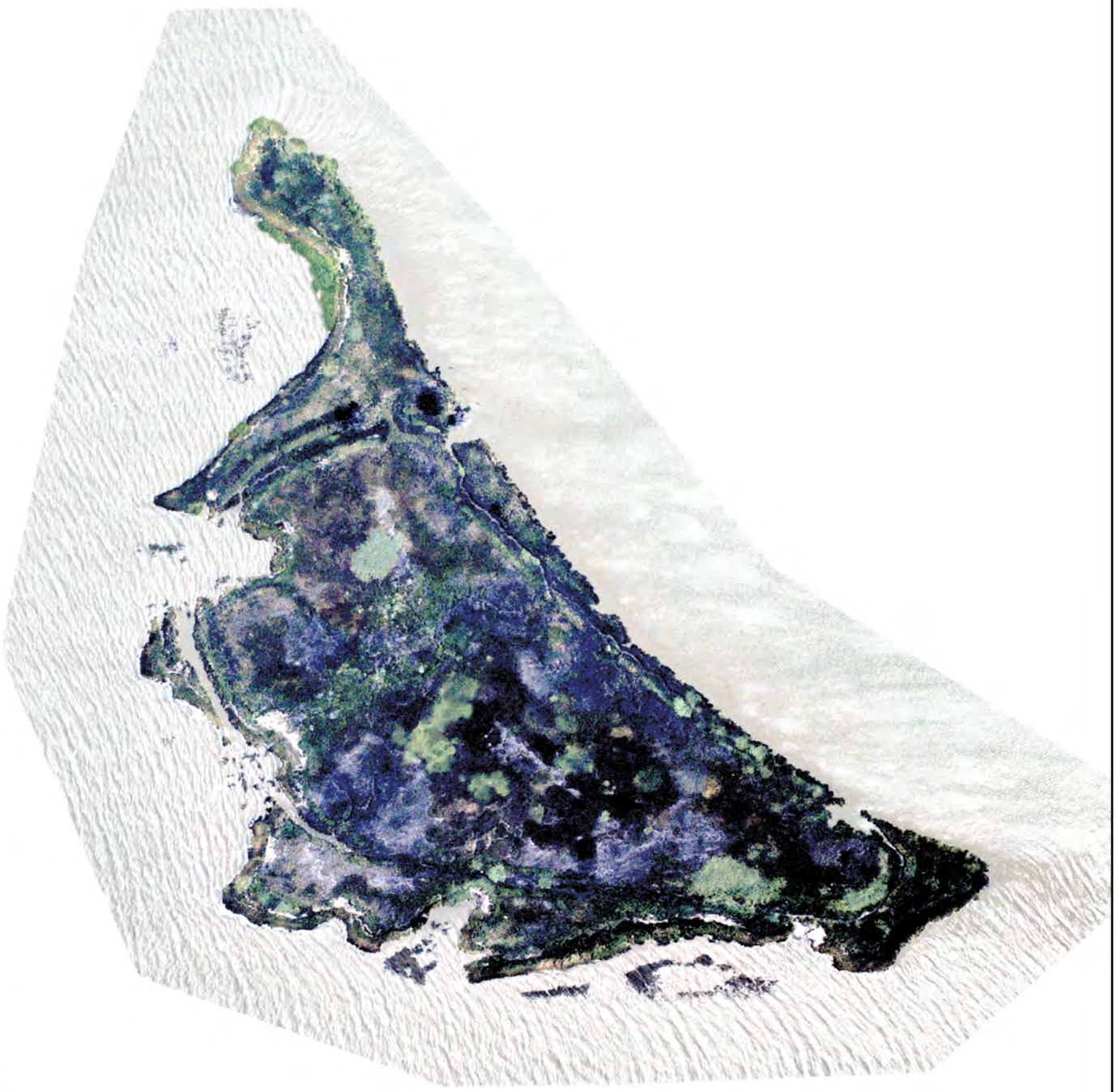
0 75 150 m

Point Buckler Island
Solano County, CA

Figure D-2

Image brightness and contrast adjusted from original for visual clarity

June 29, 2016 Natural Color Aerial Photograph, Freeman Island



Map File: air-photo_2016-0629_NC_Snag_2016-1108

Data sources: Air photo (Terravion, 2016)

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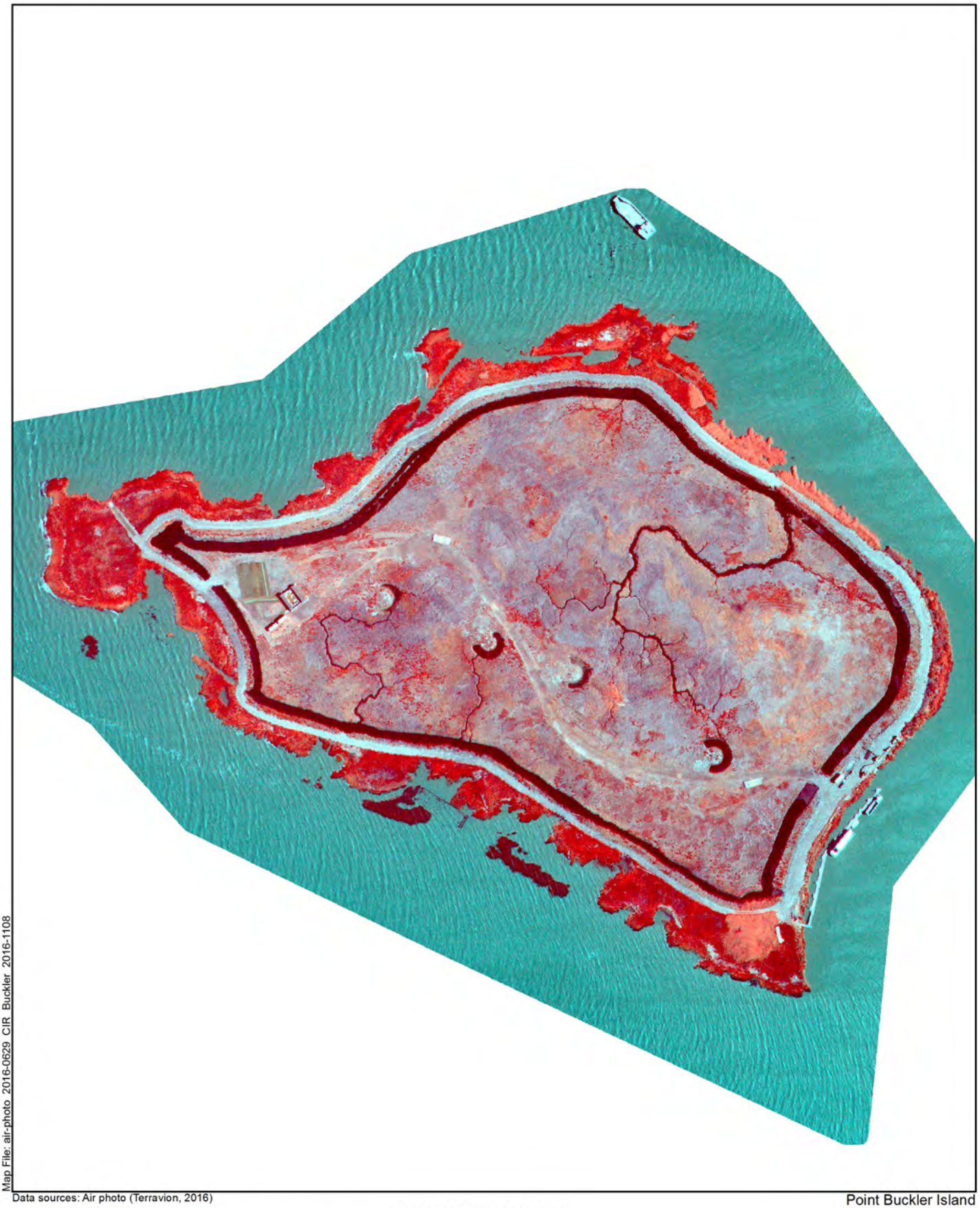
Point Buckler Island
Solano County, CA

Figure D-3

Image brightness and contrast adjusted from original for visual clarity

June 29, 2016 Natural Color Aerial Photograph, Snag Island



Map File: air-photo_2016-0629_CIR_Buckler_2016-1108

Data sources: Air photo (Terravion, 2016)

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Point Buckler Island
Solano County, CA

Figure D-4

Image brightness and contrast adjusted from original for visual clarity

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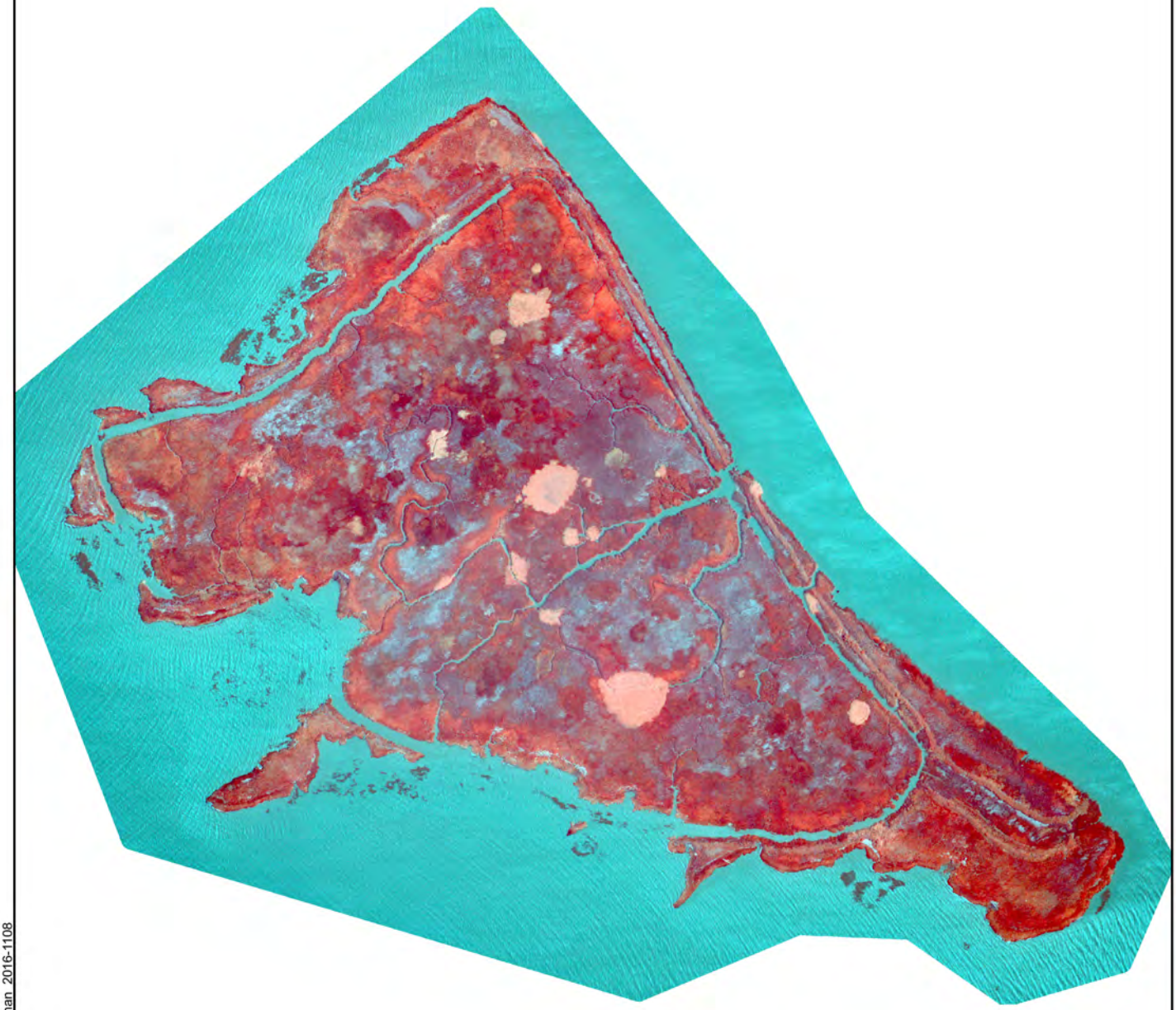

Map File: air-photo_2016-0629_CIR_Freeman_2016-1108

Data sources: Air photo (Terravion, 2016)

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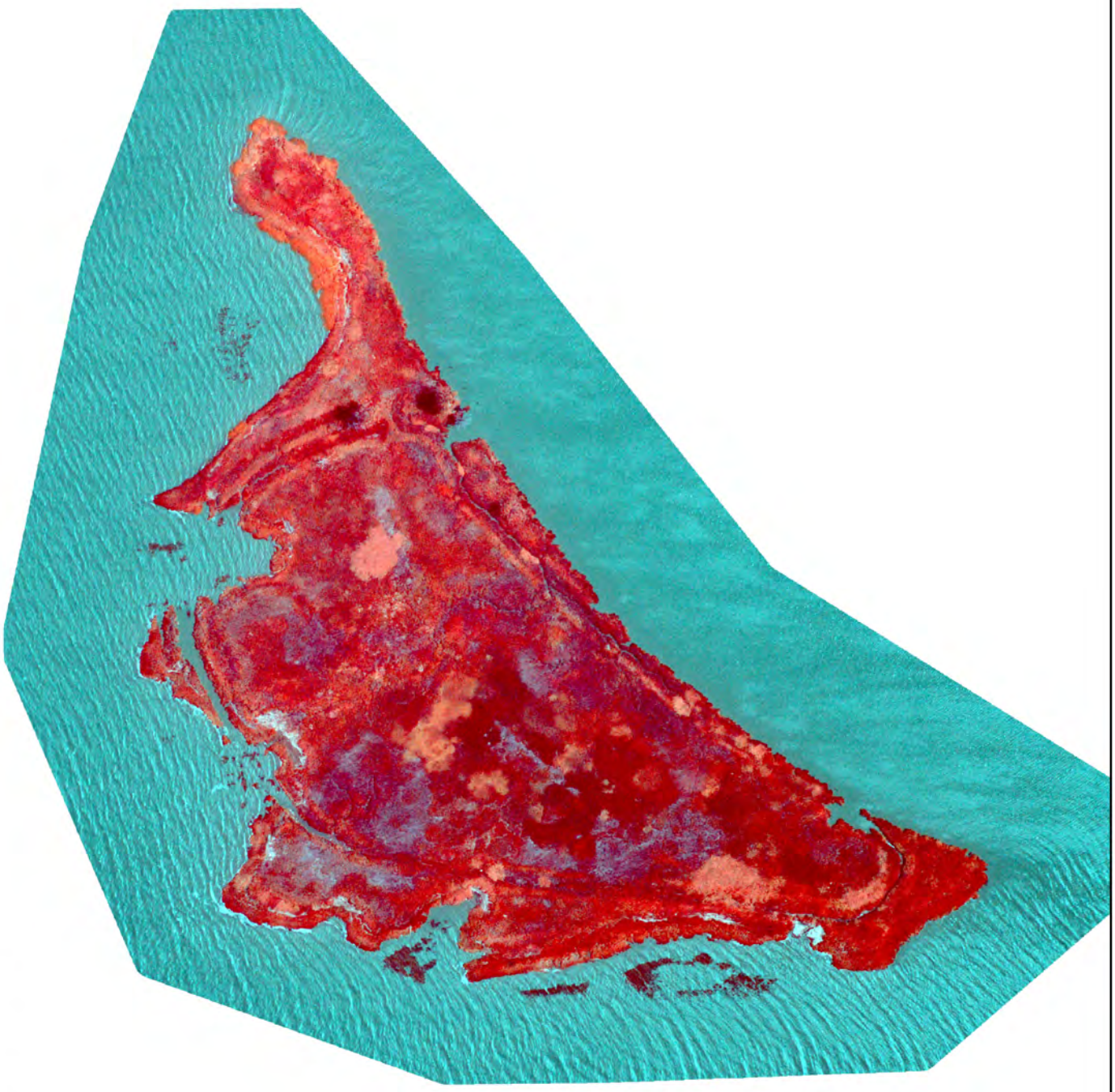
0 75 150 m

Point Buckler Island
Solano County, CA

Figure D-5

Image brightness and contrast adjusted from original for visual clarity

June 29, 2016 Color Infrared Aerial Photograph, Freeman Island



Map File: air-photo_2016-0629_CIR_Snag_2016-1108

Data sources: Air photo (Terravion, 2016)

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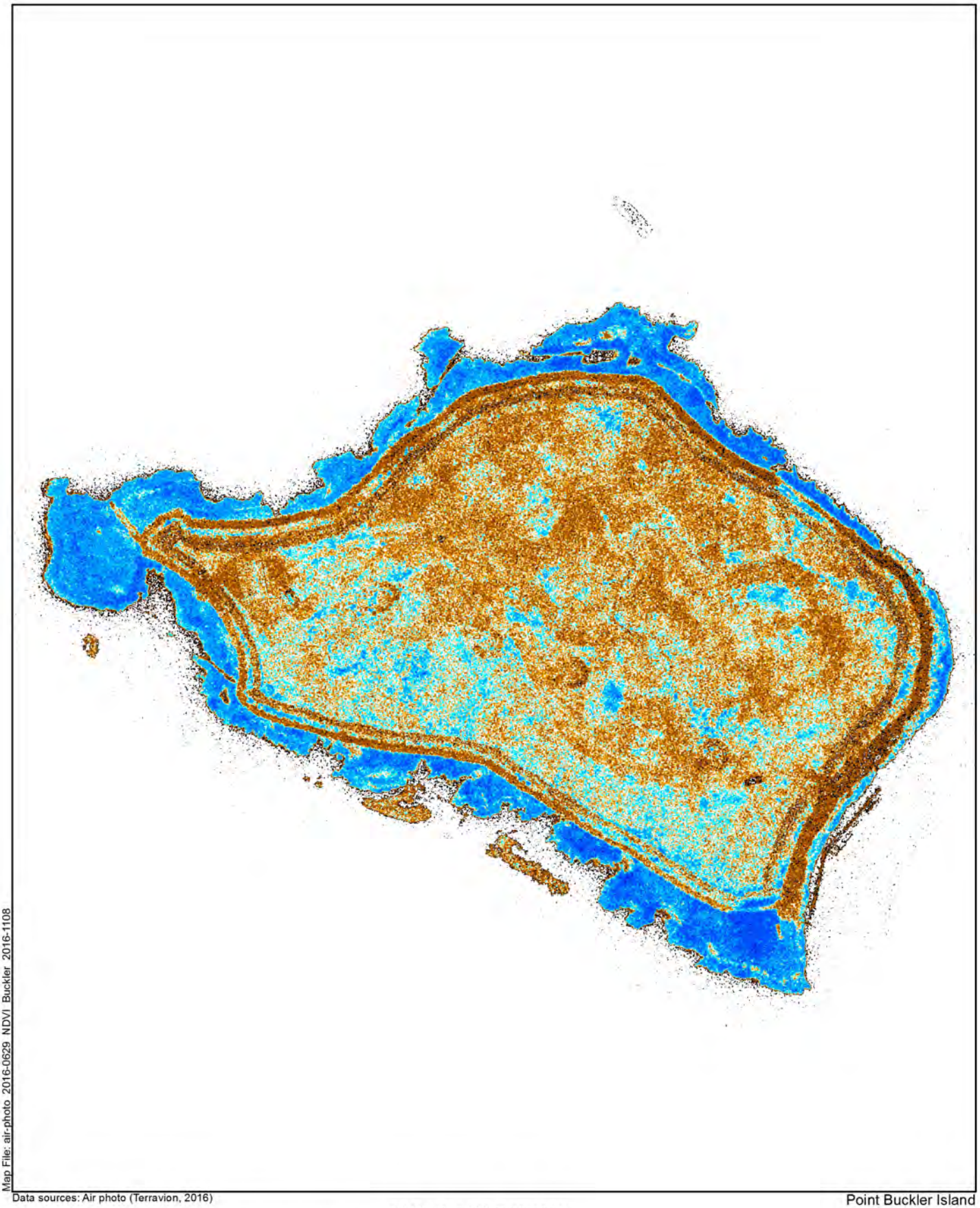
Point Buckler Island
Solano County, CA

Figure D-6

Image brightness and contrast adjusted from original for visual clarity

June 29, 2016 Color Infrared Aerial Photograph, Snag Island



Map File: air-photo 2016-0629 NDVI Buckler 2016-1108

Data sources: Air photo (Terravion, 2016)

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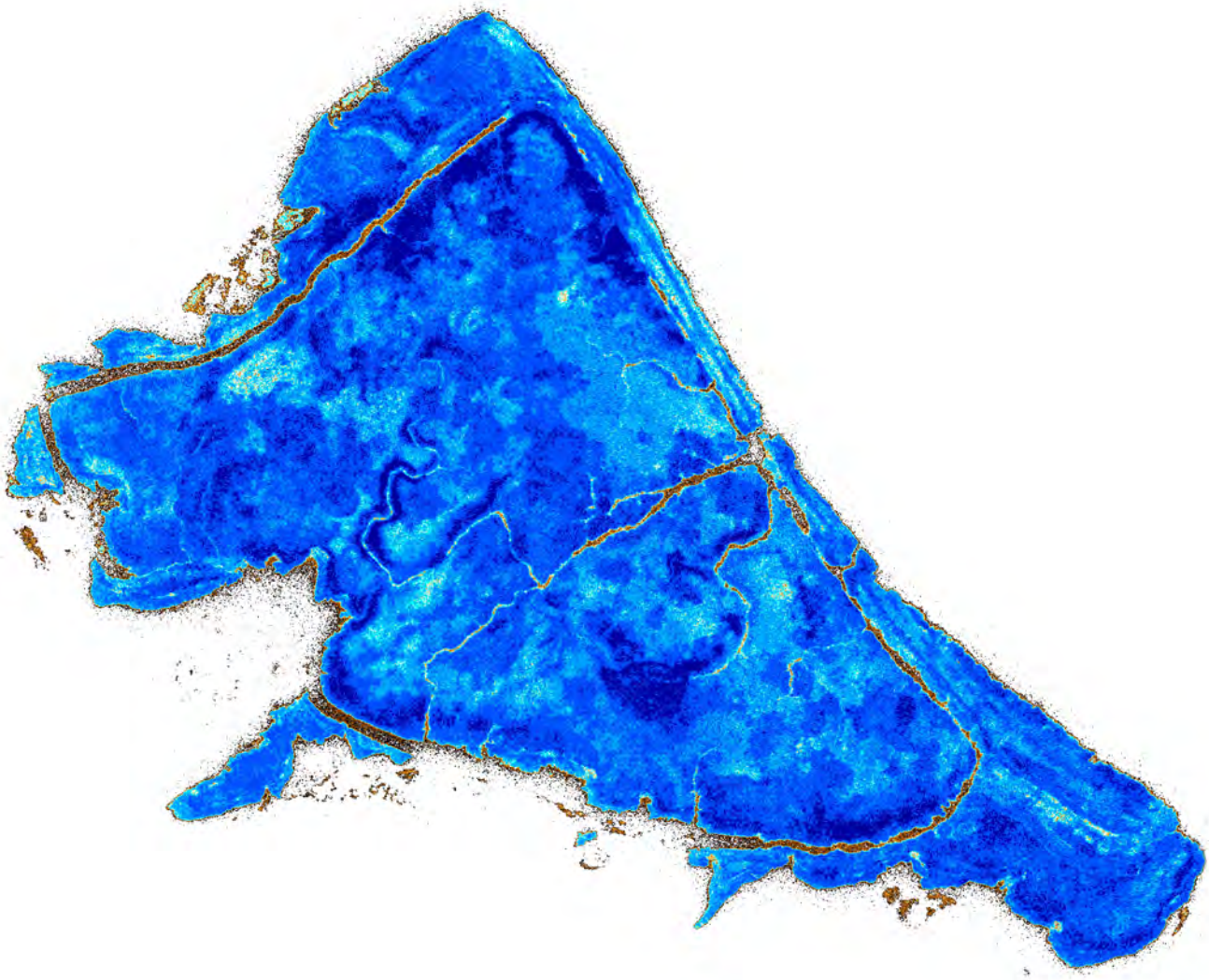
Point Buckler Island
Solano County, CA

Figure D-7

Image brightness and contrast adjusted from original for visual clarity

June 29, 2016 NDVI Map, Point Buckler



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Data sources: Air photo (Terravion, 2016)

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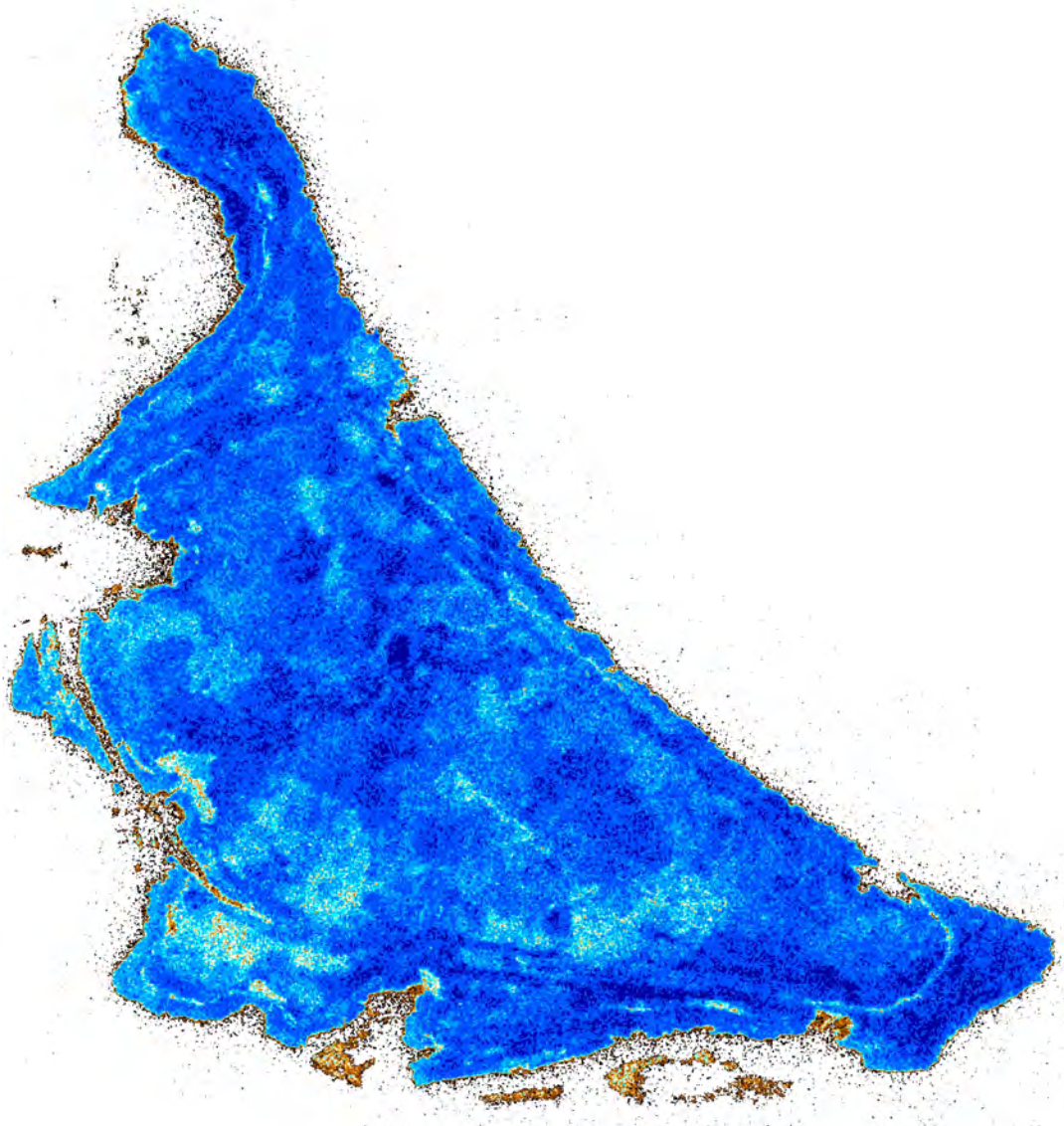
Point Buckler Island
Solano County, CA

Figure D-8

Image brightness and contrast adjusted from original for visual clarity

June 29, 2016 NDVI Map, Freeman Island



Map File: air-photo_2016-0629_NDVI_Snag_2016-1108

Data sources: Air photo (Terravion, 2016)

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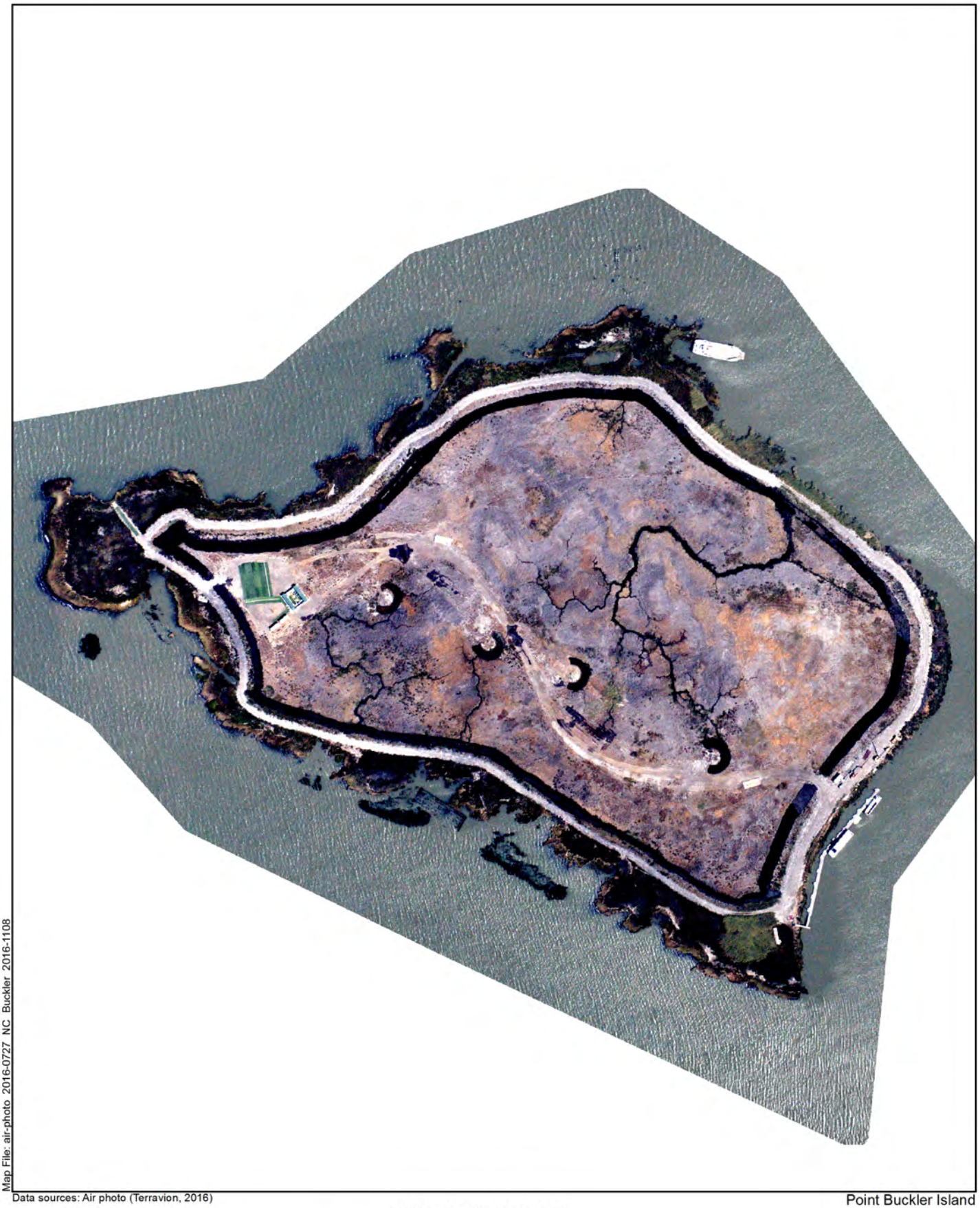
Point Buckler Island
Solano County, CA

Figure D-9

Image brightness and contrast adjusted from original for visual clarity

June 29, 2016 NDVI Map, Snag Island



Map File: air-photo_2016-0727_NC_Buckler_2016-1108

Data sources: Air photo (Terravion, 2016)

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Point Buckler Island
Solano County, CA

Figure D-10

Image brightness and contrast adjusted from original for visual clarity

July 27, 2016 Natural Color Aerial Photograph, Point Buckler

Map File: air-photo_2016-0727_NC_Freeman_2016-1108

Data sources: Air photo (Terravion, 2016)

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Point Buckler Island
Solano County, CA

Figure D-11

Image brightness and contrast adjusted from original for visual clarity

July 27, 2016 Natural Color Aerial Photograph, Freeman Island

Map File: air-photo_2016-0727_NC_Snag_2016-1108

Data sources: Air photo (Terravion, 2016)

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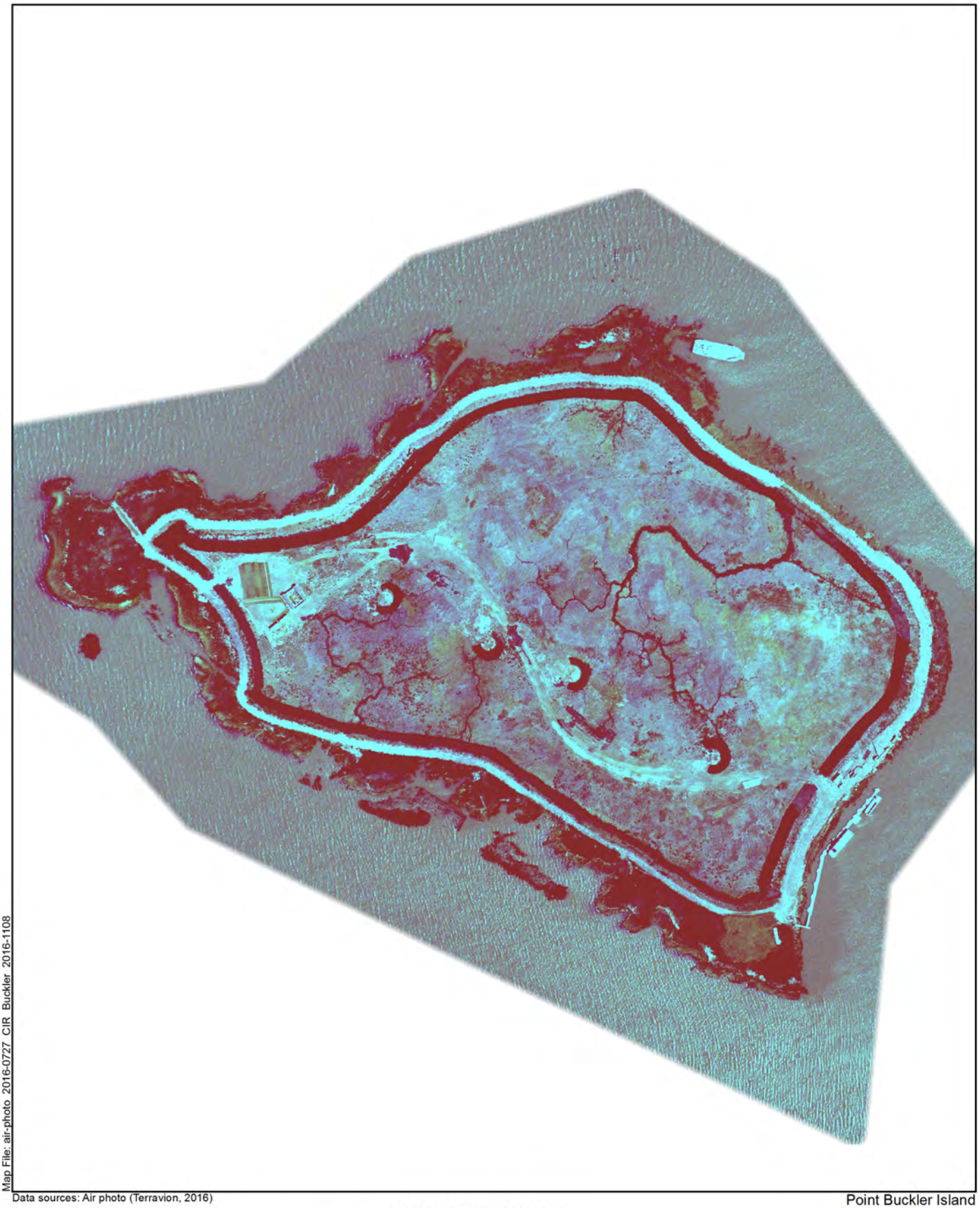
0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-12

Image brightness and contrast adjusted from original for visual clarity

July 27, 2016 Natural Color Aerial Photograph, Snag Island



Map File: air-photo_2016-0727_CIR_Buckler_2016-1108

Data sources: Air photo (Terravion, 2016)

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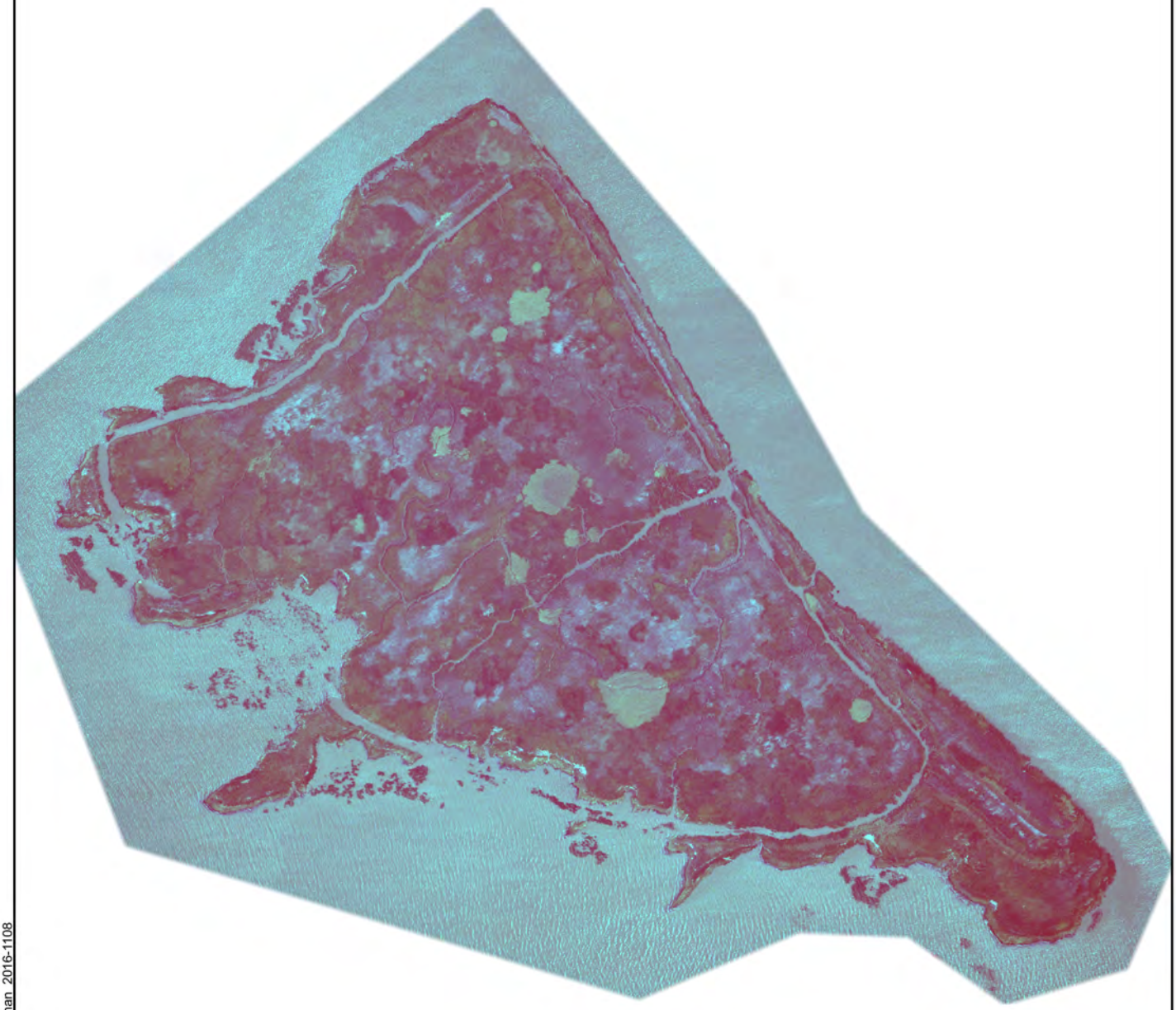
Point Buckler Island
Solano County, CA

Figure D-13

Image brightness and contrast adjusted from original for visual clarity

July 27, 2016 Color Infrared Aerial Photograph, Point Buckler



Map File: air-photo_2016-0727_CIR_Freeman_2016-1108

Data sources: Air photo (Terravion, 2016)

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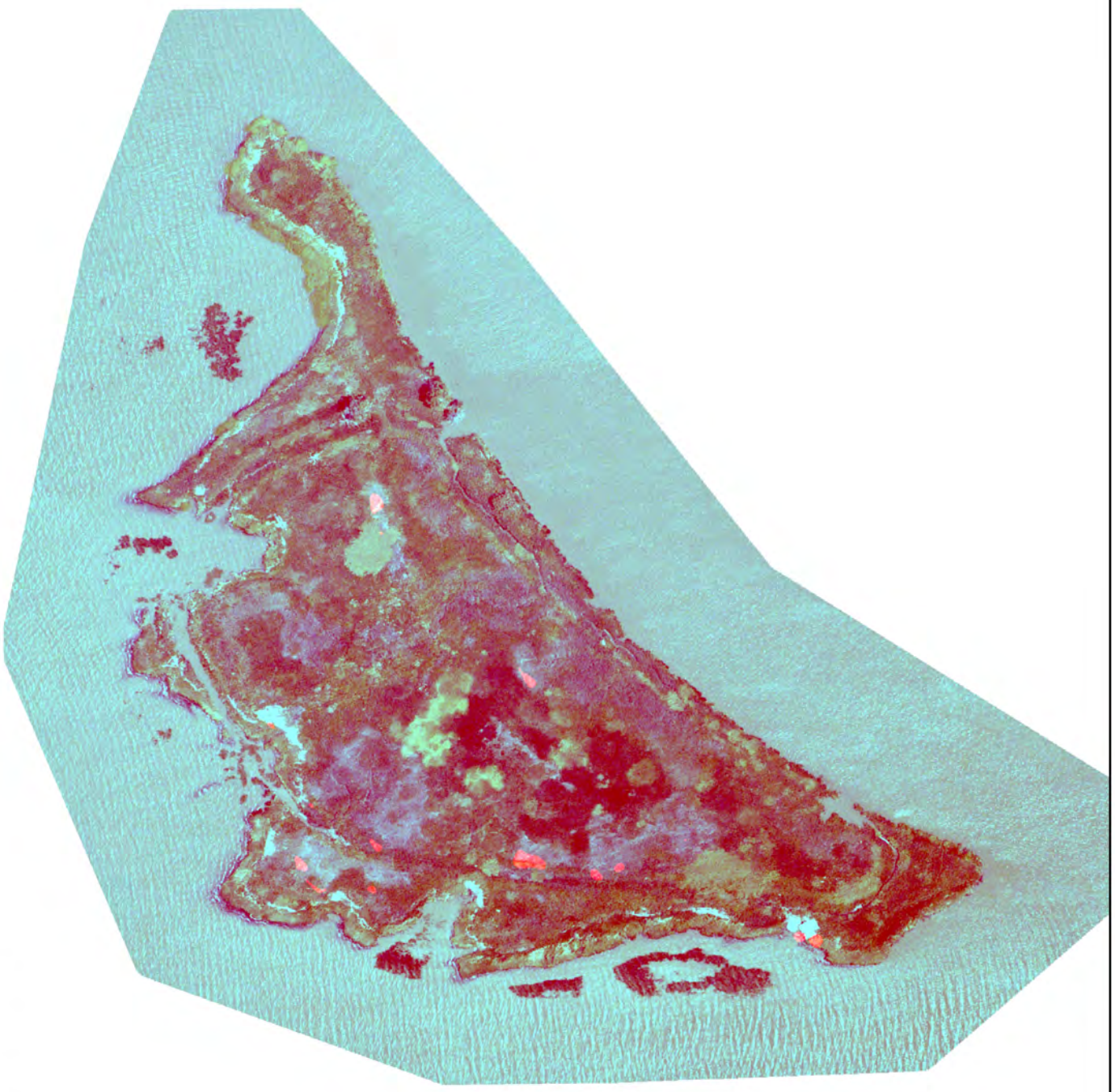
0 75 150 m

Point Buckler Island
Solano County, CA

Figure D-14

Image brightness and contrast adjusted from original for visual clarity

July 27, 2016 Color Infrared Aerial Photograph, Freeman Island



Map File: air-photo_2016-0727_CIR_Snag_2016-1108

Data sources: Air photo (Terravion, 2016)

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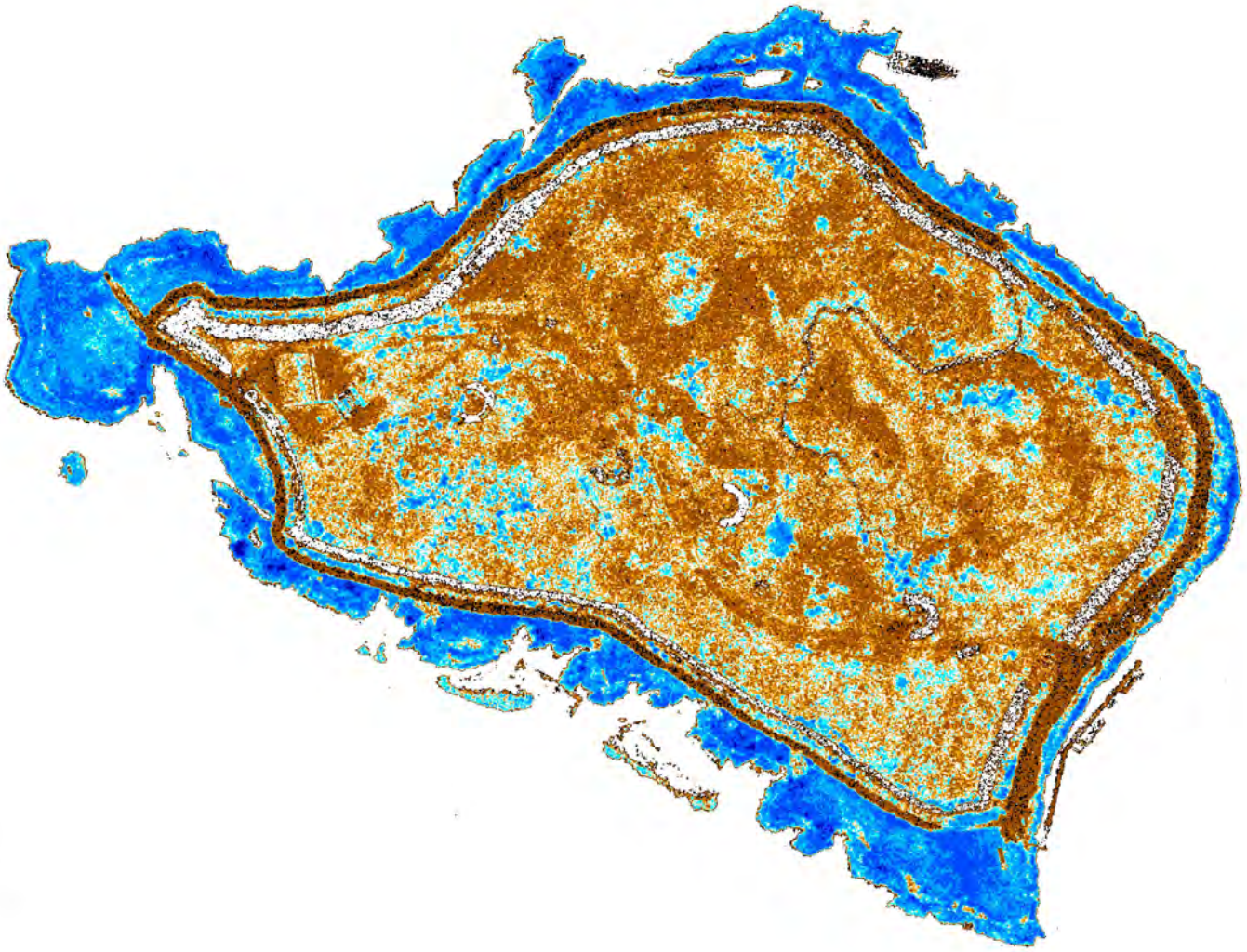
0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-15

Image brightness and contrast adjusted from original for visual clarity

July 27, 2016 Color Infrared Aerial Photograph, Snag Island



Map File: air-photo 2016-0727 NDVI Buckler 2016-1108

Data sources: Air photo (Terravion, 2016)

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0 150 300 ft

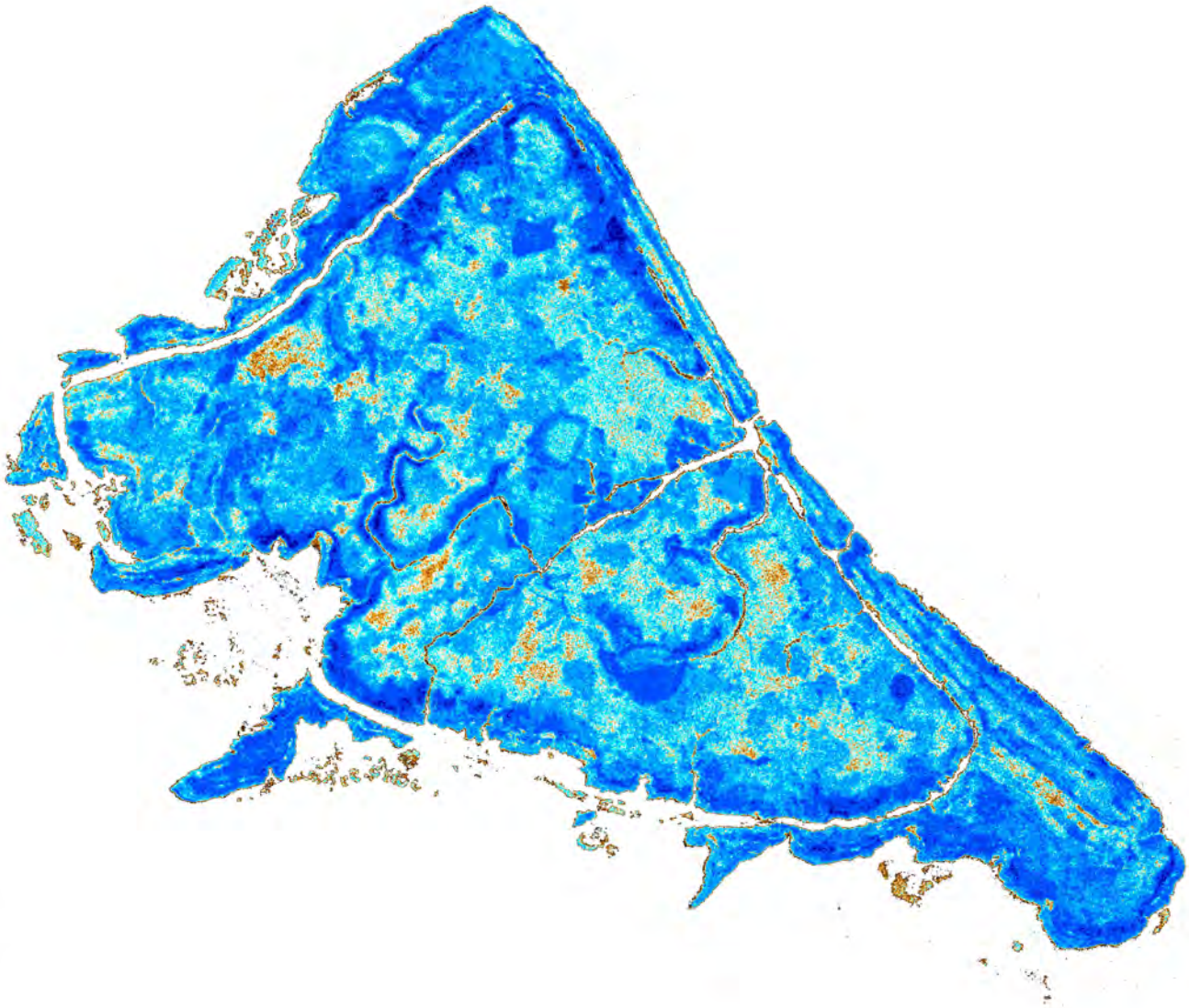
0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-16

Image brightness and contrast adjusted from original for visual clarity

July 27, 2016 NDVI Map, Point Buckler



Map File: air-photo_2016-0727_NDVI_Freeman_2016-1108

Data sources: Air photo (Terravion, 2016)

1:6,000 (1" = 500' at letter size)

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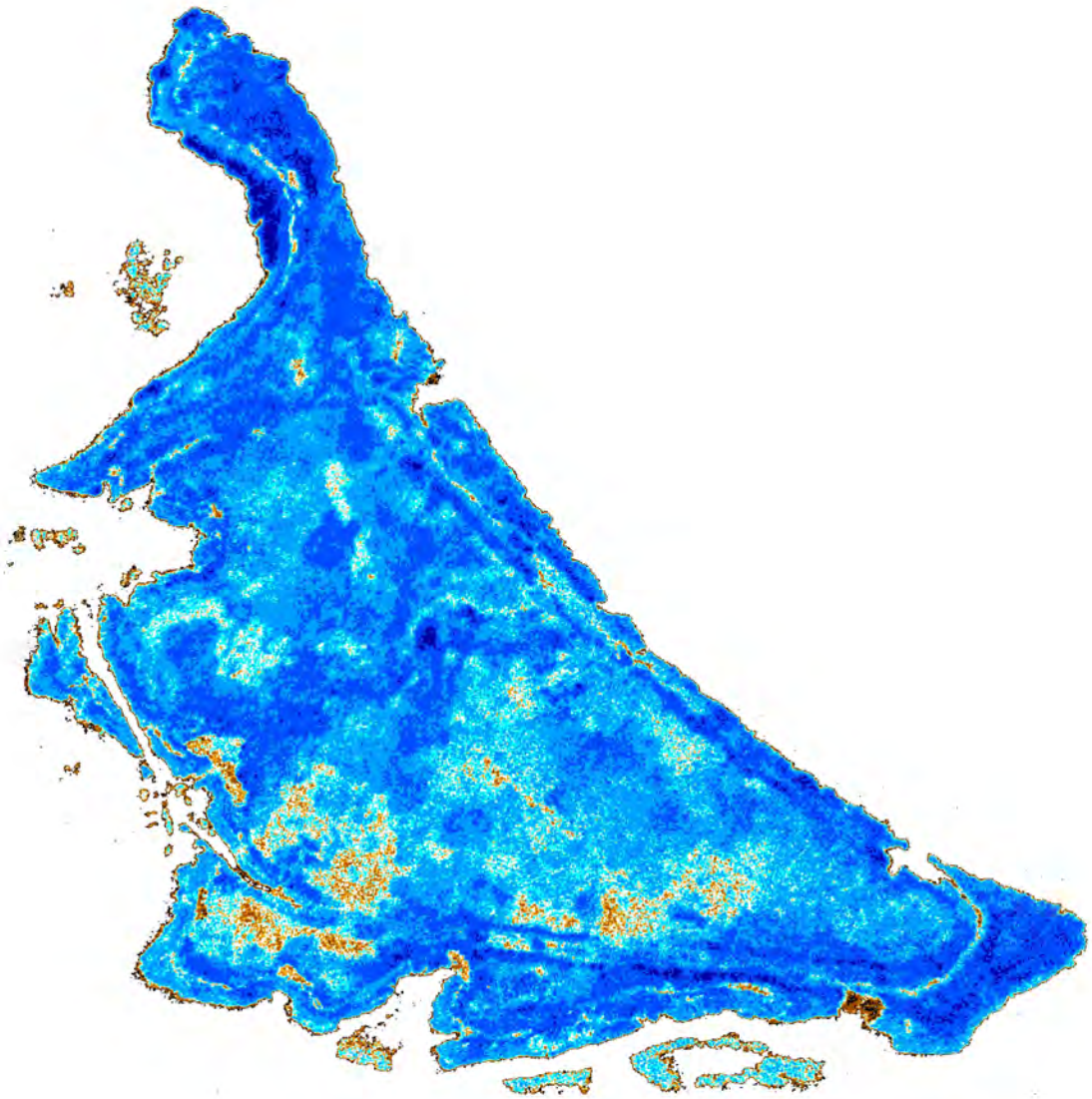
0 75 150 m

Point Buckler Island
Solano County, CA

Figure D-17

Image brightness and contrast adjusted from original for visual clarity

July 27, 2016 NDVI Map, Freeman Island



Map File: Fig-D-18_air-photo_2016-0727_NDVI_Snag_2016-1108

Data sources: Air photo (Terravion, 2016)

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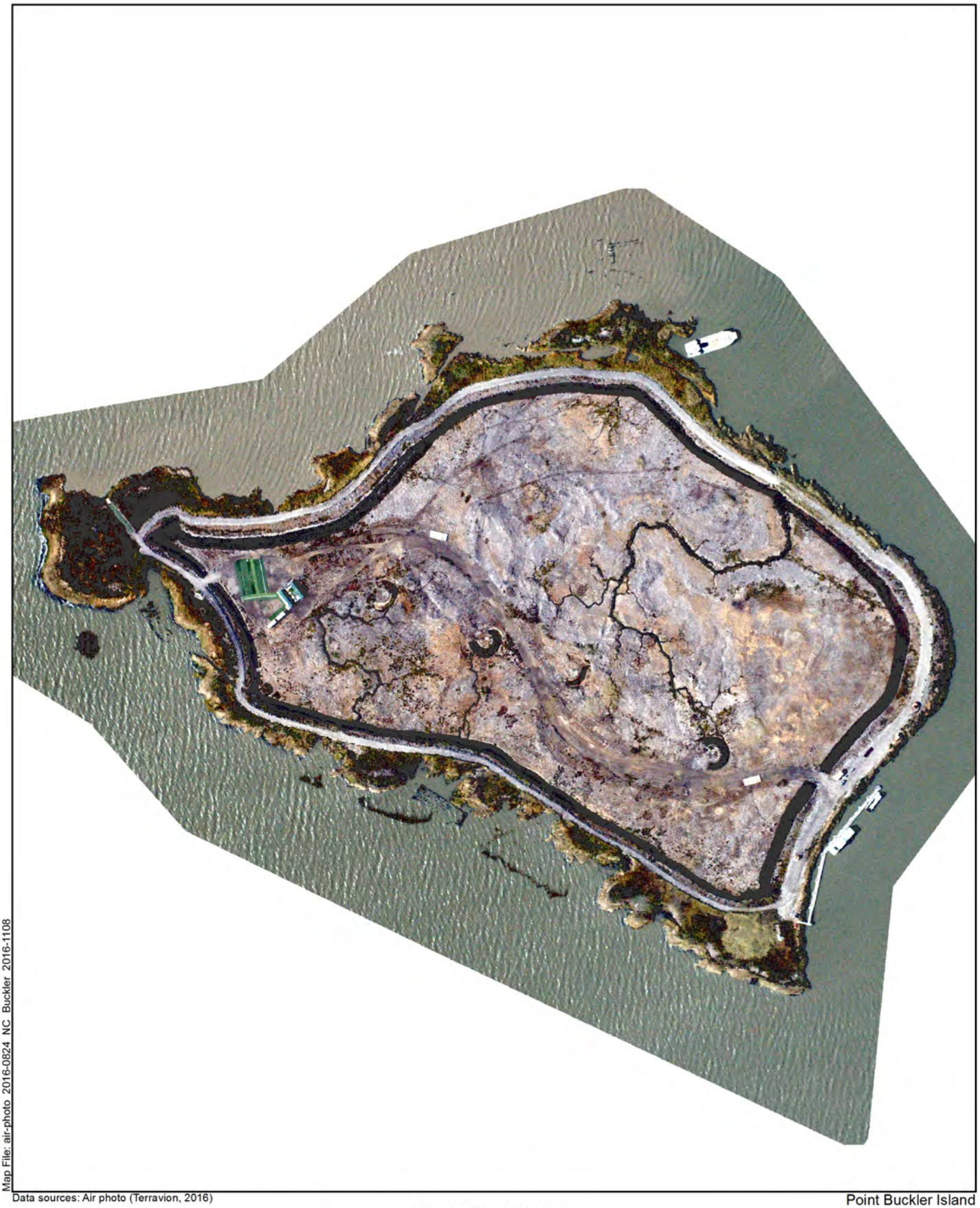
Point Buckler Island
Solano County, CA

Figure D-18

Image brightness and contrast adjusted from original for visual clarity

July 27, 2016 NDVI Map, Snag Island



Map File: air-photo_2016-0824_NC_Buckler_2016-1108

Data sources: Air photo (Terravion, 2016)

1:3,600 (1" = 300' at letter size)

0 150 300 ft

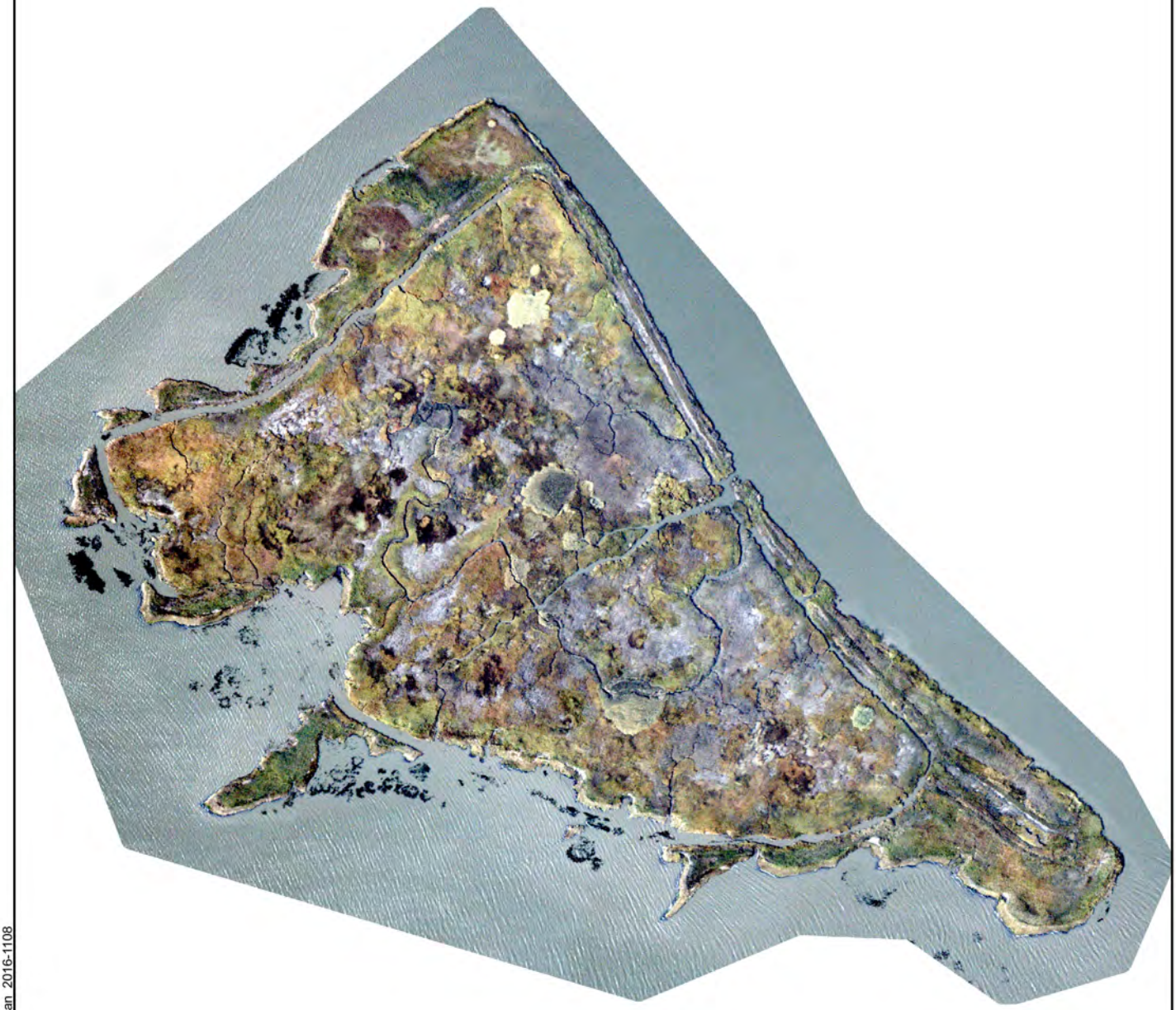
0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-19

Image brightness and contrast adjusted from original for visual clarity

August 24, 2016 Natural Color Aerial Photograph, Point Buckler



Map File: air-photo_2016-0824_NC_Freeman_2016-1108

Data sources: Air photo (Terravion, 2016)

1:6,000 (1" = 500' at letter size)

0 250 500 ft

0 75 150 m

Point Buckler Island
Solano County, CA

Figure D-20

Image brightness and contrast adjusted from original for visual clarity

August 24, 2016 Natural Color Aerial Photograph, Freeman Island

Map File: air-photo_2016-0824_NC_Snag_2016-1108

Data sources: Air photo (Terravion, 2016)

1:3,600 (1" = 300' at letter size)

0 150 300 ft

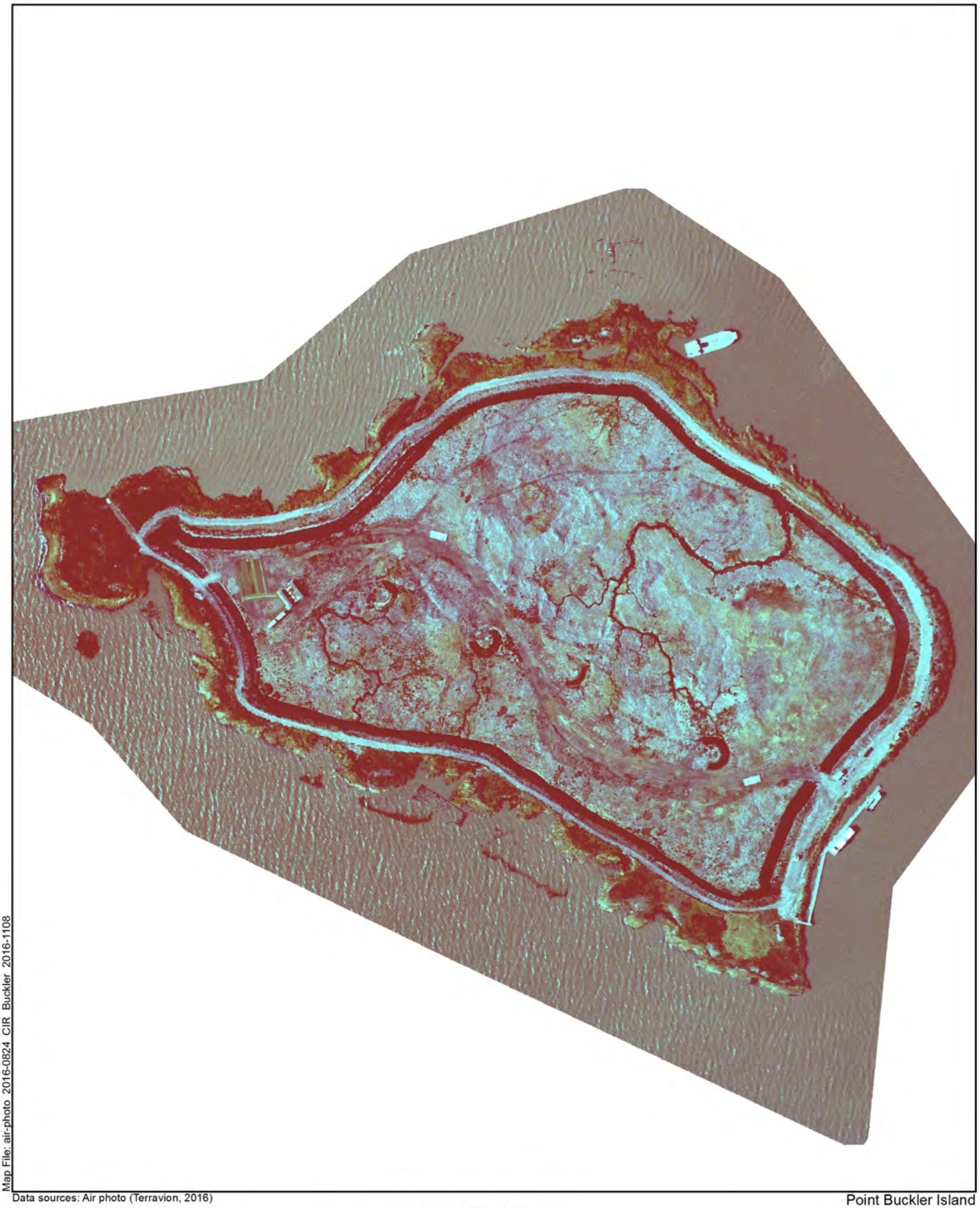
0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-21

Image brightness and contrast adjusted from original for visual clarity

August 24, 2016 Natural Color Aerial Photograph, Snag Island



Map File: air-photo_2016-0824_CIR_Buckler_2016-1108

Data sources: Air photo (Terravion, 2016)

1:3,600 (1" = 300' at letter size)

0 150 300 ft

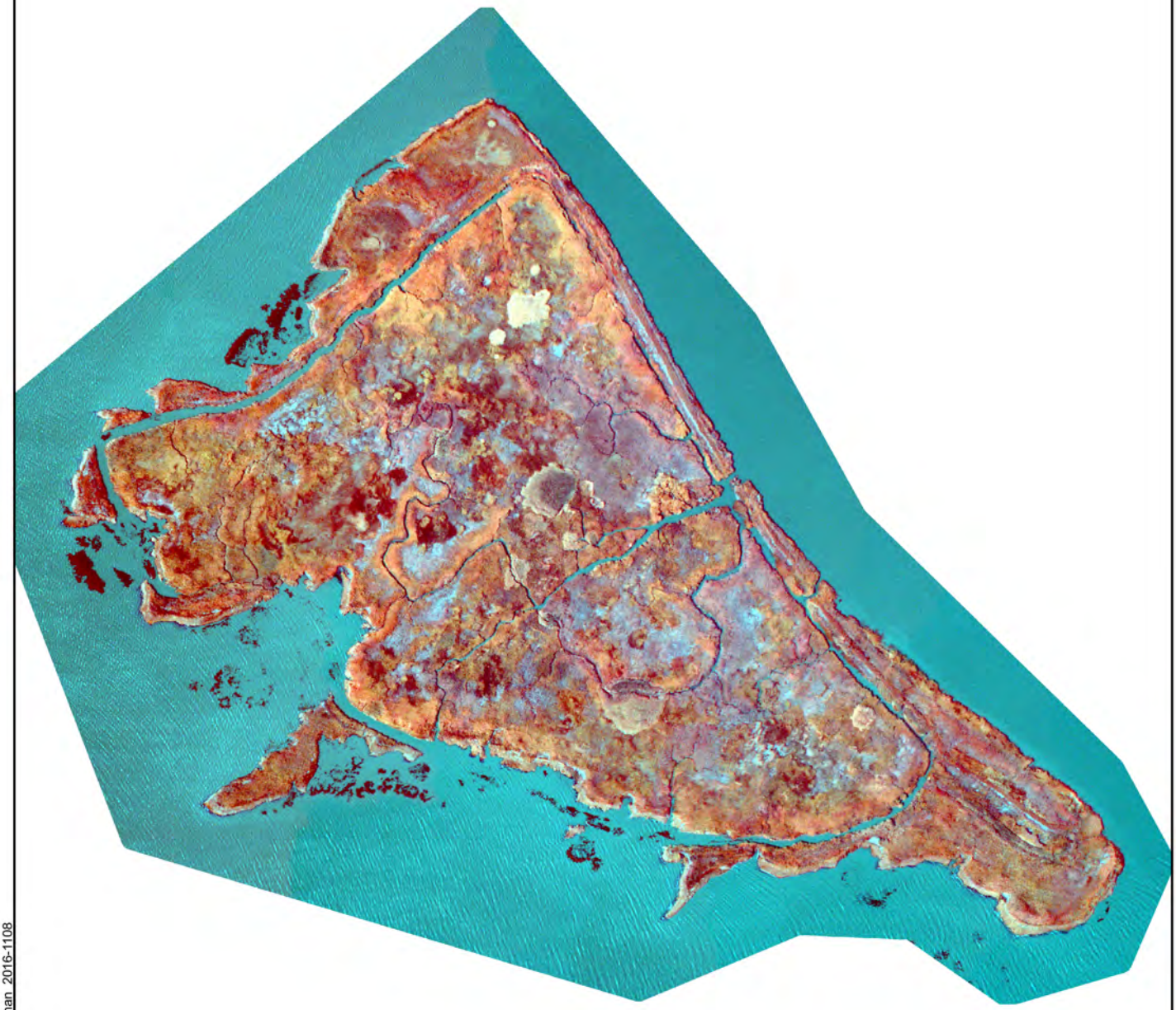
0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-22

Image brightness and contrast adjusted from original for visual clarity

August 24, 2016 Color Infrared Aerial Photograph, Point Buckler



Map File: air-photo_2016-0824_CIR_Freeman_2016-1108

Data sources: Air photo (Terravion, 2016)

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0 250 500 ft

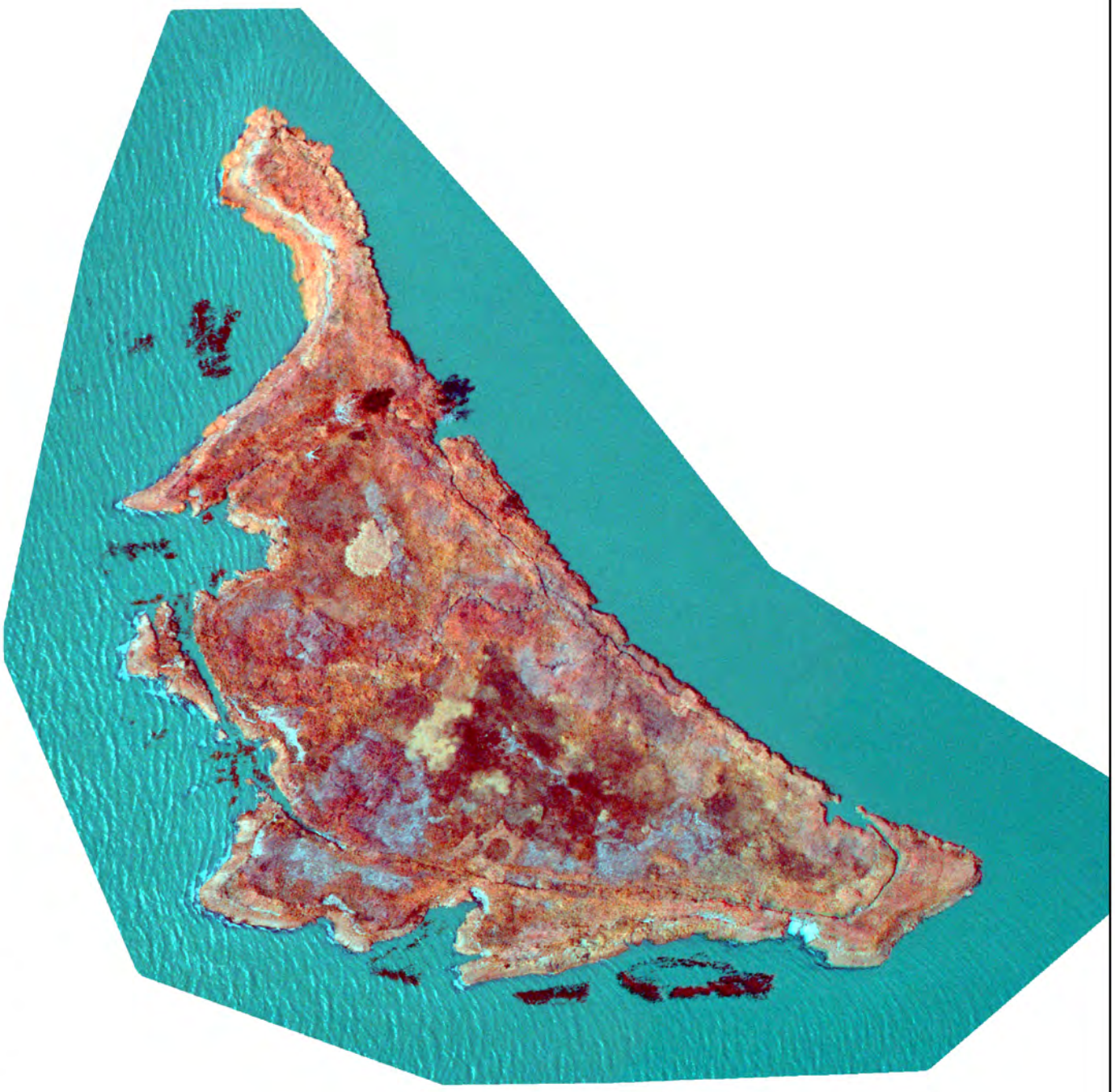
0 75 150 m

Point Buckler Island
Solano County, CA

Figure D-23

Image brightness and contrast adjusted from original for visual clarity

August 24, 2016 Color Infrared Aerial Photograph, Freeman Island



Map File: air-photo_2016-0824_CIR_Snag_2016-1108

Data sources: Air photo (Terravion, 2016)

1:3,600 (1" = 300' at letter size)

0 150 300 ft

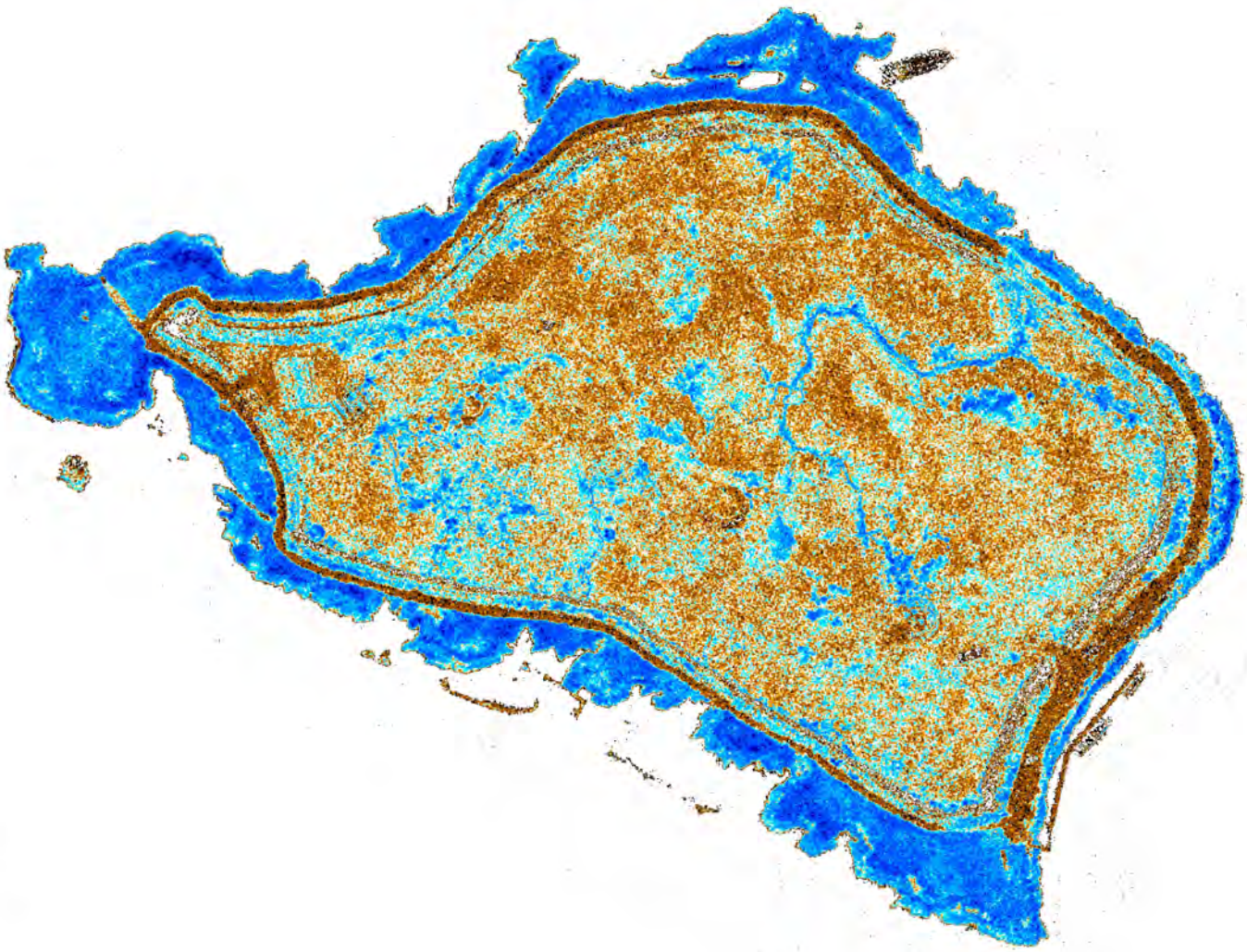
0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-24

Image brightness and contrast adjusted from original for visual clarity

August 24, 2016 Color Infrared Aerial Photograph, Snag Island



Map File: air-photo 2016-0824 NDVI Buckler 2016-1108

Data sources: Air photo (Terravion, 2016)

1:3,600 (1" = 300' at letter size)

0 150 300 ft

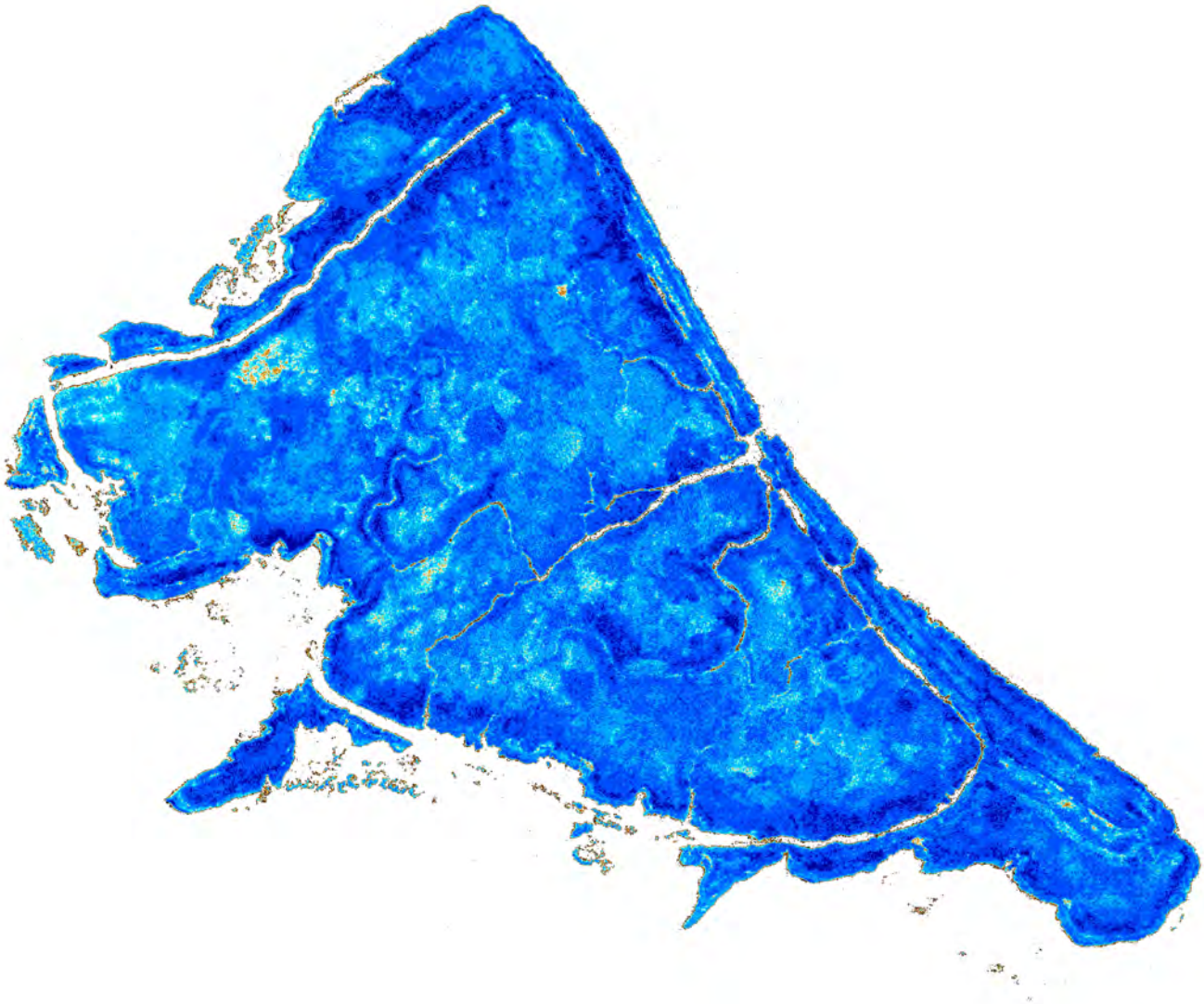
0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-25

Image brightness and contrast adjusted from original for visual clarity

August 24, 2016 NDVI Map, Point Buckler



Map File: air-photo_2016-0824_NDVI_Freeman_2016-1108

Data sources: Air photo (Terravion, 2016)

1:6,000 (1" = 500' at letter size)

0 250 500 ft

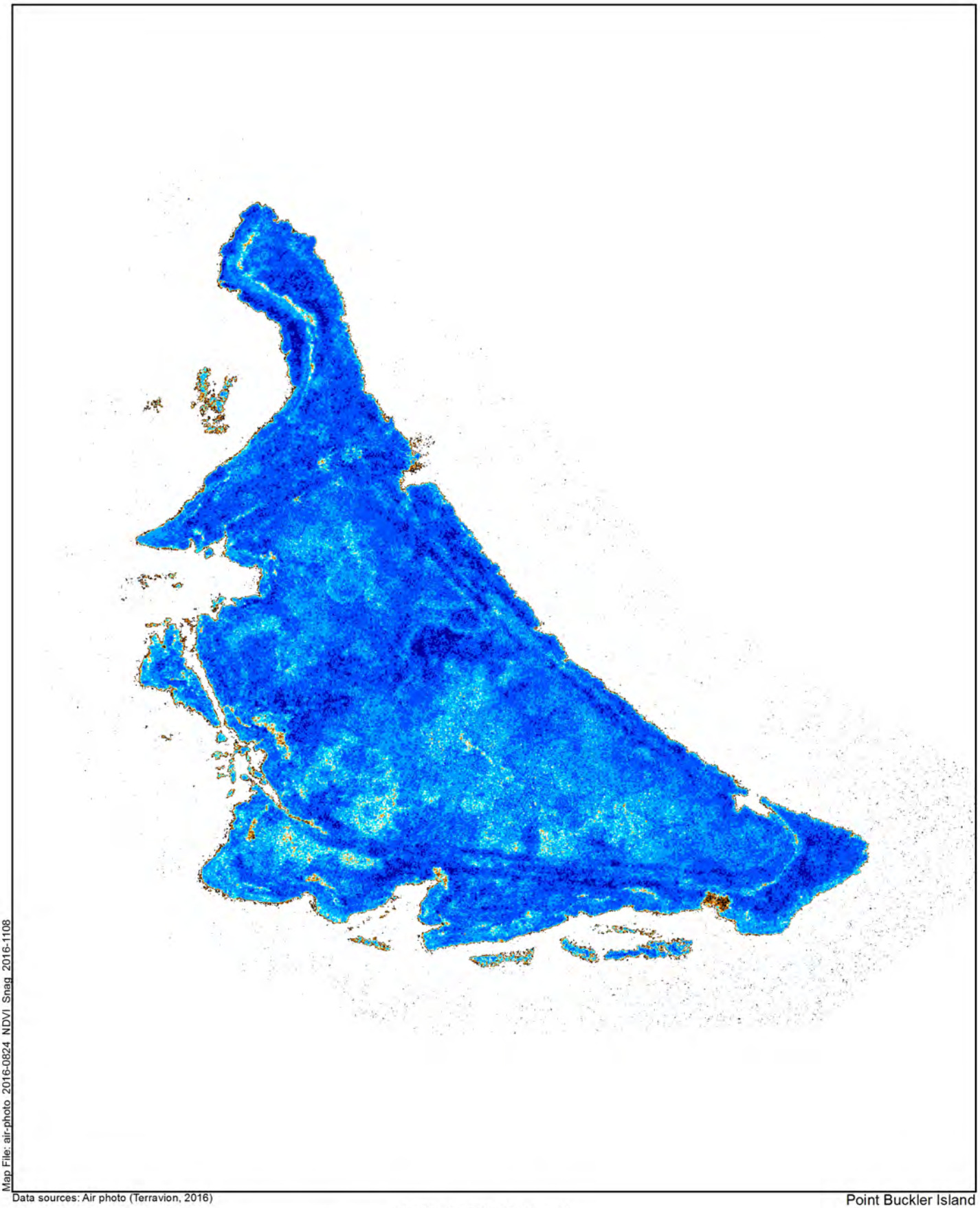
0 75 150 m

Point Buckler Island
Solano County, CA

Figure D-26

Image brightness and contrast adjusted from original for visual clarity

August 24, 2016 NDVI Map, Freeman Island



Map File: air-photo_2016-0824_NDVI_Snag_2016-1108

Data sources: Air photo (Terravion, 2016)

1:3,600 (1" = 300' at letter size)

0 150 300 ft

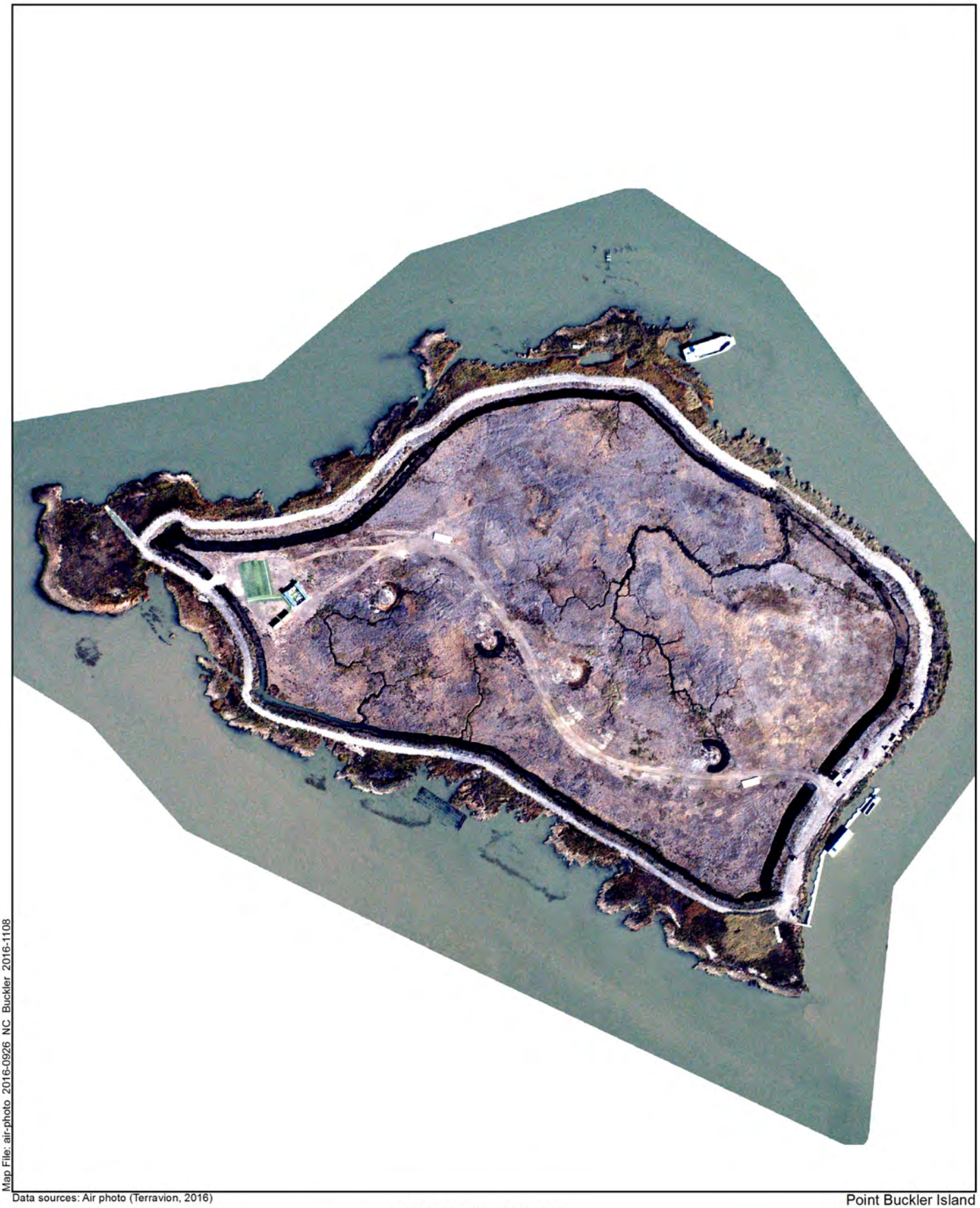
0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-27

Image brightness and contrast adjusted from original for visual clarity

August 24, 2016 NDVI Map, Snag Island



Map File: air-photo_2016-0926_NC_Buckler_2016-1108

Data sources: Air photo (Terravion, 2016)

1:3,600 (1" = 300' at letter size)

0 150 300 ft

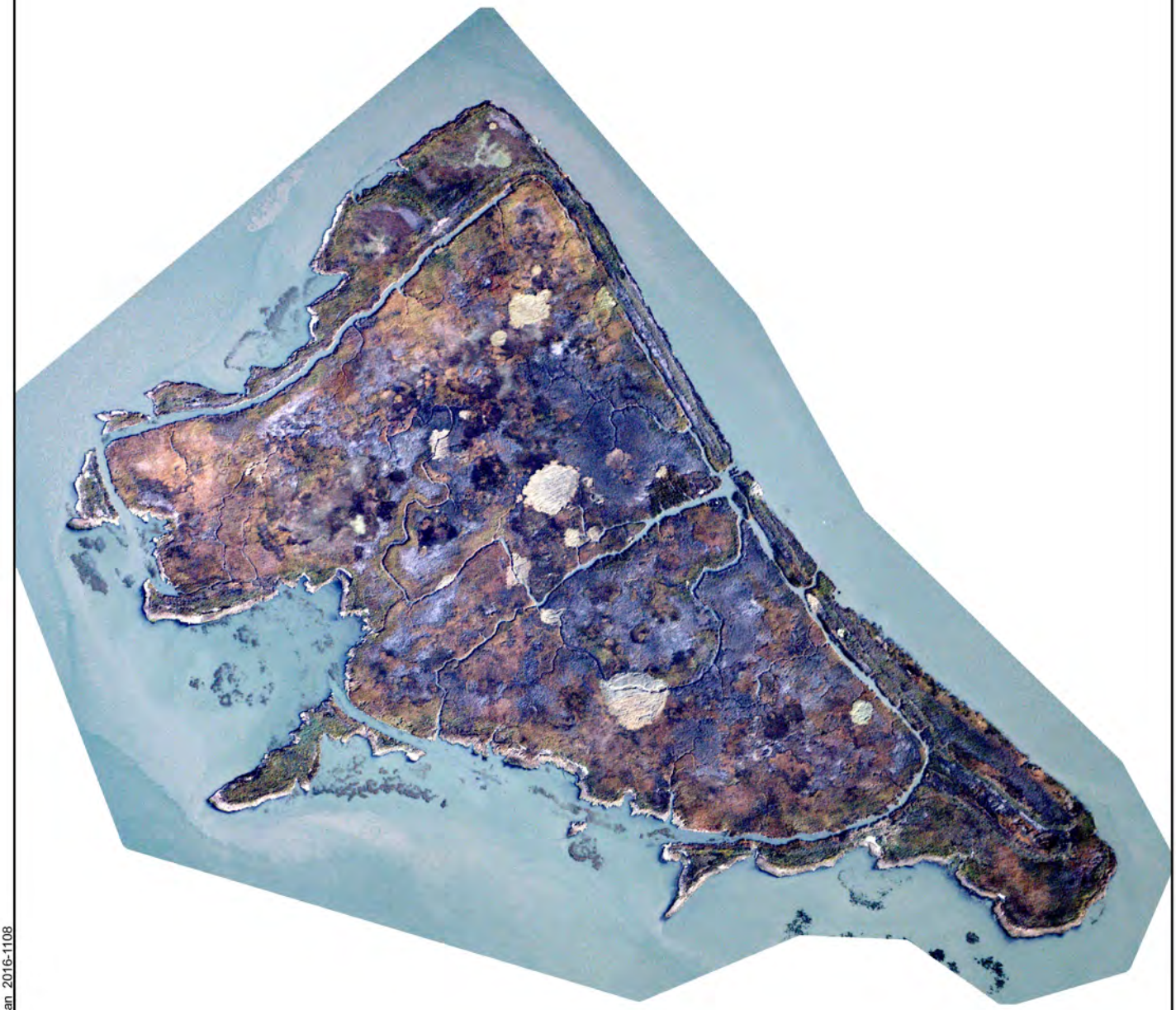
0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-28

Image brightness and contrast adjusted from original for visual clarity

September 26, 2016 Natural Color Aerial Photograph, Point Buckler



Map File: air-photo_2016-0926_NC_Freeman_2016-1108

Data sources: Air photo (Terravion, 2016)

1:6,000 (1" = 500' at letter size)

0 250 500 ft

0 75 150 m

Point Buckler Island
Solano County, CA

Figure D-29

Image brightness and contrast adjusted from original for visual clarity

September 26, 2016 Natural Color Aerial Photograph, Freeman Island

Map File: air-photo_2016-0926_NC_Snag_2016-1108

Data sources: Air photo (Terravion, 2016)

1:3,600 (1" = 300' at letter size)

0 150 300 ft

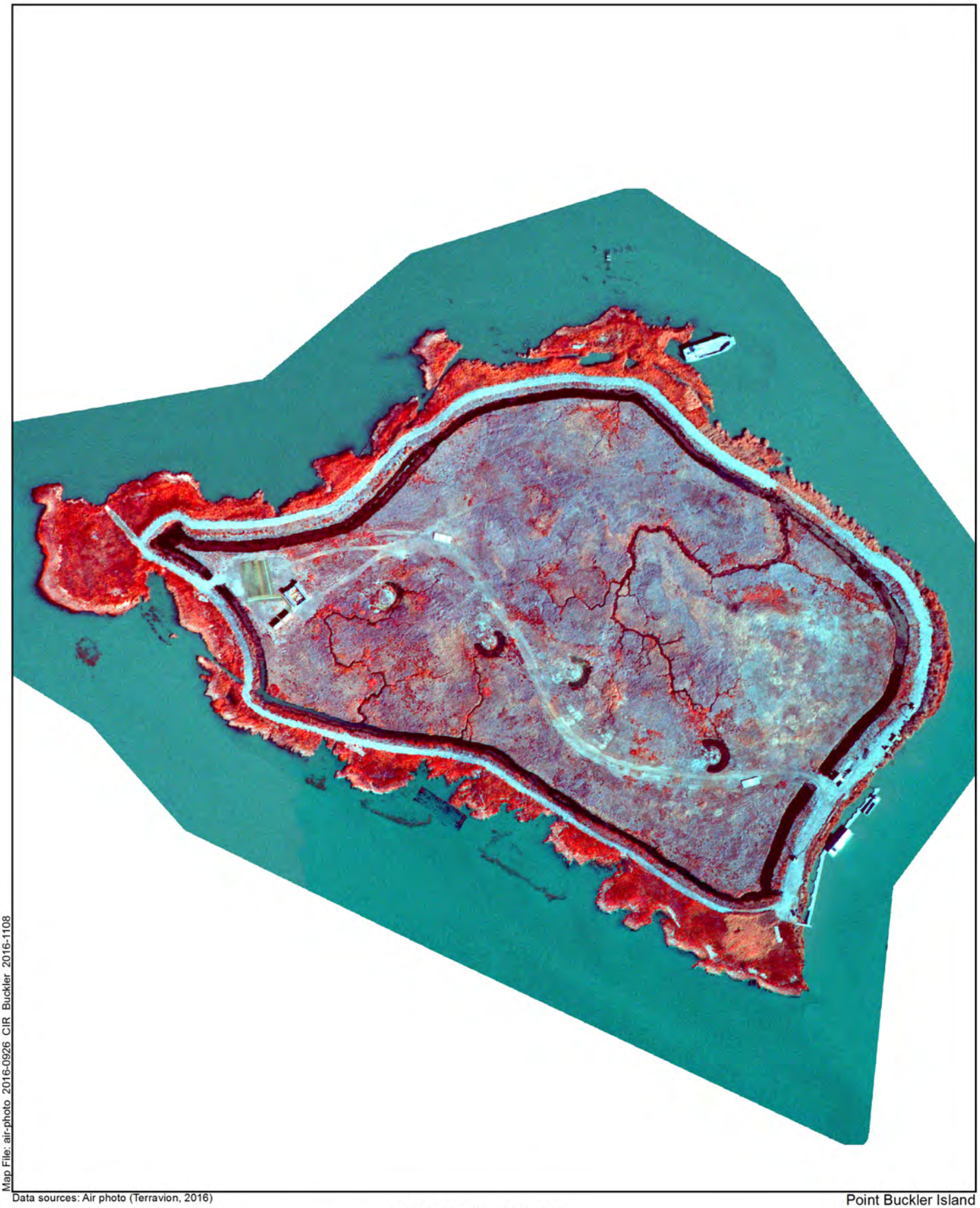
0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-30

Image brightness and contrast adjusted from original for visual clarity

September 26, 2016 Natural Color Aerial Photograph, Snag Island



Map File: air-photo_2016-0926_CIR_Buckler_2016-1108

Data sources: Air photo (Terravion, 2016)

1:3,600 (1" = 300' at letter size)

0 150 300 ft

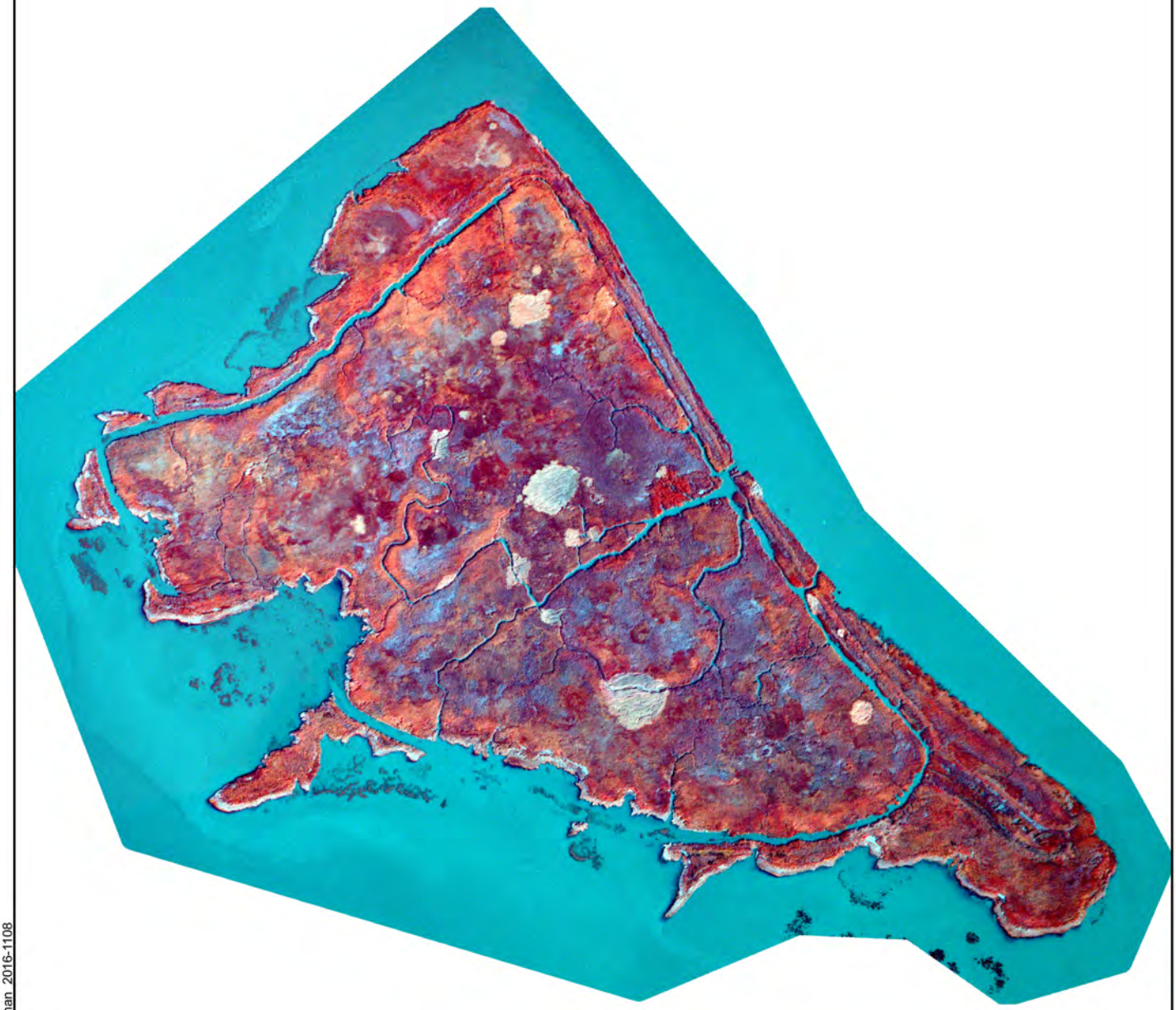
0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-31

Image brightness and contrast adjusted from original for visual clarity

September 26, 2016 Color Infrared Aerial Photograph, Point Buckler



Map File: air-photo_2016-0926_CIR_Freeman_2016-1108

Data sources: Air photo (Terravion, 2016)

1:6,000 (1" = 500' at letter size)

0 250 500 ft

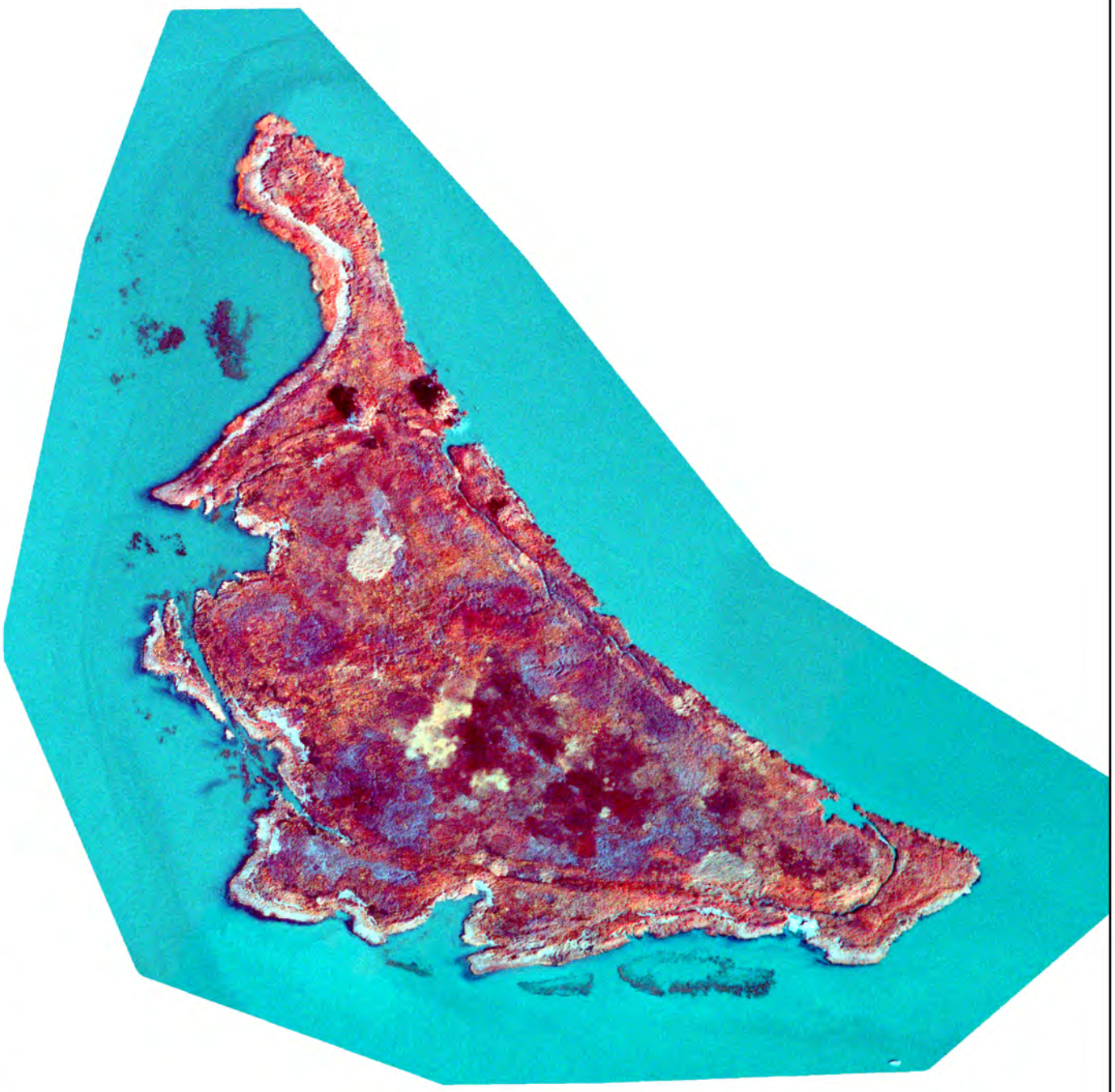
0 75 150 m

Point Buckler Island
Solano County, CA

Figure D-32

Image brightness and contrast adjusted from original for visual clarity

September 26, 2016 Color Infrared Aerial Photograph, Freeman Island



Map File: air-photo_2016-0926_CIR_Snag_2016-1108

Data sources: Air photo (Terravion, 2016)

1:3,600 (1" = 300' at letter size)

0 150 300 ft

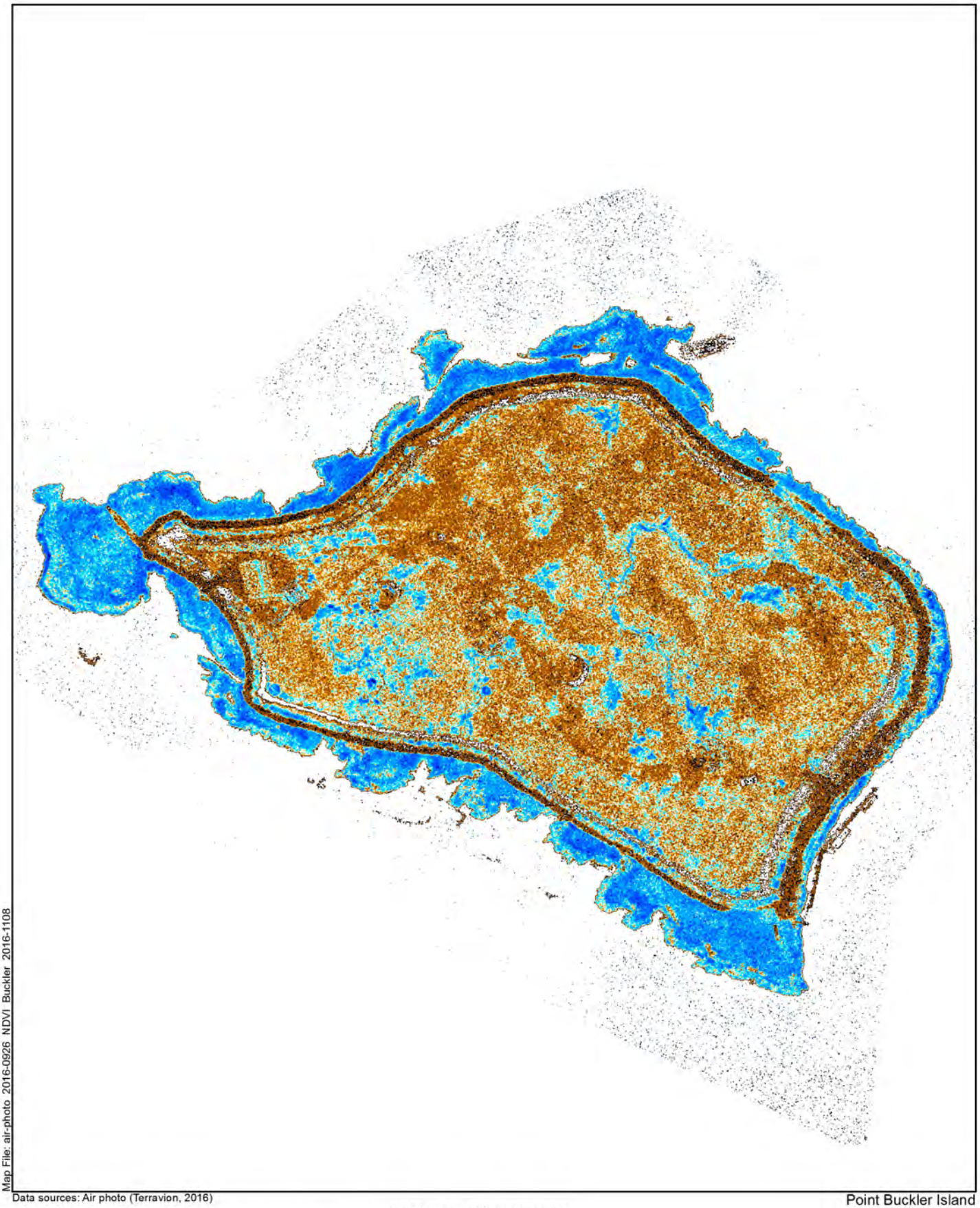
0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-33

Image brightness and contrast adjusted from original for visual clarity

September 26, 2016 Color Infrared Aerial Photograph, Snag Island



Map File: air-photo 2016-0926 NDVI Buckler 2016-1108

Data sources: Air photo (Terravion, 2016)

1:3,600 (1" = 300' at letter size)

0 150 300 ft

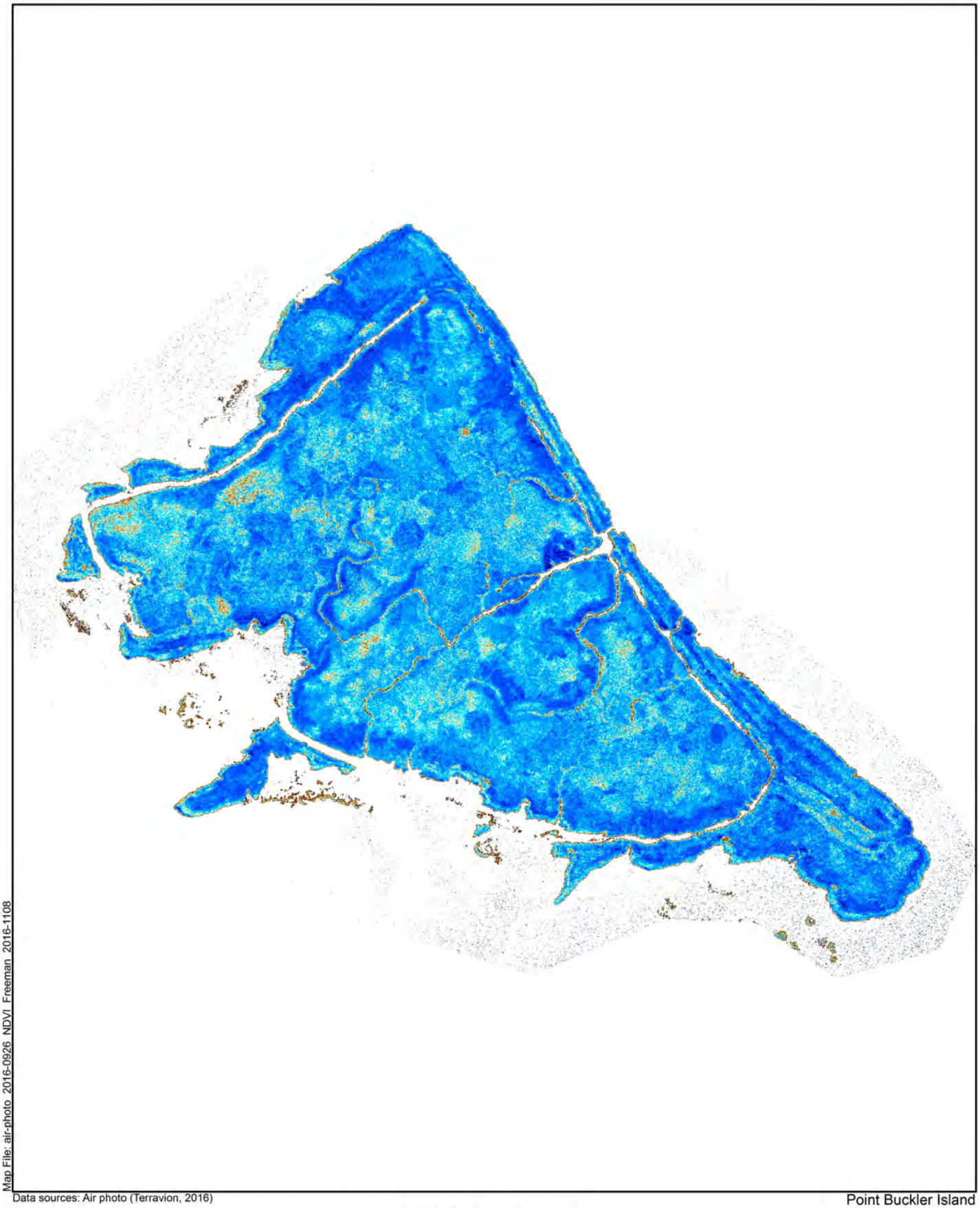
0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-34

Image brightness and contrast adjusted from original for visual clarity

September 26, 2016 NDVI Map, Point Buckler



Map File: air-photo_2016-0926_NDVI_Freeman_2016-1108

Data sources: Air photo (Terravion, 2016)

1:6,000 (1" = 500' at letter size)

0 250 500 ft

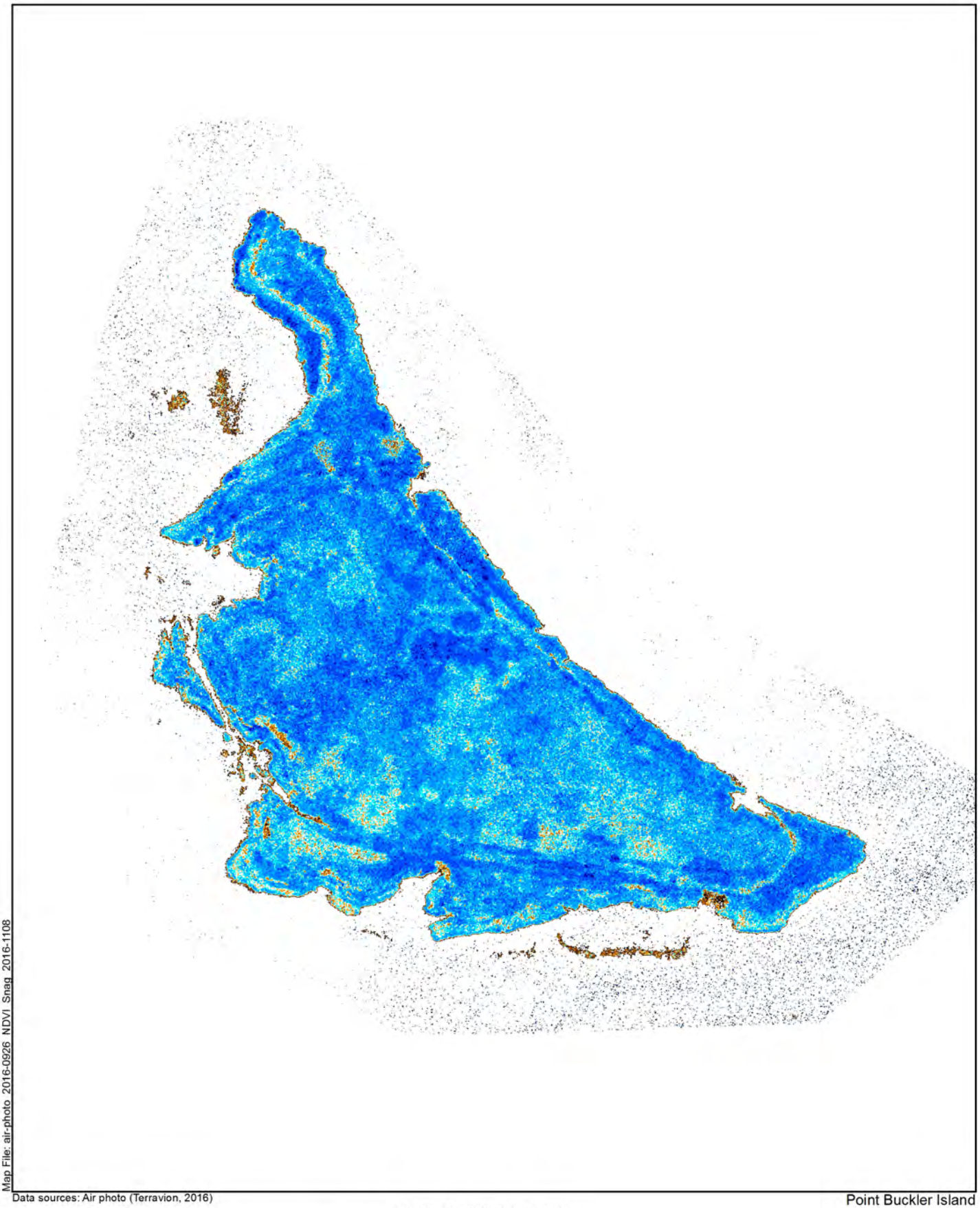
0 75 150 m

Point Buckler Island
Solano County, CA

Figure D-35

Image brightness and contrast adjusted from original for visual clarity

September 26, 2016 NDVI Map, Freeman Island



Map File: air-photo_2016-0926_NDVI_Snag_2016-1108

Data sources: Air photo (Terravion, 2016)

1:3,600 (1" = 300' at letter size)

0 150 300 ft

0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-36

Image brightness and contrast adjusted from original for visual clarity

September 26, 2016 NDVI Map, Snag Island

Map File: air-photo_2016-1114_NC_Buckler_2016-1114

Data sources: Air photo (Terravion, 2016)

1:3,600 (1" = 300' at letter size)

0 150 300 ft

0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-37

Image brightness and contrast adjusted from original for visual clarity

November 11, 2016 Natural Color Aerial Photograph, Point Buckler

Map File: air-photo_2016-1111_NC_Freeman_2016-1114

Data sources: Air photo (Terravion, 2016)

1:6,000 (1" = 500' at letter size)

0 250 500 ft

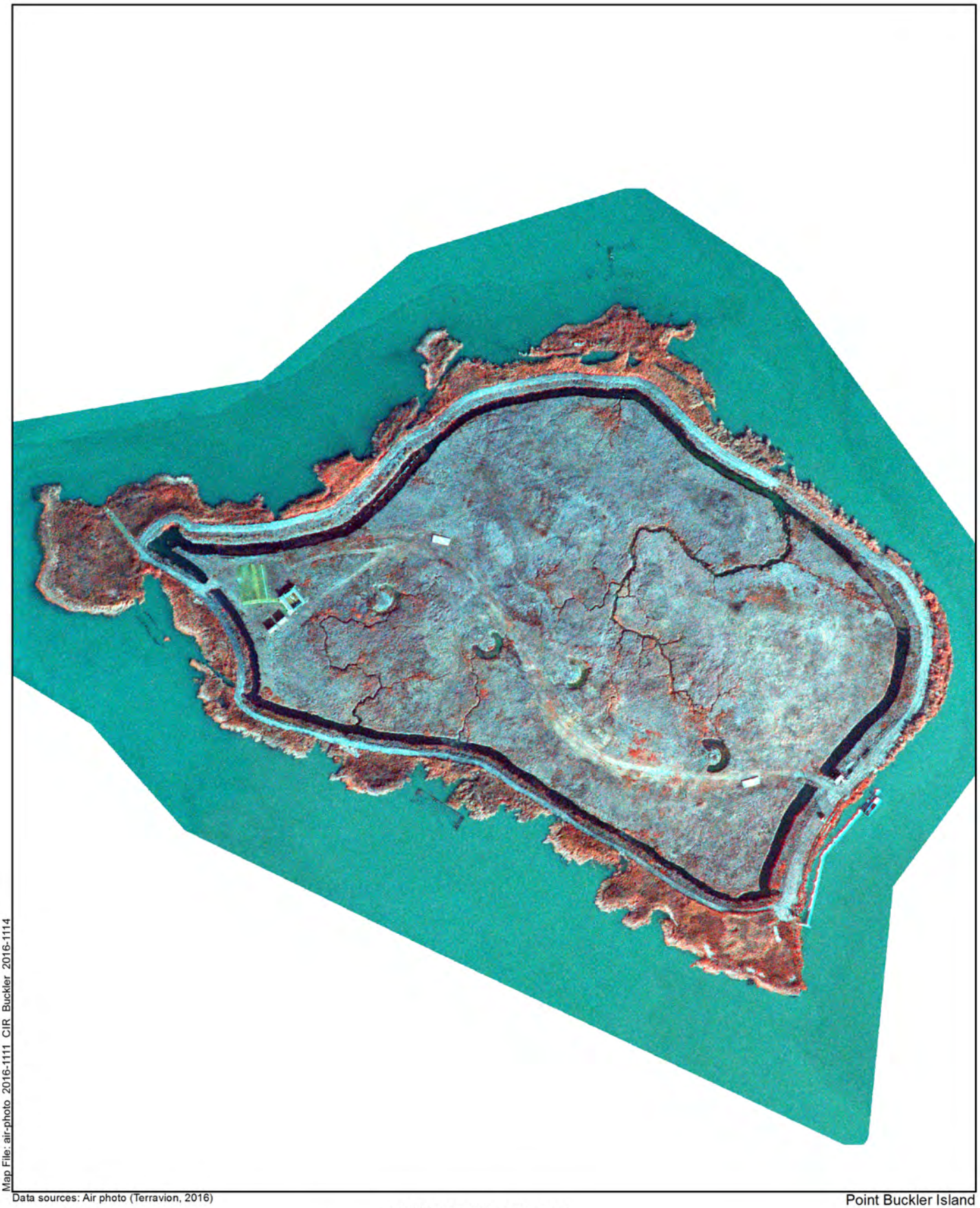
0 75 150 m

Point Buckler Island
Solano County, CA

Figure D-38

Image brightness and contrast adjusted from original for visual clarity

November 11, 2016 Natural Color Aerial Photograph, Freeman Island



Map File: air-photo_2016-1111_CIR_Buckler_2016-1114

Data sources: Air photo (Terravion, 2016)

1:3,600 (1" = 300' at letter size)

0 150 300 ft

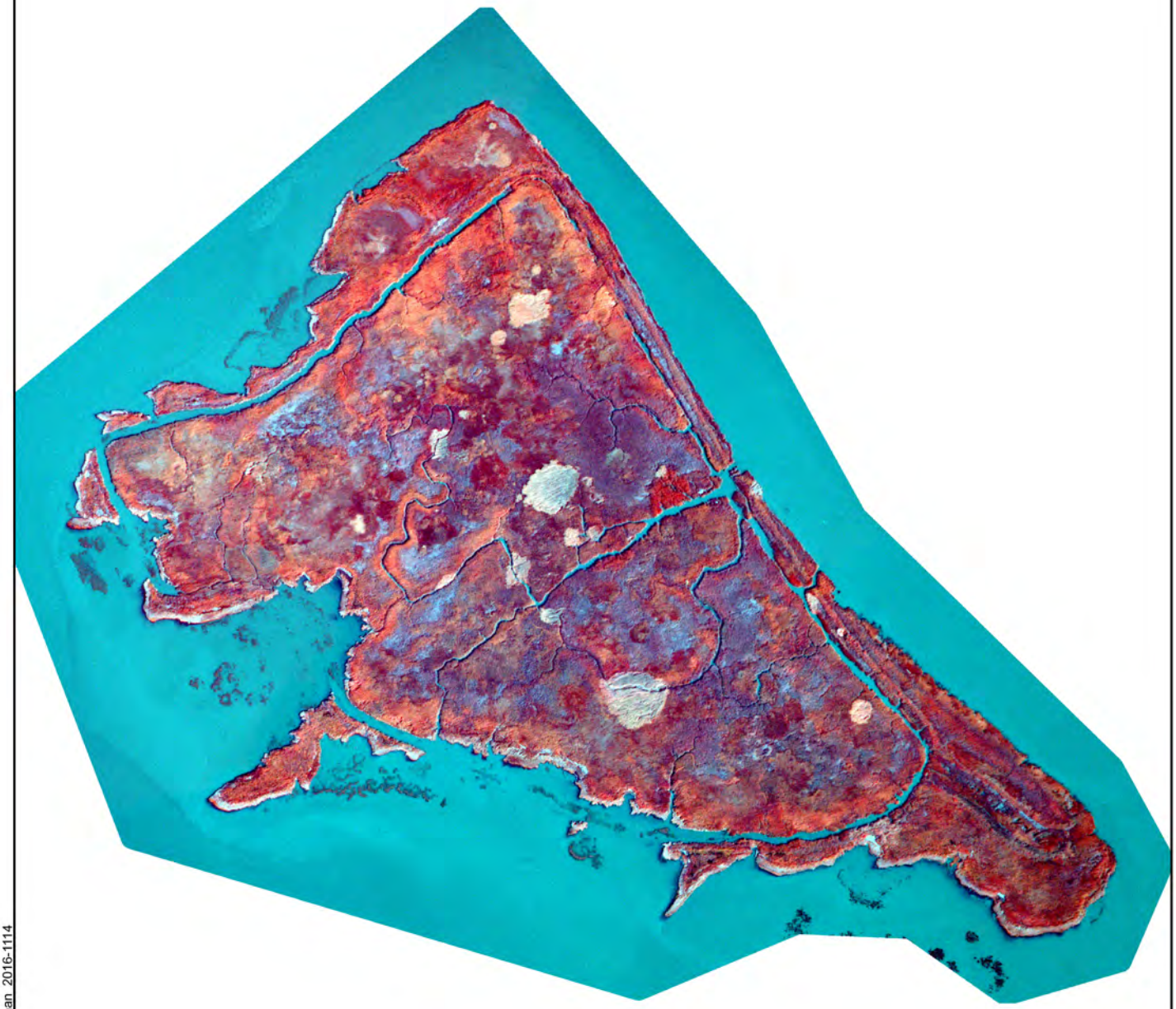
0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-39

Image brightness and contrast adjusted from original for visual clarity

November 11, 2016 Color Infrared Aerial Photograph, Point Buckler



Map File: air-photo_2016-1111_CIR_Freeman_2016-1114

Data sources: Air photo (Terravion, 2016)

1:6,000 (1" = 500' at letter size)

0 250 500 ft

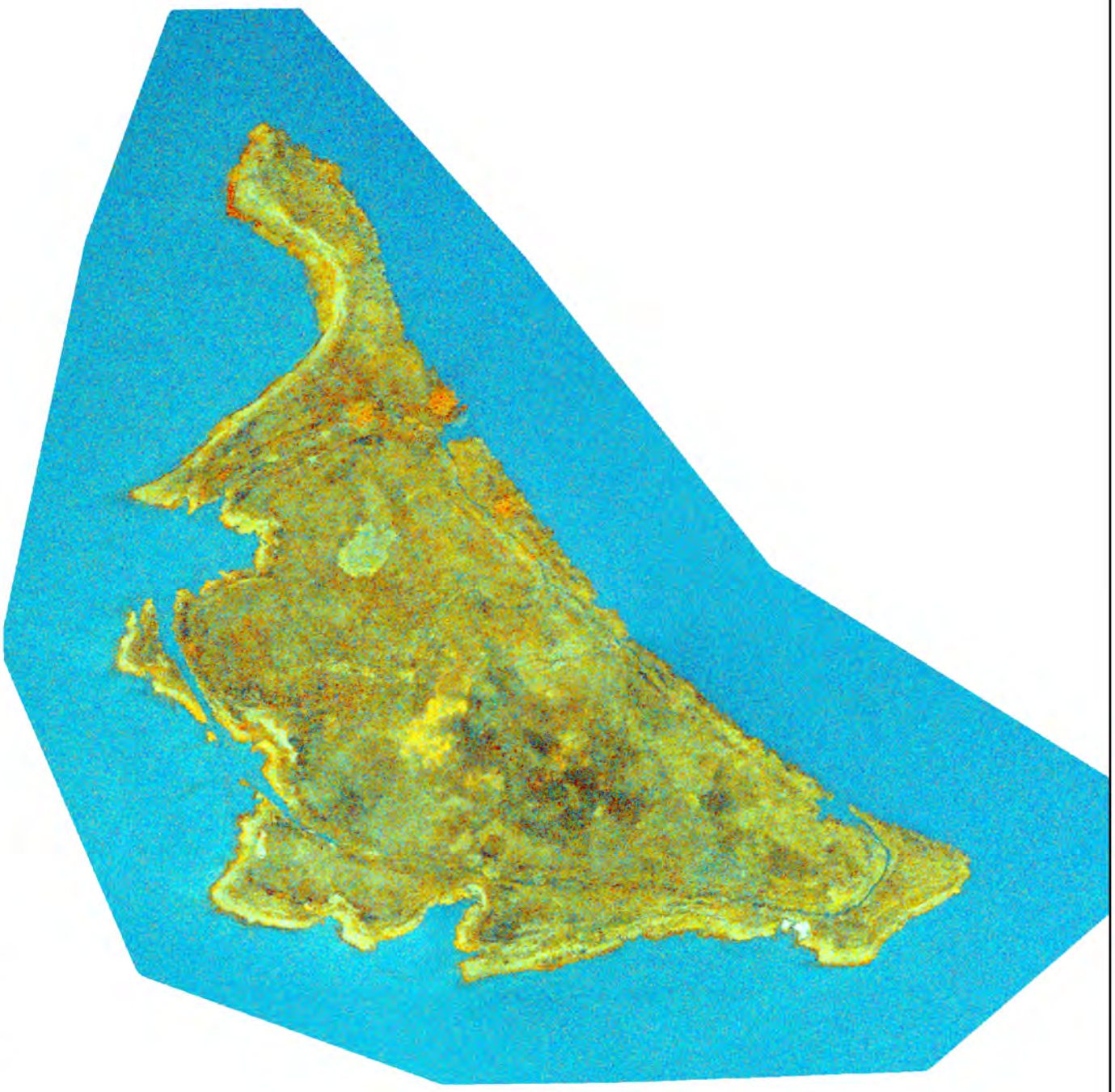
0 75 150 m

Point Buckler Island
Solano County, CA

Figure D-40

Image brightness and contrast adjusted from original for visual clarity

November 11, 2016 Color Infrared Aerial Photograph, Freeman Island



Map File: air-photo_2016-1110_SCIR_Snag_2016-1111

Data sources: Air photo (Terravion, 2016)

1:3,600 (1" = 300' at letter size)

0 150 300 ft

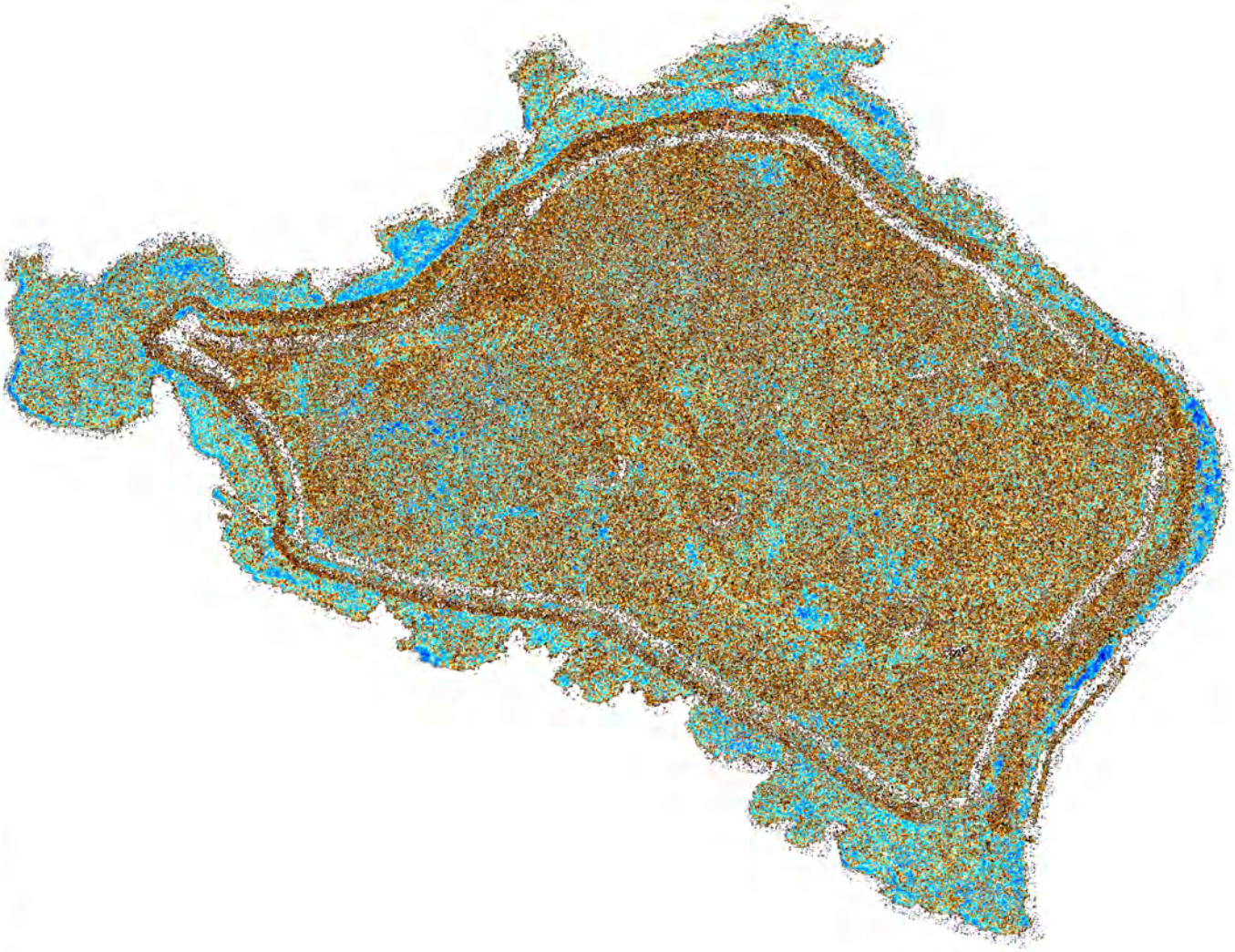
0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-41

November 10, 2016 Single Camera Infrared Aerial Photograph, Snag Island

Image brightness and contrast adjusted from original for visual clarity



Map File: air-photo 2016-1111 NDVI Buckler 2016-1114

Data sources: Air photo (Terravion, 2016)

1:3,600 (1" = 300' at letter size)

0 150 300 ft

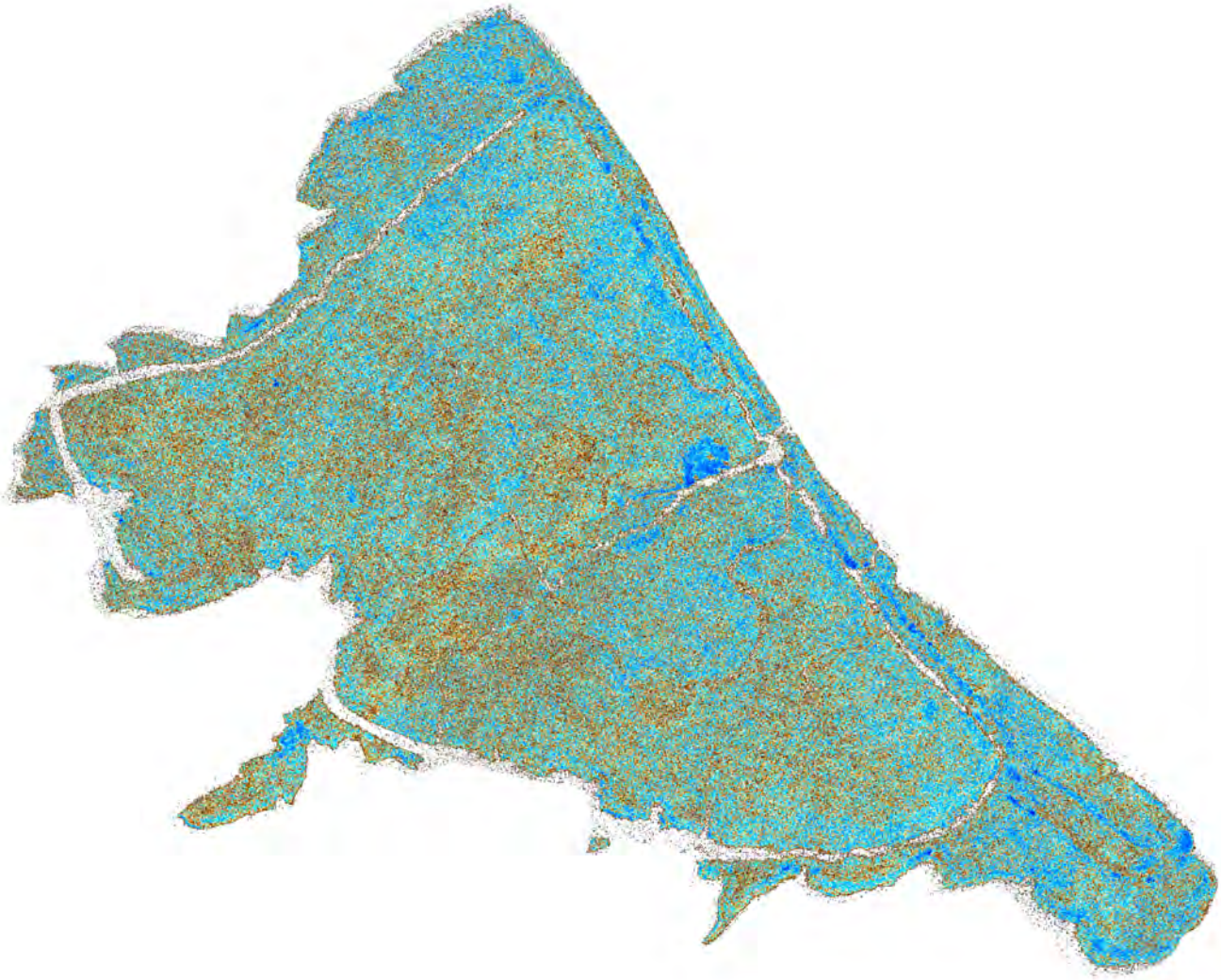
0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-42

Image brightness and contrast adjusted from original for visual clarity

November 11. 2016 NDVI Map, Point Buckler



Map File: air-photo_2016-1111_NDVI_Freeman_2016-1114

Data sources: Air photo (Terravion, 2016)

1:6,000 (1" = 500' at letter size)

0 250 500 ft

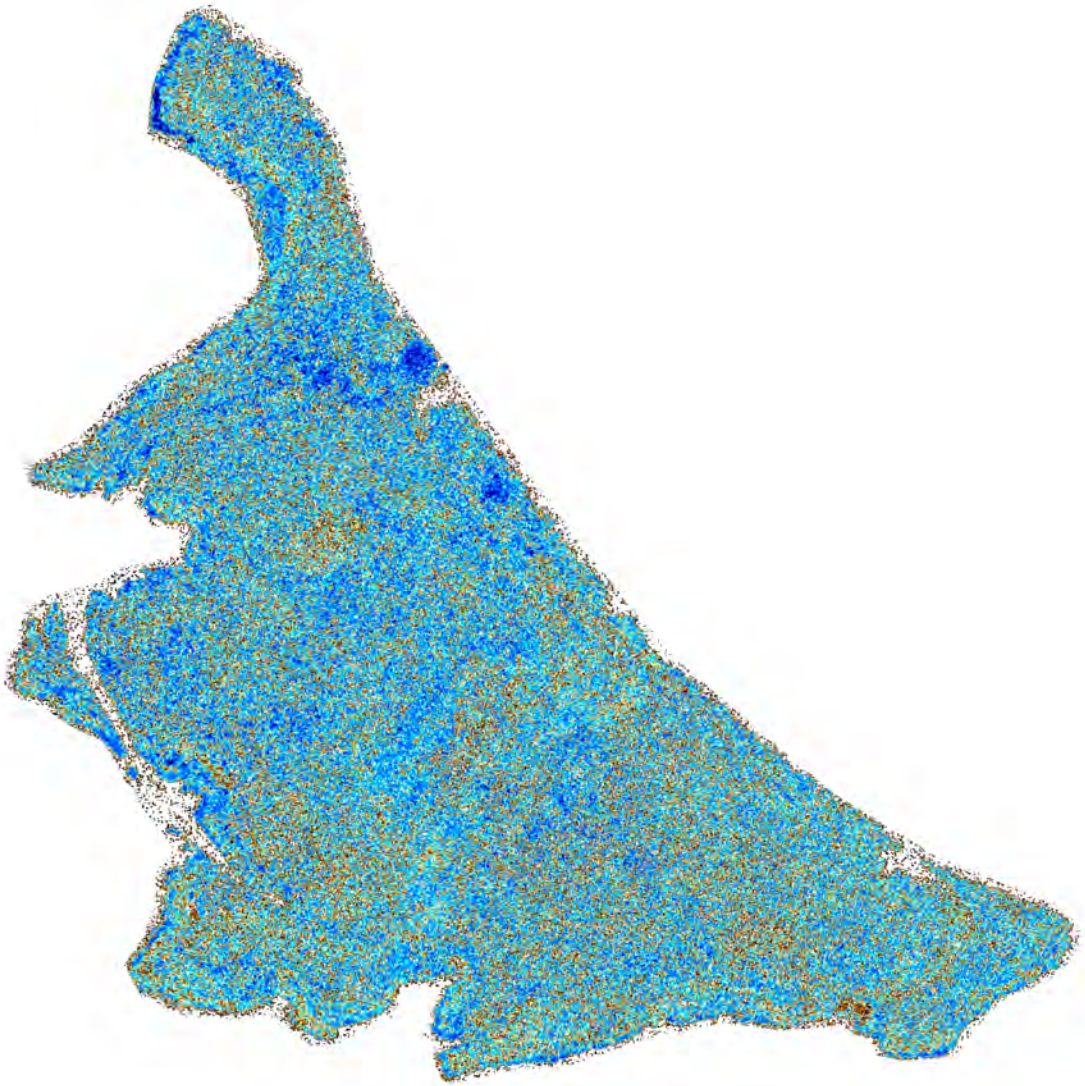
0 75 150 m

Point Buckler Island
Solano County, CA

Figure D-43

Image brightness and contrast adjusted from original for visual clarity

November 11, 2016 NDVI Map, Freeman Island



Map File: air-photo 2016-1110 NDVI Snag 2016-1111

Data sources: Air photo (Terravion, 2016)

1:3,600 (1" = 300' at letter size)

0 150 300 ft

0 50 100 m

Point Buckler Island
Solano County, CA

Figure D-44

Image brightness and contrast adjusted from original for visual clarity

November 10, 2016 NDVI Map, Snag Island

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Attachment E Other Information

Tide Gate Newly Installed in 2014

Oral testimony by the Opposition Brief author, Larry Bazel, at the November 17, 2016 Bay Conservation and Development Commission meeting stated that the tide gate currently at Point Buckler in the southwest corner was newly installed in 2014 in association with construction of the new levee. **This statement is false. The tide gate did not exist prior to new levee construction and was installed in a tidal channel that was filled by new levee construction in 2014.** Figure E-1 shows the position of each end of the culvert as surveyed on March 2, 2016. The upper and lower frames show the culvert position atop the pre-construction 2011 aerial photograph and the 2016 post-construction aerial photograph, respectively.

Placing Point Buckler into Suisun Marsh Regional Context

Suisun Marsh comprises extensive diked marshes along with about 8,000 acres of tidal marsh distributed around Suisun some of which is remnant historical marsh (such as Rush Ranch), some of which is naturally building marsh along levee banks, and some of which is naturally restored former diked marshes (Figure E-2, from WWR 2011[4]).

Extent of Ponds on Point Buckler in 1948

The 1948 aerial photograph (May 2016 Technical Assessment, Figure A-1) showed three ponds on Point Buckler at a time when the property was diked and utilized as a duck club. Figure E-3 outlines these ponds. The total estimated area of these ponds is approximately 3.2 acres. As these ponds were no longer visible in the 1985 aerial photograph (May 2016 Technical Assessment, Figure A-4), it is reasonable to assume that they filled in with sediment and/or tidal marsh vegetation. The March 2, 2016 topographic survey did not reveal distinct topographic depressions in the locations where the ponds visible in the 1948 photograph were located. Assuming then that these ponds filled with sediment over time through natural sedimentation, and assuming that pond depth may have been 1 to 2 feet as is typical in Suisun Marsh diked marshes, then the volume of sediment that filled these depressions would be roughly 5,000 to 10,000 cubic yards.

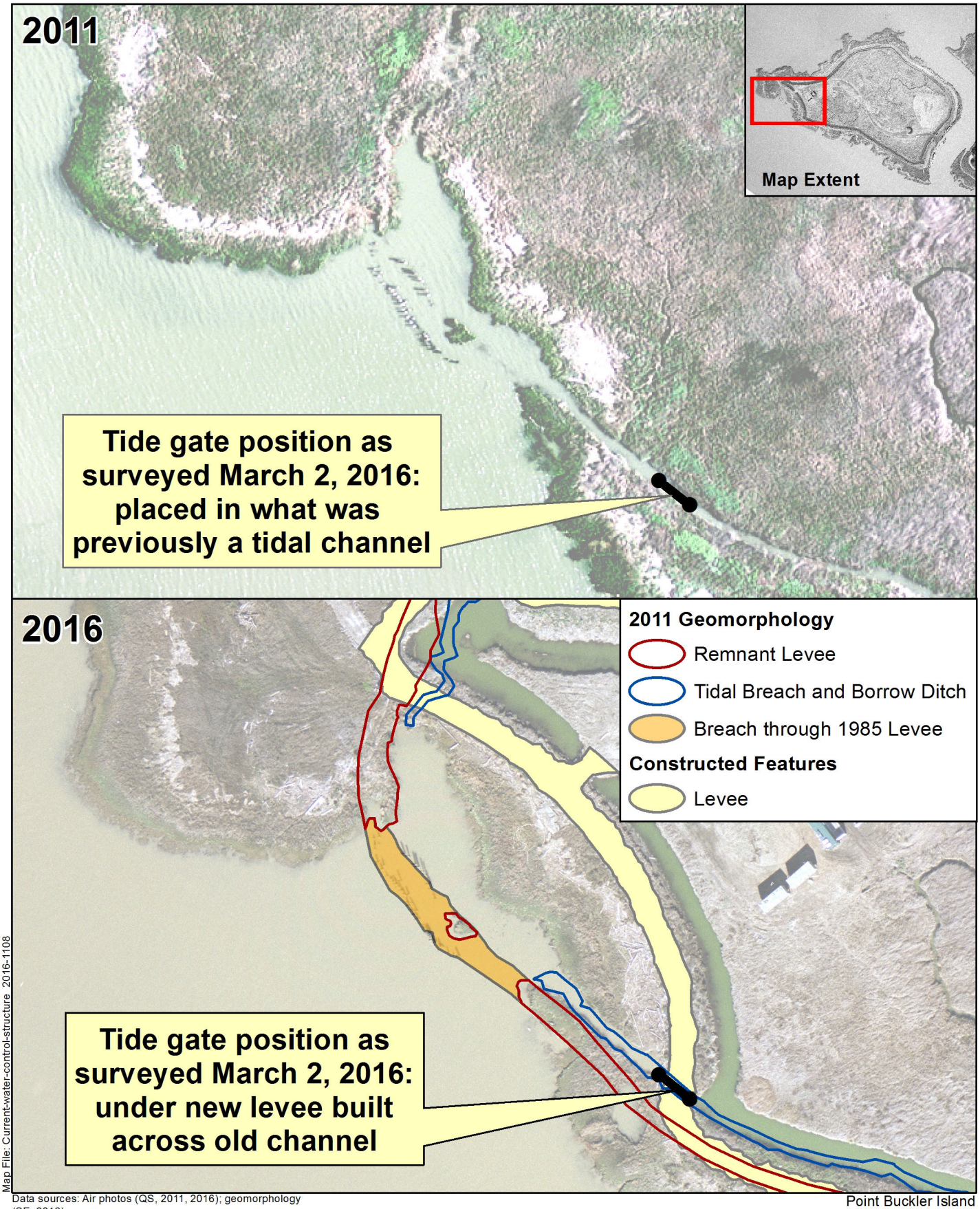
List of Figures

Figure E-1. Location of Tide Gate Newly Installed in 2014

Figure E-2. Suisun Land Uses

Figure E-3. Ponds on Point Buckler, 1948

[4] Wetlands and Water Resources. 2011. Suisun Marsh Conservation Strategy. Prepared for The Nature Conservancy, Sacramento, CA.



Map File: Current-water-control-structure_2016-1108

Data sources: Air photos (QS, 2011, 2016); geomorphology (SE, 2016)

1:1,200 (1" = 100' at letter size)

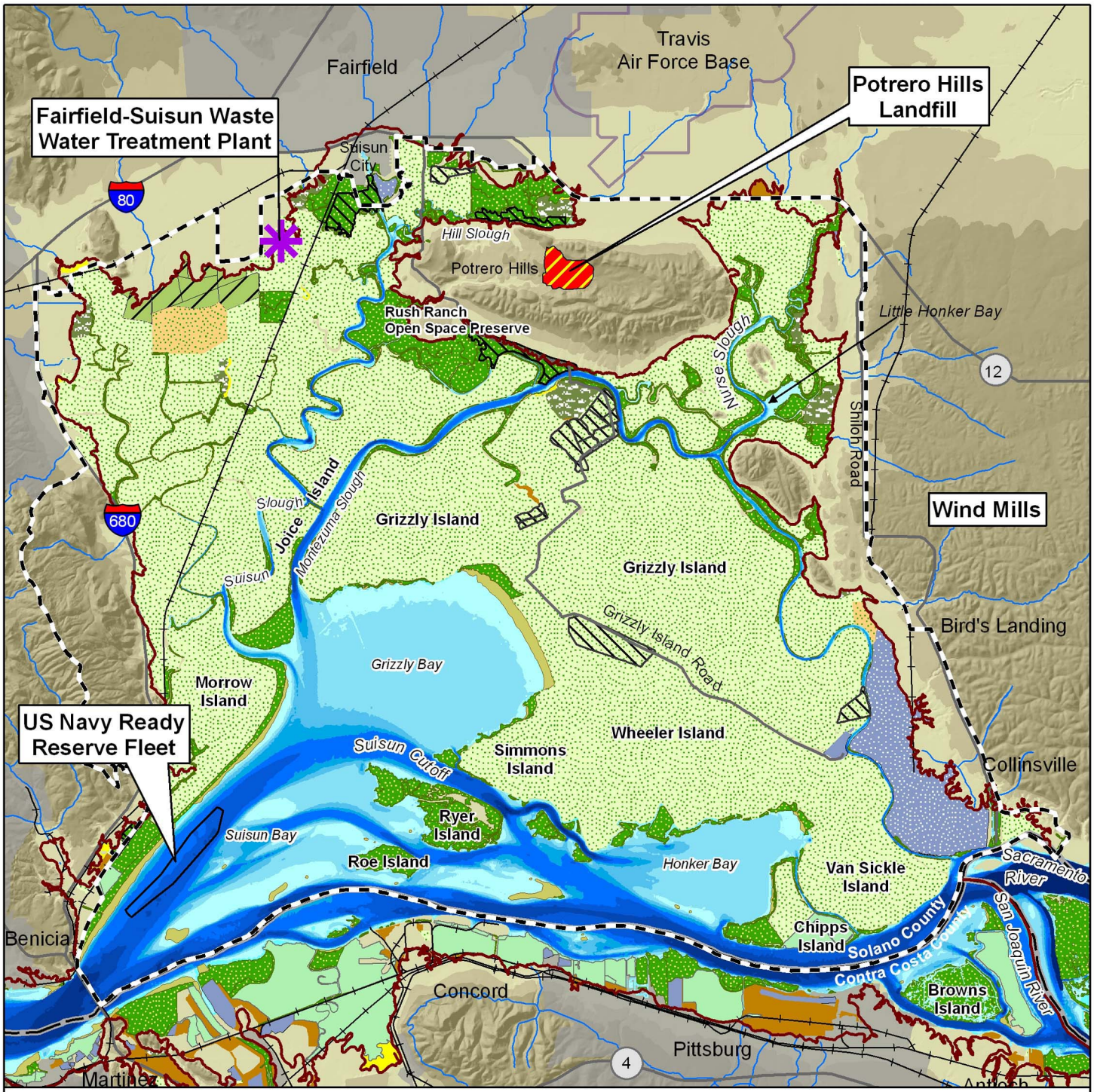
0 50 100 ft

0 15 30 m

Point Buckler Island
Solano County, CA

Figure E-1

Location of Tide Gate Newly Installed in 2014



Diked Baylands

- Managed Marsh
- Diked Marsh
- Farmed Bayland
- Grazed Bayland
- Ruderal
- Pheasant Club
- Dredged Material Basin
- Other

Tidal Baylands

- Tidal Marsh
- Muted Tidal Marsh
- Mudflat

Salt Marsh Harvest Mouse Conservation Areas

- DFG Diked Lands
- DFG Tidal Lands

Reference Features

- Historic Baylands Margin
- Suisun Marsh Protection Plan Boundary
- Urban Area

Bathymetry (ft NAVD 88)

Shallow	Deep
1	-20
-20	-140

N W E S

1:150,000 (1" = 12,500' at letter layout)

0 1 2 mi

0 2 4 km

Data sources: USGS (2004), TIGER (2000), GAP (1998), Eco Atlas (1998 with updates by WWR: 2009, 2011), CDFG (2006-2007)
Produced by WWR, September 2011
map file: land-use_Suisun_AP_1151_2011-0912mdl.mxd

WETLANDS AND WATER RESOURCES

SUISUN LAND USES

Suisun Marsh
Solano County, California

September 2011

Figure E-2

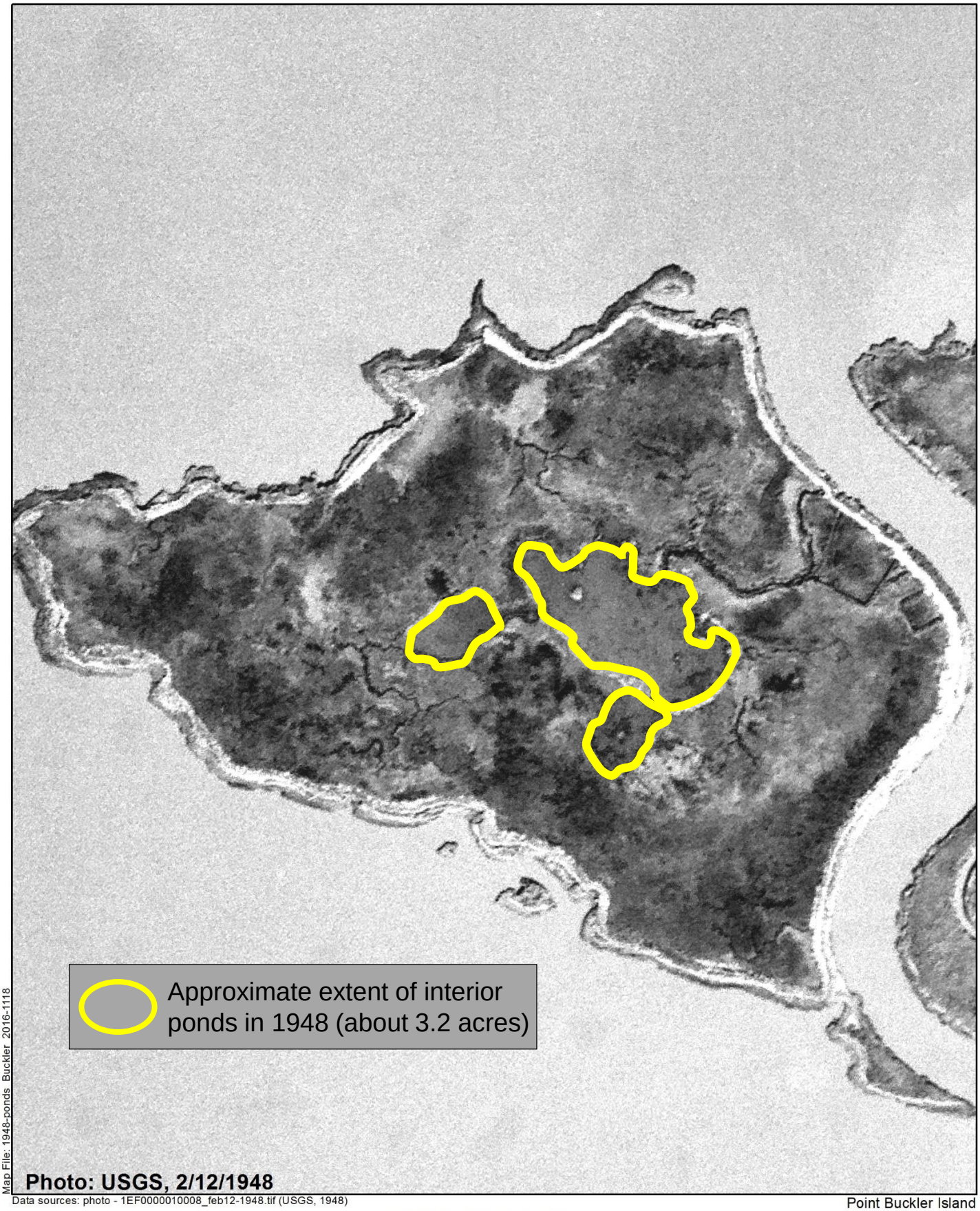


Photo: USGS, 2/12/1948

Map File: 1948-ponds_Buckler_2016-1118

Data sources: photo - 1EF0000010008_feb12-1948.tif (USGS, 1948)

1:3,600 (1" = 300' at letter size)

0 150 300 ft

0 50 100 m

Point Buckler Island
Solano County, CA

Figure E-3

Image brightness and contrast adjusted from original for visual clarity

Ponds on Point Buckler, 1948

Administrative Civil Liability Complaint
No. R2-2016-1008

John D. Sweeney and
Point Buckler Club, LLC

Description of Exhibit Provided by Hard Copy and Electronically or by Reference
(Ability to Pay and BEN Economic Benefit Model)

Exhibit 47

47a. Ability to Pay Analysis Memo – Sweeney/Point Buckler Club, Bryan Elder, November 16, 2016

47b. Individual Ability to Pay Claim, Financial Data Request Form

47c. BEN Economic Benefit Model Program - U.S. EPA
https://www.epa.gov/enforcement/penalty-and-financial-models

47d. BEN User's Manual - U.S. EPA
http://www.waterboards.ca.gov/water_issues/programs/ocean/docs/wqplans/benmanual.pdf

47a. Ability to Pay Analysis Memo – Sweeney/Point Buckler Club,
Bryan Elder, November 16, 2016

TO: PROSECUTION TEAM

FROM: Bryan Elder, MBA, PE
Water Resource Control Engineer
OFFICE OF ENFORCEMENT

DATE: November 16, 2016

SUBJECT: ABILITY TO PAY ANALYSIS SUPPLEMENTAL – SWEENEY / POINT BUCKLER CLUB

The preliminary ability to pay analysis was completed as part of the Administrative Civil Liability Complaint issued May 17, 2016, and updated September 2, 2016. That analysis found that Mr. Sweeney and Point Buckler Club, LLC could pay the proposed penalty based on a preliminary asset search and valuation. Mr. Sweeney provided additional ability to pay information in his declaration dated November 2, 2016, on behalf of himself and Point Buckler Club, LLC. Based on that information, Mr. Sweeney or Point Buckler Club has not demonstrated an inability to pay the proposed penalty for the reasons outlined below.

Ability to Pay

There are two key factors affecting an individual's or business' ability to pay: net cash flow and net worth. Cash flow is used to determine whether the entity can pay the proposed penalty directly, and as a factor used to secure financing. Cash flow is typically determined based on an entity's financial information, such as that disclosed in federal/state income tax returns and individual/business accounting records (income statements, profit/loss statements, balance sheets, cash flow statements, etc.). Income and expenses not disclosed in financial documents, such as personal living expenses, may also impact net cash flow.

Net worth is defined by an entity's assets and liabilities. Positive net worth implies that the value of the entity's assets exceeds the value of their liabilities (e.g., debt). Net worth is used as an additional factor when determining an entity's ability to secure financing. To determine net worth, an accurate account of all assets (e.g., real estate, personal property, cash, etc.) and liabilities (e.g., loans, liens, judgments, etc.) is necessary. While a public records search can be used to identify and value some assets and liabilities, the most complete and accurate disclosure should come from the entity themselves.

Dischargers' Inability to Pay the Recommended Penalty Claims

Neither Mr. Sweeney nor Point Buckler Club, LLC has submitted any financial information to support an inability to pay the proposed liability. According to Mr. Robert Bucci's declaration, "Mr. Sweeney states he has no net taxable income, and has not had any net taxable income for several years." There are two issues with this statement. First, Mr. Bucci also discloses in his declaration that "there has been no verification of any of the information provided by Mr. Sweeney." Second, net taxable income is not the same as, or representative of cash flow, as there are a number of allowable non-cash expenses and adjustments in the tax code that can be used to reduce or offset tax liability, but that do not affect cash flow. Such expenses and adjustments may include, but are not limited to, depreciation, amortization, and net operating loss carryover.

It is imperative that if an inability to pay claim is being raised, the Prosecution Team should be entitled to review applicable financial records pertaining to Mr. Sweeney and Point Buckler Club, LLC to make a determination of ability or inability to pay a proposed liability. Without full financial disclosure by Mr. Sweeney and Point Buckler Club, LLC, it is nearly impossible to properly assess an inability to pay claim.

Production of the following documents is necessary to properly assess the inability to pay claim:

1. Mr. Sweeney's ownership interest in any partnerships, companies, clubs, assets, etc.
2. Past three years of federal tax returns for Mr. Sweeney and Point Buckler Club, LLC
3. Completed and signed Individual Ability to Pay Claim Form for John D. Sweeney
4. Completed and signed Business Ability to Pay Claim Form for Point Buckler Club, LLC
5. Past 12 months of all bank statements for Mr. Sweeney and Point Buckler Club, LLC

Additional Information on Preliminary Analysis of Ability to Pay

During the preliminary public records search, many assets were identified; however, the valuation, ownership status, and associated debt were not available in many cases, as pointed out in Mr. Sweeney's declaration. While Mr. Sweeney has questioned the assumptions made in the Complaint, he has not provided any valid counter assessments for property valuations that the Prosecution Team may consider. In addition, the Prosecution Team has reason to believe (through Mr. Sweeney's declaration and social media postings) that additional assets such as business associations, duck clubs, personal investments, vehicles, and real estate have not been fully identified or disclosed. They should be included as a basis for ability to pay as any equity in these assets contributes to Mr. Sweeney's and/or Point Buckler Club, LLC's net worth.

It is reasonable to assume that Mr. Sweeney has no financial issues preventing him from securing debt. The Office of Enforcement conducted a preliminary ability to pay analysis for Mr. Sweeney and Point Buckler Club, LLC based on available information via a public records search. In that analysis, it was determined that a property was purchased by Mr. Sweeney in July 2016 for $1.125 million. Based on Solano County filings, a mortgage on the property was obtained in the amount of $805,000. In Mr.

Sweeney's declaration, he acknowledges the recent home purchase in July 2016, and claims that a second mortgage is also leveraged against the property in the amount of $160,000. Assuming Mr. Sweeney's statement regarding the second mortgage is true, the property is then leveraged to approximately $965,000, or approximately 86% of the value (based on the sale price). It is reasonable to assume that mortgages of this magnitude were approved based on the lender's detailed review of Mr. Sweeney's income, assets, and creditworthiness. Considering that Mr. Sweeney disclosed in his declaration that he is retired and has no net taxable income, additional information is necessary to understand how he was able to obtain such large financial obligations.

The valuation of Point Buckler Island should reflect investment and financial gain from business operations. In the preliminary ability to pay analysis, the Prosecution Team conservatively estimated the value of Point Buckler Island at $1.2 million based on debt leveraged against the property. The analysis further estimated that club membership sales could generate $600,000 based on a review of duck club memberships in the delta area. In the legal Opposition Brief, Mr. Lawrence Bazel, Attorney for Point Buckler Club, LLC, stated that "no rational business person would have spent $6 million so that he could obtain $600,000 in revenue," in reference to mitigation and permitting cost estimates provided for the economic benefit analysis in the Complaint. However, the Opposition Brief further states that capital gains realized from the sale of a property located in Tiburon, California "have been invested in Point Buckler Island and other activities." The Prosecution Team previously estimated the gain from that sale at approximately $2.025 million. Assuming all of the proceeds from that sale were reinvested in Point Buckler Island to enhance its land use attributes, 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 inference to the return on investment for Point Buckler Island, it is 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.

Conclusion

Based on the information available, Mr. Sweeney and Point Buckler Club, LLC have not provided sufficient documentation to concur with their inability to pay assertion. The Prosecution Team cannot be expected to rely on Mr. Sweeney's interpretation of financial information related to his own, and Point Buckler Club, LLC's ability to pay. Receipt of the above information is necessary to substantiate such a claim, and aside from those listed, Mr. Sweeney and Point Buckler Club, LLC should submit any documents that may further support their claim.

bke

47b. Individual Ability to Pay Claim, Financial Data Request Form

INDIVIDUAL ABILITY TO PAY CLAIM

Financial Data Request Form

This form requests information regarding your financial status. The data will be used to evaluate your ability to pay for environmental clean-up or penalties. If there is not enough space for your answers, please use additional sheets of paper. Note that we may request further documentation of any of your responses. We welcome any other information you wish to provide supporting your case, particularly, if you feel your situation is not adequately described through the information requested here. **Failure to answer all the questions clearly and completely may result in denial of your claim of inability to pay.**

Certification

Under penalties of perjury, I declare that this statement of assets, liabilities, and other information is true, correct, and complete to the best of my knowledge and belief. I further understand that I will be subject to prosecution by the United States Government to the fullest extent possible under the law should I provide any information that is not true, correct, and complete to the best of my knowledge.

Signature _____ **Date** _____

Name: _____

Spouse's Name: _____

Address: _____

_____

County of Residence: _____

PART I. BACKGROUND INFORMATION

1. **MEMBERS OF HOUSEHOLD** (List the head of the household and all persons living with you)

Name	Age	Relationship to Head of Household	Currently Employed?
1.			
2.			
3.			
4.			
5.			
6.			.
7. .			

2. **Employment** (List all jobs held by persons in the household)

Name	Employer	Length of Employment	Annual Salary
1.			
2.			
3.			
4.			
5.			
6.			.
7. .			

2a. If you have other employment, state the name and address of your employer, the position held by you, the date(s) you began this employment, period of payment and salary.

_____

_____

_____

_____

_____

2b. Are you self-employed or do you own all or any part of a business as sole owner, partner, or stockholder?

_____

_____

2c. If your answer to the previous question is in the affirmative, state the name and address of the business, the type of business conducted, the form of business organization, (e.g. corporation, partnership, sole proprietorship), the date you acquired your interest in the business, the nature of your ownership interest, the present value of your interest, how and when you draw from it, your office or position in the business, the name and address of each officer, director, or partner of the business, and the name and address of each location at which the business is conducted.

_____

_____

_____

_____

_____

_____

_____

_____

2d. Were any articles of incorporation, partnership or certificates of doing business under a fictitious name filed with any governmental agency by the enterprises mentioned in the preceding question?

_____

2e. If so, for each such filing, state: (i) the nature of the document filed, (ii) the location where filed; and (iii) the date of filing.

_____

_____

_____

3. **INCOME (List all income earned by persons in the household. If members of the household other than the applicant and spouse earn income, please itemize on a separate page.**

	Gross (Pre-Tax)		Period of Payment (Check One)			
Source	**Applicant**	**Spouse**	**Weekly**	**Monthly**	**Quarterly**	**Yearly**
Wages/Salaries						
Sales Commissions						
Investment Income (interest, dividends, capital gains, etc.)						
Net business Income						
Rental income						
Retirement income (Pension, Social Security, etc.)						
Child Support						
Alimony						
Other income. (please itemize)						

3a. If your spouse or any dependent claimed by you is self-employed or owns all or any part of a business, state the name and address of the business, the nature of his or her ownership interest therein, and the amount of the income derived there from.

_____

_____

_____

_____

_____

3b. Give an accurate account of the financial condition of this business for the last three years, including statements of profit and loss, assets, inventories, liabilities, gross and net income, and the amount of any undistributed profits in the business.

(PLEASE ATTACH)

3c. State the source and amount of any income received by (1) you, (2) your spouse, and (3) your dependents, other than that stated above.

_____

_____

_____

_____

3d. What accounts receivable, notes receivable, checks for $1000 or more, mortgages, liens, leases, royalties, or pledges of personality do (1) you, (2) your spouse, or (3) your dependents, own or hold, whether in your name or the name of another, what is their value, and where are the evidences of ownership located?

3e. When and where did you last file a Federal income tax return, and what was the amount of the gross income reported therein? Please attach **SIGNED** copies of Federal income tax returns for the last three (3) years, including all schedules and attachments.

PART II. CURRENT LIVING EXPENSES

In the table below, please list personal living expenses which were typical during the last year and indicate if any of these values is likely to change significantly in the current year. Please do not include business expenses. If you are the owner of an operating business, please attach any available financial statements.

Provide the Current Living Expenses in the timeframe most convenient to you. Thus, you may use Amount per week, or Amount per month, or Amount per quarter, or Amount per year.

Expense	Amount per week	Amount per month	Amount per quarter	Amount per year	For Agency Use ONLY
A. Living Expense					
1. Rent or Mortgage Payment					
2. Home Maintenance					
3. Auto fuel maintenance / other transportation					
4. Utilities					
a. Fuel (gas, oil, propane)					
b. Electric					
c. Water/sewer					
d. Telephone					
5. Food					
6. Clothing, personal care					
7. Medical costs					
B. Debt Payments					
1. Car payments					
2. Credit card payments					
3. Other loan payments					
4. Other loan payments					
C. Insurance					
1. Household Insurance					
2. Life Insurance					
3. Automobile Insurance					
4. Medical Insurance					
D. Taxes					
1. Property Taxes					
2. Federal income taxes					
3. State income taxes					

Expense	Amount per week	Amount per month	Amount per quarter	Amount per year	For Agency Use ONLY
4. FICA					
E. Other Expenses					
1. Childcare					
2. Current School tuition					
3. Legal or Prof Services					
4. Other (itemize on separate sheet)					
Total Current Expenses					

PART III. NET WORTH

Please provide the following information to the best of your ability. Data should be as current as possible. Estimates are acceptable; please note all estimates with an "estimated."

If you are the sole proprietor of a business, please list business assets and liabilities in addition to personal assets and liabilities. Please list the business assets and liabilities on a separate form.

1. BANK ACCOUNTS (Checking, NOW, Savings, Money Market, CDs etc.)

Describe and state ownership and value of any account or shares held by (1) you, (2) your spouse, (3) your dependents, or (4) anyone on your behalf in any bank, building and loan association, saving institution, cooperative, or credit union.

Name and Address of Bank or Institution	Type of Account	Current Balance
1.		
2.		
3.		
4.		
5.		
6.		
For Agency Use only- Total Current Balance in Bank Accounts		

2. INVESTMENTS (Stock, Bonds, Mutual Funds, Options, Futures, Real Estate Investment trusts, etc.)

Name and Address of Bank or Institution	Number of Shares or Units	Current Market Value
1.		
2.		
3.		
4.		
5.		
6.		
For Agency Use Only- Total Estimated Market Value of Investments		

3. RETIREMENT FUNDS AND ACCOUNTS (IRA, 401K, Keogh, vested interest in company retirement.)

Description of Account	Estimated Market Value
1.	
2.	
3.	
4.	

4. LIFE INSURANCE POLICIES (Whole Life, Universal Life, etc.)

State the names and address of all insurers with whom you have policies of life or accident insurance; give the date, face value, and cash surrender value of each policy, and specify which policies are payable to your estate.

Policy Holder	Issuing Company	Policy Value	Cash Value
1.			
2.			
3.			
4.			
5.			
For Agency Use Only- Total Value of Life Insurance Policies			

5. VEHICLES

5a. VEHICLES USED FOR COMMUTING PURPOSES ONLY

Brand and Model	Year	Estimated Market Value
1.		
2.		
3.		
For Agency Use Only- Total Estimated Market Value of Vehicles		

5b. OTHER VEHICLES (Cars, Trucks, Motorcycles, Motor Homes, Travel Trailers, Boats, Airplanes, etc.)

Brand and Model	Year	Estimated Market Value
1.		
2.		
3.		
For Agency Use Only- Total Estimated Market Value of Vehicles		

6. Personal Property

Describe the Household Goods and Furniture, Jewelry, Art, Antiques, Collections, Precious Metals, etc. valued at $1000 or more per item or $5000 or more in the aggregate owned by (1) you, (2) your spouse, or (3) your dependents.

Type of Property	Estimated Market Value
1.	
2.	
3.	
4.	
5.	
6.	
For Agency Use Only - Total Estimated Market Value of Personal Property	

7. REAL ESTATE

7a. PRIMARY RESIDENCE (Home - List only one such residence)

Location	Legal Description of Property	Estimated Market Value

7b. OTHER REAL ESTATE (Land, Buildings, Land with Buildings, Mineral Rights)

Location	Legal Description of Property	Estimated Market Value
1.		
2.		
3.		
For Agency Use Only- Total Estimated Market Value of Real Estate		

8. OTHER ASSETS

8a. Have you made or do you hold or own, or have a lien upon, any claim by suit or otherwise against the United States or any other party?

_____

_____

8b. Vested or contingent future interests

i. Do you have any vested or contingent future interest in any property, or to the payment of any money, for any reason whatsoever?

_____

ii. If so, state the nature and source of such interest, the location of the property, the identity and address of any person or institution that may be involved, the circumstances that will cause the property or money to inure to your benefit, and the probable value or amount thereof.

_____

_____

_____

_____

_____

8c. Property held in trust

i. Is any money or property held in trust for (1) you, (2) your spouse, or (3) your dependents?

_____

ii. If so, state the name and address of the trustee or other fiduciary, identify the trust, state what monies or property are held in trust, the value thereof, and the date upon which the trust is to terminate.

8d. If any monies or property are held in trust for (1) you, (2) your spouse, or (3) your dependents, state the amount of income which is or may be received therefrom, the timing of such payments, give the value of the corpus of trust which may be distributed to (1) you, (2) your spouse, or (3) your dependents, and the expected date of distribution.

8e. What other sources of income or property, actual or potential do (1) you, (2) your spouse, or (3) your dependents have which you have not disclosed in answer to previous questions and what is the value thereof?

Type of Asset	Estimated Market Value
1.	
2.	
3.	
4.	
5.	
For Agency Use Only- Total Other Assets	

9. CREDIT CARDS AND LINES OF CREDIT

Credit Card/Line of Credit (Type)	Owed To	Balance Due
1.		
2.		
3.		
4.	.	
5.		
6.		
For Agency Use Only - Total Balance Due on Credit cards and Lines of Credit		

10. VEHICLE LOANS (Cars, Trucks, Motorcycles, Motor Homes, Travel Trailers, Airplanes, etc)

Vehicle (Model and Year)	Owed To	Balance Due	Start Date	End Date
1.				
2.				
3.				
4.				
For Agency Use Only - Total Balance Due on Vehicle Loans				

11. FURNITURE AND HOUSEHOLD GOODS LOANS:

Type of Loan	Owed To	Balance Due	Start Date	End Date
1.				
2.				
3.				
4.				
For Agency Use Only- Total Balance Due- Furniture & HHG Loans				

12. MORTGAGES AND REAL ESTATE LOANS:

Type of Loan	Owed To	Property Secured Against	Balance Due	Start Date	End Date
1.					
2.					
3.					
4.	.				
For Agency Use Only- Total Balance Due- Mortgages and Real Estate loans					

13. OTHER DEBT (Amounts due to individuals, Fixed Obligations, Taxes Owed, Overdue Alimony Child Support, etc.

13a. Are any suits or judgments pending against you?

13b. If so, state the full details, including the dates and amounts of recent payments thereon made for you and whether your salary has been garnished and by whom.

Type of Debt	Owed To	Balance Due	Start Date	End Date
1.				
2.				
3.				
4.				
5.				
For Agency use only- Total Balance Due on Other Debt				

PART IV. ADDITIONAL INFORMATION

Please respond to the following questions. For any question that you answer "Yes" please provide additional information on separate pages or at the bottom of this page.

QUESTION	YES	NO
1. Do you have any reason to believe that your financial situation will change during the next year?		
2. Are you currently selling or purchasing any real estate?		
3. Is anyone (or any entity) holding any real or personal property on your behalf, (trust)?		
4. Are you the party in any pending lawsuit?		
5. Have any of your belongings been repossessed in the last three years?		
6. Are you a Trustee, Executor, or Administrator?		
7. Are you a participant or beneficiary of an estate or profit sharing plan?		
8. Have you declared bankruptcy in the last seven years?		
9. Do you receive any type of federal aid or public assistance?		

Administrative Civil Liability Complaint
No. R2-2016-1008

John D. Sweeney and
Point Buckler Club, LLC

Description of Exhibit Provided by Hard Copy and Electronically
(CDFW Point Buckler Review)

Exhibit 48

CDFW Vegetation Classification and Mapping Program Review of Point Buckler Tidal Wetland Conversion, Todd Keeler-Wolf, November 14, 2016

State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Director's Office
1416 Ninth Street, 12th Floor
Sacramento, CA 95814
www.wildlife.ca.gov

EDMUND G. BROWN JR., Governor
CHARLTON H. BONHAM, Director

To: Benjamin Martin
Environmental Scientist
SF Bay Regional Water Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Re: Summary of CDFW Vegetation Classification and Mapping Program Review of Point Buckler tidal wetland conversion.

November 14, 2016

Dear Mr. Martin,

We reviewed the formal complaint (NO. R2-2016-1008) lodged by the Water Board on the matter of alteration and destruction of tidal wetland at Point Buckler, Suisun Marsh, Solano County. We did this in our capacity as the principle scientific authorities on vegetation and habitat mapping of Suisun Marsh, the larger marsh including Point Buckler. The Vegetation Classification and Mapping Program has produced detailed vegetation maps and collected and monitored numerous vegetation samples throughout Suisun Marsh since 1999 and has mapped and remapped the vegetation of Point Buckler and the surrounding Suisun Marsh seven times (once every 3 years) since 1999. The mapping and vegetation assessment maps and reports are available through the Department of Fish and Wildlife's web portals (https://www.wildlife.ca.gov/Data/VegCAMP/Reports-and-Maps and https://www.wildlife.ca.gov/Data/GIS/Vegetation-Data).

Our findings agree with the summary of events and impacts covered in **sections B and D** of the Administrative Civil Liability Complaint (hereby referred to as "the Complaint") written by the San Francisco Bay Region Water Quality Control Board (NO. R2-2016-1008).

Based on our understanding of the habitat that has been altered as a result of the recent activity at Point Buckler (further referred to as "the Site"), we concur with the findings listed in Section C of the Complaint, that among other things, 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.

Our review of the evidence from our mapping also agrees with the findings in the Complaint summarized under **Section F**. This specifically includes: 1. The great majority of the land surface at the Site was tidal marsh, prior to the recent alterations since 2013, at least since July 1988, which coincides with the oldest aerial photographs

we had the ability to review, and furthermore, that the original ditch and levee constructed prior to July 1988 had clear evidence of deterioration that enabled it to allow regular tidal influence to the interior marsh of the site at multiple areas. We also concur with the findings that construction of the new levee negatively impacted the vast majority of tidal marsh present prior to the recent activities (approximately 30 acres). With regard to the current ecological viability of the wetlands in the interior of the Site we also concur with findings under points 52c, 53, and 54 of the Complaint that the tidal marsh inboard of the new levee is being drained and thus is drying out. Wetland vegetation within the levee was brown and growth had stopped or was significantly decreased, despite the date of the imagery being well within the greening-up period of normal healthy marsh for that time of year (April 1, 2015).

More specifically: based on April 2015 aerial photos, by that date the interior marsh exhibited reduced growth and showed primarily dead stems of the emergent bulrush and cattail (primarily: *Schoenoplectus acutus* and *Typha angustifolia)* compared to the spring 2014 imagery. The dying emergent marsh vegetation was not due to any differences in seasonal growth conditions since the same types of vegetation elsewhere in adjacent areas of the Suisun Marsh (outside of the Site) showed green stems of living marsh vegetation. Instead, it corresponded to drying of the interior marsh as a result of the digging of the deep borrow ditch, dropping water levels, and the severing of any tidal connections. Following the drying of the interior marsh, it appears that the invasive non-native plant Perennial pepperweed (*Lepidium latifolium*) increased in cover around the northeastern dendritic channel. We would expect other invasive plants to increase with the physical removal of cover and the dropping of water levels through the center of the island.

Yours sincerely,

Todd Keeler-Wolf, Ph.D.
Lead Ecologist
Vegetation Classification and Mapping Program
Biogeographic Data Branch
1416 9th Street, Suite 1266
Sacramento, CA 95814
(916) 324-6857

Administrative Civil Liability Complaint
No. R2-2016-1008

John D. Sweeney and
Point Buckler Club, LLC

Description of Exhibit Provided by Hard Copy and Electronically
(BCDC Documents)

Exhibit 49

49a. Declaration of Adrienne Klein, September 23, 2016

49b. Declaration of Ming Yeung, November 1, 2016

49c. BCDC Recommended Enforcement Decision, September 23, 2016

49d. BCDC Enforcement Committee Recommended Enforcement Decision, November 4, 2016

49e. BCDC Final Cease and Desist Order No. 2016.02, November 18, 2016

49a. Declaration of Adrienne Klein, September 23, 2016

DECLARATION OF ADRIENNE KLEIN

I, Adrienne Klein, declare as follows:

1. Mr. Sweeney has stated at least three times since the inception of the BCDC enforcement action, that he was informed that Point Buckler is not located in BCDC jurisdiction. I never made this statement. I believe Mr. Sweeney drew false conclusions from second hand information as explained below.
2. During a site visit to the Point San Pablo Yacht Harbor (PSPYH) on November 18, 2010, I observed and photographed a series of stored boat docks moored on the east side of the marina basin. I concluded that they were stored because they were tied together and not being used to moor vessels. Upon inquiry, the owners of the PSPHY, Eric and Roslyn Johnson, informed me that Rick Moseley of Salt River Construction, had asked if he could store the docks at the PSPYH and they had acquiesced.
3. On July 14, 2011, Ande Bennett apparently spoke by telephone to Rick Moseley, Salt River Construction, following which she sent an email to him to confirm her understanding that the docks that Salt River Construction apparently and eventually took to Chipps Island would be towed to Herman and Helen's Marina at Empire Tract Island by July 31, 2011, where they would be used to replace that marina's docks (Enforcement File No ER2011.028).
4. On November 9, 2011, I sent an email to Zack Cohn, Salt River Construction, informing him that Mr. Johnson, PSPYH, had informed me that the stored docks had been removed from his marina and, as such, requesting written confirmation of this fact. I requested the date of relocation, the destination and a photograph (Enforcement File No ER2011.028).
5. On November 9, 2011, Mr. Cohn informed me that the docks had been towed a couple of months prior to Spinner Island, which is located east of Chipps Island. In a follow-up email, he changed the location to Chipps Island. Mr. Cohn did not send me a map of the location to which the docks had been towed (Enforcement File No ER2011.028).
6. Following receipt of this email, I closed Enforcement Case No. ER2011.028, and reported this fact in the 2011 Year-End Enforcement Report, because I believed that the docks had be relocated outside of BCDC's McAteer-Petris Act (MPA) jurisdiction.
7. I don't know why I did not inquire of Mr. Cohn where on Chipps Island the docks had been located since it is located entirely within BCDC's Suisun Marsh Preservation Act jurisdiction. Instead, I drew an incorrect conclusion that they were going to be located east of the eastern boundary of the MPA jurisdiction.
8. I believe I never received a call from, or placed a call to, John Sweeney concerning this – or any other - matter. Enforcement File No ER2011.028 lacks any records of a conversation between Mr. Sweeney and me, which affirms my belief.

9. I never stated to Salt River Construction or anyone else that Point Buckler Island is not located in BCDCD's jurisdiction. I never heard of Point Buckler Island until Spring 2014, when my colleagues Cody Aichele and Joe LaClair reported their observations of an apparent violation involving heavy equipment, levee work and new boat docks at this location following their tour of the marsh in March 2014, with Steve Chappell, ED, SRCD.

10. Prior to September 19, 2016, I never saw the email dated August 31, 2011, from Mr. Cohn to Mr. Sweeney, submitted with Mr. Sweeney's Declaration. The title of this email is "Chips Island Sport and Social Club – Docks to be Moved." In the body of the email, Mr. Cohn states that the docks were going to be placed on the upland. In the body of the email, Mr. Cohn states that I "unofficially" informed him that placing the docks on the upland was "ok."

11. Therefore, it appears that Mr. Cohn believed the docks were going to be located on the upland of Chipps Island and not in the water at Point Buckler or Chipps Island. To my knowledge, there is no such entity as the "Chips Island Sport and Social Club." Instead, I understand that Mr. Sweeney owns and operates the Point Buckler Sport and Social Club on Point Buckler Island and that he also owns Chipps Island. Through inference, error, or both, Mr. Sweeney drew an incorrect conclusion that because BCDC staff "unofficially" stated that it was "ok" to place docks on the upland of Chipps Island, that Point Buckler Island was not located in BCDC's jurisdiction.

12. Four years later, in April, 2015, during a boat ride from the Martinez Marina, Contra Costa County, to Point Buckler Island, Solano County, with Mr. Sweeney, three other members of the BCDC staff, and me, we passed a series of abandoned docks in poor condition in the channel that separates Chipps and Spinner Islands. Mr. Sweeney informed us that these were the docks that Salt River Construction had towed from the PSPYH four years prior. Though I do not recall precisely what I said to Mr. Sweeney that day about this observation, I believe that I informed Mr. Sweeney that they were located in, and should be removed from, BCDC's jurisdiction. I believe Mr. Sweeney stated that he had done Salt River Construction a favor in allowing them to store the docks offshore from his property and that they had failed to ever cut up and dispose of the docks and that Mr. Sweeney didn't plan on assuming the expense of doing it himself. Mr. Sweeney had done the favor because, he stated, he had grown up with Rick Moseley and his brothers in Marin County. Mr. Sweeney did not tell me that I had informed him during a prior conversation that it was okay to place the docks at this location.

13. Following this boat trip, on April 13, 2015, I contacted Salt River Construction and reached Dave (Cohn), and directed them to remove the boat docks (i.e. marine debris) from SF Bay. Dave told me Zack (Williams) would call be back on the 17th. Having not received a call from Zack on April 17th, on April 22, 2015, I called back. No one answered the telephone, so I left a message asking for a call back from Zack or Rick (Moseley) to remove the docks from the PSPYH, now at Chipps Island, from the Bay. Enforcement File No ER2011.028 lacks any further record of communication between Salt River Construction and BCDC. I have no recollection that anyone from Salt River Construction called me back and, as of the date of this declaration, to my knowledge, the docks are still being stored in the Bay adjacent to Chipps Island.

14. As stated, I believe Mr. Sweeney is incorrect in stating that he and I spoke about the Salt River boat docks and BCDC's jurisdiction. Prior to learning from the ACOE about the placement of a shipping container in a levee breach at Chipps Island by Mr. Sweeney, I had never heard of him. Mr. Sweeney took a risk in conducting work on Chipps and Point Buckler Islands without first contacting and obtaining permits from the SRCD, the RWQCB, the ACOE and/or BCDC. Any one of these agencies would have referred him to the others.

15. BCDC records show that the agency has issued two cease and desist orders, entered into one settlement agreement and written six enforcement letters to property owners in the marsh. It is also possible that some of the marsh development permits were issued after-the-fact for work that had already occurred.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

September 23, 2016
Date

Adrienne Klein
ADRIENNE KLEIN

49b. Declaration of Ming Yeung, November 1, 2016

DECLARATION OF MING YEUNG

I, Ming Yeung, declare as follows:

1. I am currently employed as a Planner with the City and County of San Francisco.
2. From approximately January 14, 2005 to October 9, 2015, I was employed as a Coastal Program Analyst with the San Francisco Bay Conservation and Development Commission (BCDC).
3. I have read pages 51-52 of the Reporter's Transcript of the October 6, 2016 Enforcement Committee Meeting, at which John Sweeney testified that he contacted me in approximately March 2011 to inquire whether Point Bucker Island is in BCDC's jurisdiction and that I later called him back and stated that it is not in BCDC's jurisdiction.
4. I have no recollection of ever speaking with John Sweeney.
5. I have no recollection of ever receiving an inquiry from anyone as to whether Point Buckler Island is in BCDC's jurisdiction.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

11/1/2016.
Date

MING YEUNG

49c. BCDC Recommended Enforcement Decision, September 23, 2016

San Francisco Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

September 23, 2016

TO: Enforcement Committee Members

FROM: Marc Zeppetello, Chief Counsel, (415/352-3655; marc.zeppetello@bcdc.ca.gov)
Adrienne Klein, Chief of Enforcement (415/352-3609; adrienne.klein@bcdc.ca.gov)

SUBJECT: **Executive Director's Recommended Enforcement Decision**
Proposed Cease and Desist and Civil Penalty Order No. CDO 2016.02
(For Committee consideration on October 6, 2016)

Executive Director's Recommendation

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I. SUMMARY OF BACKGROUND TO THE ALLEGED VIOLATIONS

This enforcement proceeding involves alleged violations of the McAteer-Petris Act (MPA) and the Suisun Marsh Preservation Act (SMPA) at Point Buckler Island, which is located in the primary management area of the Suisun Marsh in Solano County (the Site). Point Buckler Club, LLC owns the Site. Mr. Sweeney is a principal of Point Buckler Club, LLC and owned the Site from approximately April 19, 2011, to October 27, 2014, when he conveyed the Site to Point Buckler Club, LLC. (Mr. Sweeney and Point Buckler Club, LLC are collectively referred to as Respondents.)

The MPA requires any person wishing to place fill, extract materials, or make any substantial change in use of any water, land, or structure, within the area of the Commission's jurisdiction, including the Site, to obtain a permit from the Commission. Govt Code § 66632(a).

The SMPA generally requires any person wishing to perform or undertake any "development," as that term is broadly defined in Public Resources Code Section 29114(a), in the primary management area of the Suisun Marsh, including the Site, to obtain a marsh development permit (MDP) from the Commission. Pub. Res. Code §§ 29500, 29501. However, no MDP is required for any development specified in the component of the local protection program (LPP) for the Suisun Marsh prepared by the Suisun Resource Conservation District (SRCD) and certified by the Commission.

The SRCD's component of the LLP, known as the Suisun Marsh Management Program (SMMP), consists of a number of elements including, but not limited to, individual water management programs (commonly referred to as individual management plans or IMPs) for each privately-owned "managed wetland" within the primary management area of the Suisun Marsh. The SMPA defines the term "managed wetland" to mean "those diked areas in the marsh in which water inflow and outflow is artificially controlled or in which waterfowl food plants are cultivated, or both, to enhance habitat conditions for waterfowl and other water-associated birds, wildlife, or fish…." Pub. Res. Code. § 29105.

In 1984, IMPs were developed for each privately-owned managed wetland in the primary management area of the Suisun Marsh, including the Site, and were certified by the Commission. The IMP for the Site, denominated the "Annie Mason Point Club" (Annie Mason IMP), states that the club is contained within a single levee surrounded by Grizzly Bay to the north and Suisun Cutoff to the south, and describes two water control structures, one on the east side and another on the north side of the Site. The Annie Mason IMP further states that it is "necessary that the club follows a regular program of water management," and that:

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

Substantial evidence demonstrates that since at least the late-1980s, the Site was never managed in accordance with the Anne Mason IMP. Among other evidence, at all times subsequent to certification of the Annie Mason IMP, all property owners within the Suisun Marsh, including the Site, have been subject to certain regulatory requirements imposed by the United States Army Corps of Engineers (USACE) under the Clean Water Act and/or the Rivers and Harbors Act of 1899, which have been set forth in a series of Regional General Permits (RGPs) issued for successive five-year terms. The RGP currently in effect, RGP3 dated July 8, 2013, regulates, among other things, levee repairs "to repair damage from storms and to counteract subsidence of the levees." The RGP3 also requires property owners who intend to perform repair and other activities regulated by the permit to prepare and submit to SRCD a report (called a "work request form") that describes the proposed activities. The RGP3 gives to the SRCD the responsibility to compile and submit to the USACE the reports that the SRCD receives from property owners. Previous versions of the RGP contained regulatory requirements of similar scope and content. SRCD's records since 1994 reveal no reports submitted by any owner of the Site for purposes of compliance with an RGP regarding repair or

maintenance of the levees at the Site. This complete lack of SRCD records reflects that no levee repair or maintenance occurred at the Site for at least almost 20 years until Mr. Sweeney commenced extensive new levee construction and excavation work, as discussed below.

Beginning no later than August 1988, with a first levee breach, the areas of the Site formerly consisting of managed wetlands began reverting to tidal marsh due to: (a) the lack of maintenance of the levees and water control structures; (b) the constant exposure of the Site to daily tides and the forces of the waves and winds; and (c) the periodic exposure of the Site to storm events. The reversion to and persistence of the Site as tidal marsh continued after May 1991 from three levee breaches, after August 1993 from five levee breaches, and after August 2003 from seven levee breaches, which provided daily tidal exchange between the Bay waters and the interior channels and ditch, and provided internal tidal circulation throughout the Site. During this same period, due to the progressive erosion and deterioration of the remnant levees, portions of the Site interior to the levees were subject periodically to the inflow and outflow of tidal waters from overtopping of the levees.

An aerial photograph taken in April 2011, the month Mr. Sweeney purchased the Site, shows that the levees at the Site were breached at seven different locations and the entire Site was intersected by countless tidal channels that, together with the remnant interior ditch, and combined with periodic overland flow of tidal waters from overtopping of the remnant levees, provided internal tidal circulation throughout the entire Site.

Before Mr. Sweeney began conducting levee construction and excavation activities at the Site, he knew that the placement of fill on levees in managed wetlands in the Suisun Marsh, including levee repair work, requires authorization from multiple agencies. In June 2011, Mr. Sweeney contacted the SRCD and the USACE regarding proposed levee repair work at Chipps Island (Club 915) in the Suisun Marsh. SRCD provided Mr. Sweeney with copies of the USACE's RPG and a relevant Biological Opinion prepared by the National Marine Fisheries Services, and Mr. Sweeney completed a Corps Wetlands Maintenance Permit Application. Working with SRCD through the permitting process, Mr. Sweeney obtained authorization from the Corps to

perform the levee repair under the RGP. However, he did not adhere to the RGP3's conditions, and on October 24, 2011, the Corps issued a Notice of Violation to Mr. Sweeney regarding his unauthorized work at Chipps Island that resulted in an illegal discharge of fill.

BCDC staff believes that when Mr. Sweeney contemplated the nature and extent of the levee construction, excavation, and other work that he planned to perform at the Site, based on his experience with SRCD and the USACE to authorize a levee repair at Chipps Island, he made a knowing and intentional decision to proceed without contacting SRCD, the USACE, or BCDC, and without applying for any of the permits that he knew or should have known were required. Staff further believes that Mr. Sweeney intentionally proceeded without contacting any regulatory agency to avoid the expense and delay of the permitting process, including the costs that would have been associated with providing mitigation for adverse impacts to tidal marsh, biological resources, and water quality. Although Mr. Sweeney may have considered that he might later have to obtain after-the-fact authorization for his work, by proceeding without applying for the necessary permits, Respondents benefitted economically by being able to conduct their kiteboarding business, and expand their kiteboarding operations in the northwestern portion of the Site, for the past two years without having those operations disrupted or damaged from tidal action, including tidal flooding from periodic overtopping of the remnant levees.

II. SUMMARY OF THE ESSENTIAL ALLEGATIONS IN THE VIOLATION REPORT/COMPLAINT FOR THE ADMINISTRATIVE IMPOSITION OF CIVIL PENALTIES

The Executive Director issued a Violation Report/Complaint for the Administrative Imposition of Civil Penalties (Complaint) to Respondents on May 23, 2016. Following is a summary of the essential allegations of the Complaint:

Over an approximately 20-year period before Mr. Sweeney purchased the Site: (a) the levees and water control structures were not maintained; (b) the Site was subject to tidal action and consisted of tidal marsh; and (c) the Site did not contain managed wetlands as defined in the SMPA. For these reasons, when Mr. Sweeney purchased the Site, the Annie Mason IMP no

longer applied to the Site and, therefore, no potential development at the Site was specified in the SRCD's component of the LLP. Therefore, at the time Mr. Sweeney purchased the Site, a MDP from the Commission was required pursuant to the SMPA, to authorize any "development" (as defined in Pub. Res. Code § 29114(a)) at the Site, and a permit was required by the Commission, pursuant to the MPA (Government Code § 66632(a)), to authorize the placement of any fill or to make any substantial change in use of any water, land, or structure at the Site.

Beginning by no later than May 2012, and without contacting or applying for a permit from BCDC (and without contacting SRCD or the USACE), Mr. Sweeney began excavating trenches and ditches in tidal marsh, rebuilding eroded levees, and placing fill on tidal marsh to construct new levees at the Site. This work included but may not have been limited to constructing new levees by excavating material from the ditch inside the eroded levees and placing such material on (a) the remnants of the eroded levees in locations where the eroded levees remained; and (b) tidal marsh and waters of the State inside former levee locations where the former levees had completely eroded and disappeared and had been replaced by tidal marsh. In addition, without applying for or obtaining a permit from BCDC, Mr. Sweeney removed one of the former water control structures from the Site and, in approximately September 2013, replaced a sunken dock located in the southeast portion of the Site with a larger dock at the same location. Each of these unauthorized activities constitutes "development" as defined in Public Resources Code Section 29114, and the construction of new levees, and installation of a replacement dock each constitutes both placement of fill and a substantial change of use of land and water under Government Code Section 66632(a).

Some time in or about 2014, and without applying for a permit from BCDC, Respondents began operating the Site as a "Private Sport and Social Island located in the California Delta. Ideally suited for the Bay Area / Silicon Valley Executives who want to get away and enjoy kiting in a safe and secluded environment without boarding a plane." www.pointbucklerisland.com.

See www.facebook.com/pointbucklerclubVIP. Such activities constitute both a "substantial change of use of land and water" under the MPA (Govt Code § 66632(a)) and "development" (as defined in Pub. Res. Code § 29114) under the SMPA.

On November 14, 2014, BCDC staff inspected the Site and identified a number of violations of the SMPA and the MPA. During the Site inspection, BCDC staff provided Mr. Sweeney with a copy of the Annie Mason IMP because he had previously informed BCDC staff that he did not have a copy of that document and had requested a copy.

The unauthorized work Respondents performed at the Site from May 2012 to January 29, 2015, as shown in a series of aerial photographs and Google Earth images, includes the following:

1. Initiated trench excavation and filling activities by no later than May 2012;

2. Installed a large dock in Annie Mason Slough and began grading in the southeastern corner of the Site by February 3, 2014;

3. Conducted levee construction and ditch excavation activities along the southern and southwestern portion of the Site, closing two of the tidal breaches, by March 24, 2014;

4. Conducted levee construction and ditch excavation activities in a clockwise direction around to the northeastern portion of the site, closing off the five remaining tidal breaches and cutting off all tidal channel connectivity to the interior of the Site, by August 6, 2014;

5. Completed the final segment of levee construction and ditch excavation activities along the eastern portion of the Site by October 28, 2014; and

6. Excavated three crescent ponds in tidal marsh in the interior of the Site by January 29, 2015.

On January 30, 2015, BCDC sent a letter to Respondents regarding the unauthorized work observed during the November 14, 2014 Site inspection. The letter discussed the regulatory framework governing the Suisun Marsh and, in particular the Site, and explained that based on

available information, the history of the Site, and the recent Site visit, the Site had never been managed in accordance with the Annie Mason IMP and had long ago reverted to a tidal marsh due to neglect, abandonment, and/or the forces of nature. The letter advised Respondents that a MDP from BCDC was required prior to performing any development at the Site, and that any work that could not be retroactively approved through such a permit would likely need to be removed, restoring the Site to tidal marsh. BCDC staff recommended that Respondents restore the Site, following BCDC approval of a professionally prepared plan, or begin compiling a MDP application. Furthermore, BCDC staff requested that Respondents stop work at the Site.

A Google Earth image dated April 1, 2015 shows that Respondents continued to perform unauthorized work at the Site after receiving BCDC's letter dated January 30, 2015 directing them to stop work. The referenced image shows new work (since an aerial photograph taken on January 29, 2015) including, but not limited to: (a) excavating a fourth crescent pond in tidal marsh in the interior of the Site; (b) placing fill in the ditch for a road to cross the ditch at the west side of the Site; (c) placing fill on tidal marsh for a road to the water's edge at the northwestern corner of the Site; (d) mowing vegetation and grading for a road on tidal marsh across the Site; (e) installing containers and trailers on tidal marsh in the western portion of the Site; and (f) installing another trailer or container on the east side of the Site.

On October 21, 2015, representatives of BCDC, the San Francisco Bay Regional Water Quality Control Board (Regional Board), United States Environmental Protection Agency, and the USACE inspected the Site, together with Mr. Sweeney and his counsel. [1] During this Site inspection, BCDC staff observed that Respondents had performed additional work since the November 14, 2014 Site inspection including:

A. Installed a dirt "land bridge" over culverts by placing fill at two locations across the drainage ditch to provide access to portions of the Site;

[1] The findings in the accompanying proposed Cease and Desist and Civil Penalty Order include additional information regarding the Regional Board's enforcement action against Respondents. The Regional Board issued Cleanup and Abatement Order No. R2-2016-0038 to Respondents on August 10, 2016.

B. Constructed a road across the interior of the Site;

C. Excavated four semi-circular ponds in the interior of the Site;

D. Installed a new, unauthorized water-control structure in the western portion of the Site;

E. Moved two storage containers from the northwestern portion of the Site, where they were located during the November 14, 2014, Site inspection, to the interior of the Site and added two additional storage containers;

F. Installed a goat pen and brought a number of goats to the Site;

G. Removed, mowed, grazed, and/or flattened tidal marsh vegetation throughout the interior of the Site; and

H. Planted approximately 14 trees on the Site, all of which had died, apparently due to high salinity levels.

An aerial photograph dated February 10, 2016, shows that Respondents continued to perform unauthorized work at the Site after receiving BCDC's letter dated January 30, 2015 directing that they stop work. The image shows new work (since the Google Earth image dated April 1, 2015) including, but not limited to, installation of two helicopter landing pads and placement of three wind-break platforms, all on tidal marsh.

On February 17, 2016, representatives of the Regional Board performed a boat survey with the Solano County Sheriff Marine Patrol around the perimeter of the Site and observed, among other things: (a) recent unauthorized grading on the east site of the Site that appeared to be maintenance or repair to the new levee; and (b) placement of two mobile helicopter landing pads.

On March 4, 2016, representatives of the Regional Board, escorted by the Solano County Sheriff's Department, inspected the Site pursuant to an Inspection Warrant issued by Solano County Superior Court. During this inspection, Regional Board staff observed that Respondents had performed additional work since the October 21, 2015 Site inspection including: (a)

installed three white flat-rack containers around two green closed freight containers to create an enclosure; (b) installed four flat-rack containers (two red and two blue), painted with a yellow "H," as two helicopter landing pads, one landing pad on the eastern side and one on the western side of the Site; (c) installed a green gate and posts across the ditch crossing on the eastern side of the Site; and (d) mowed tidal marsh vegetation throughout an approximately 1.5-acre area on the eastern side of the Site (this area had not been mowed on October 21, 2015). In addition, Regional Board staff observed that the water in the ditch was bright green in color, and notably different in color compared to the water in Suisun Bay, indicative of stagnant and eutrophic conditions, in contrast to their observation during the October 21, 2015 Site inspection, when the water in the ditch was greenish brown in color and not noticeably different in color in comparison to the water in Suisun Bay.

Respondents have violated and continue to violate the MPA by conducting the unpermitted activities at the Site as described herein, including but not limited to:

A. Placing fill in waters of San Francisco Bay, including tidal marsh, by constructing and rebuilding levees, excavating ditches and four crescent shaped ponds, installing a new dock in Annie Mason Slough, constructing roads, and placing numerous containers, trailers, and other structures and two helipads on tidal marsh; and

B. Making substantial changes in the use of water, land, or structures within the area of the Commission's jurisdiction by: (1) closing all the tidal breaches that existed in 2011 when Mr. Sweeney purchased the Site and thereby cutting off all tidal activity to the interior of the Site; (2) installing a new water control structure in the western portion of the Site; (3) draining the Site to further alter the pre-existing tidal marsh hydrology; (4) removing or destroying tidal marsh vegetation by the placement of fill, excavation activities, mowing activities, drainage activities, and bringing goats to the Site and allowing them to graze on the tidal marsh vegetation; (5) installing numerous trailers and containers and two mobile helipads at the Site; and (6) developing and operating the Site for intensive recreational uses including but not necessarily limited to kite-boarding.

Respondents have violated and continues to violate the SMPA by conducting unpermitted development at the Site as described herein, including but not limited to: (a) placing fill in waters of San Francisco Bay, including tidal marsh, by constructing and rebuilding levees; (b) excavating ditches and four crescent shaped ponds; (c) installing a new water control structure in the western portion of the Site; (d) installing a new dock in Anne Mason Slough; (e) constructing roads; (f) placing numerous containers, trailers and other structures and two mobile helipads on tidal marsh; (g) removing or destroying tidal marsh vegetation by the excavation activities, mowing activities, and bringing goats to the Site and allowing those goats to graze on the tidal marsh vegetation; and (h) developing and operating the Site for intensive recreational uses including but not necessarily limited to kiting.

III. SUMMARY OF A LIST OF ALL ESSENTIAL ALLEGATIONS EITHER ADMITTED OR NOT CONTESTED BY RESPONDENTS

Mr. Sweeney admits that he purchased the Site in 2011 and transferred the property to the Point Buckler Club, LLC in 2014.

Respondents admit or do not contest that they performed the levee construction, excavation, and other work at the Site as alleged (although they characterize the levee construction as levee repair), and that they began conducting and continue to conduct a kiteboarding operation at the Site.

Respondents admit that the SRCD's component of the LLP for the Suisun Marsh includes IMPs for each privately owned "managed wetland" within the primary management area of the Suisun Marsh, and that in 1984, BCDC certified the Annie Mason IMP for the Site. Mr. Sweeney admits that BCDC staff provided him a copy of the Annie Mason IMP in November 2014, when they visited the Site.

Respondents admit that there are numerous aerial photographs of the Site, that various letters were exchanged between BCDC staff and Respondents' counsel, and that BCDC staff and representatives of other agencies visited the Site in October 2015.

IV. DEFENSES AND MITIGATING FACTORS RAISED BY RESPONDENTS; STAFF'S REBUTTAL EVIDENCE AND ARGUMENTS

Respondents' arguments fall into two broad categories. First, they raise potential defenses that challenge the Commission's jurisdiction or the principal allegations in the Complaint as to their liability — namely, that by in engaging activities that constitute "development" under the SMPA and placement of fill, extraction of materials, and/or "substantial change in use" under the MPA, without obtaining a permit from the Commission, Respondents violated both of these laws and thus subjected themselves to liability for the enforcement remedies those laws provide. Under both laws, those remedies include a cease and desist order, subject to terms and conditions necessary to ensure compliance with applicable requirements, and under the MPA those remedies also include an appropriate administrative civil penalty.

Second, Respondents make numerous arguments that do not contest their liability but rather urge that, even if Respondents violated the law, there are mitigating factors that make it unfair, unreasonable, or inequitable to hold them responsible for the violations through the assessment of civil penalties. Because these potential mitigating factors are not responsive to the primary allegations of the Complaint regarding Respondents' liability, they pertain exclusively to exercise of the Commission's discretion in weighing the statutory considerations relevant to determining an appropriate civil penalty.

A. Potential Defenses to Liability

1. **BCDC Has Jurisdiction Over the Site Under the MPA.** Respondents argue that BCDC staff has not established the Commission's jurisdiction over the Site under the MPA, and, therefore, the Commission lack's jurisdiction to impose a penalty. There is no merit to this argument. Statement of Defense (SOD) at 41:7-10 (*i.e.,* page 41, lines 7-10).

At the time Mr. Sweeney purchased the Site, in April 2011, the open water areas at the locations of seven tidal breaches of the remnant levee, and the associated tidal channels allowing tidal exchange with locations in the interior of the Site, clearly were waters of San Francisco Bay subject to tidal action under Government Code Section 66610(a). Moreover, the

Commission's, San Francisco Bay jurisdiction under Section 66610(a) includes both "marshlands lying between mean high tide and five feet above mean sea level" and "tidelands (land lying between mean high tide and mean low tide)." The Regional Board's experts provided documentation, included in the record, establishing that a total of approximately 38.3 acres of the approximately 38.9-acre Site are subject to the Commission's MPA jurisdiction, including approximately 7.7 acres of marshlands and approximately 30.6 acres of tidelands. Point Buckler Technical Assessment Report, Appendix M (Jurisdiction: MPA and SMPA), at Table M-1 and Figure M-1.

2. **There is Substantial Evidence that the Annie Mason IMP Was Never Implemented.** Respondents argue that no evidence supports staff's assertion that the Annie Mason IMP was never implemented. SOD at 24:4-22. To the contrary, the record contains substantial evidence that, to the extent that the Annie Mason IMP calls for periodic inspection, maintenance and repair of levees, these activities were not properly carried out by the prior owners of the Site between 1984 and 2011. The Department of Water Resources (DWR) document that Respondents disparage (*see* Complaint at ¶ VI.I; Chappell Declaration at ¶ 12) stands as one, but by no means the only, example of competent evidence that the record contains that provides support for this conclusion. Moreover, SRCD Director Chappell is competent to offer testimony on what SRCD records show with regard to the history of lack of levee maintenance or repair activities at the Site. Mr. Chappell's testimony that, in contrast to the owners of virtually every other privately-owned managed wetland in the Suisun Marsh, there is not a single record of the owners of Site ever having applied for approval under the applicable USACE RGP for any maintenance project or activity at the Site provides compelling evidence of the failure of the owners of the Site to manage their property in accordance with the Annie Mason IMP.

3. **Respondents' Levee Construction Was Not Consistent with the Annie Mason IMP.** Respondents argue that what they characterize as the levee "repair" was consistent with the Annie Mason IMP. SOD at 21:17-23:17. However, in order for something to be "repaired" or even "restored," there must be something that is the object of such an undertaking. The

evidence in this matter demonstrates that between 1984 and 2011, the owners of Site neglected to maintain the levee around the perimeter of island that existed in 1984 to the point that, by 2011, the levee no longer exercised any effective control over the inflow onto and outflow of water from the island, which was the express purpose for which the levee was initially constructed. Thus, from a purely functional standpoint, the previously existing 1984 levee had ceased to exist. In other words, there was no longer anything to repair, maintain, or even restore.

This conclusion finds support in a comparison of the average elevation of the remnant levee (5.71 ft. NAVD88) with the elevation of the marsh plain on the interior of the island (5.43 ft. NAVD88). It also finds support in the fact that only 17% of the length of the new levee that the Respondents constructed around the Site in 2014 was constructed in the footprint of the 1984 levee. In other words, 83% of the length of the levee that Respondents constructed was located outside the footprint of the 1984 levee. Accordingly, the levee that the Respondent constructed around island in 2014 is properly characterized as a "new levee," not a levee repair.

4. **Whether work specified in an IMP is Exempt from SMPA Permit Requirements.** According to Respondents, BCDC staff "acknowledges" that work specified in a managed wetland individual management plan (IMP) is exempt from the permit requirements of the SMPA. Pub. Res. Code § 29500. SOD at 20:25-21:16. In asserting this defense, Respondents misrepresent BCDC staff's position, which is that work specified in an IMP is exempt from the permitting requirements of the SMPA only if the IMP is in fact applicable to the private property on which the work is being undertaken.

In this case, the staff's position is that the Annie Mason IMP was no longer applicable to Pt. Buckler when the Respondents undertook their levee construction and other development activities as a result of the Site no longer satisfying the SMPA's definition of a "managed wetland." Respondents place great emphasis on the use of the word "enhancements" in the Suisun Marsh Protection Plan (SMPP) in the context of a description

of the SMPA's permit exemption. However, the term "enhancement" does not appear in the SMPA, the SRCD's Suisun Marsh Management Program, or the Annie Mason IMP. Moreover, the passage from the SMPP cited by Respondents also makes it clear that regardless of whether any particular activity is described as "maintenance, repairs, or enhancements" the SMPA's permit exemption does not apply unless the activity is specifically "described in the [management] plans." If Respondents are arguing that the SMPP's use of the term "enhancement" means that an owner of property subject to an IMP can do whatever he wants to on his property without a permit, regardless of whether the activity is or is not described in the IMP, staff emphatically disagrees.

5. **The Commission's Alleged Failure to Review the IMPs.** Respondents argue that the Annie Mason IMP must remain in effect because BCDC has not performed the 5-year reviews of IMPs as allegedly required by the SMPA. SOD at 23:18-24:3. Staff fails to see the relevance of this "defense." The principal issue in the review to which the Respondents refer is whether or not the Suisun Mash local protection program, including its various components, is being properly implemented. The issue of whether or not any particular IMP continues to apply to private property in the primary management area on the basis of whether or not the property to which it pertains is, or continues to qualify as, a "managed wetland" is an issue that is totally separate and distinct from the issue with which the review to which the Respondents refer is concerned.

6. **Staff Are Allegedly Wrong In Asserting that the Annie Mason IMP is No Longer in Effect Because IMPs Do Not Expire.** Respondents argue that IMPs "exist in perpetuity" because the SMPA fails to expressly provide that an IMP ceases to apply to privately-owned property in the primary management area when that property ceases to be operated as a "managed wetland." SOD at 25:1-26:3. Respondents ignore Public Resources Code Section 29412.5, which states that the purpose of an IMP is to provide standards for the management of "managed wetlands."

Respondents also claim, erroneously, that the SMPA, through provisions governing

SRCD's operation, obligates the owners of private property in the primary management area to manage their property as a "managed wetland." (Respondents misconstrue Public Resources Code Section 9962(a) to be part of the SMPA. It is not, but rather, is contained in a different division of the Public Resources Code.) Respondents' argument represents a serious misinterpretation of the SMPA. Nothing in the SMPA requires an owner of private property to manage his or her property as a "managed wetland." What the SMPA does say is that if a property owner elects to so manage his property, he must do so in accordance with the provisions of a certified IMP.

7. **BCDC Was Allegedly Required to Issue a Permit to Abandon Use of the Site As A Managed Wetland.** According to Respondents, the Site must continue to be recognized as a managed wetland as a matter of law, even if it is not a managed wetland as a matter of fact, unless and until the Commission issues a permit under the MPA approving an "abandonment" of the "managed wetland" status. SOD at 26:4-12. Respondents base this argument on a BCDC regulation that defines "substantial change in use" under the MPA to include "abandonment." 14 C.C.R. § 10125(a). Government Code Section 66632(a) in turn requires a permit for any "substantial change in use of any water, land, or structure…." However, it does not follow that a permit is required for every conceivable incidence of "abandonment."

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

Even if an argument can be made that the inaction and neglect of Respondents' predecessors might have triggered the need for a permit under the MPA, the fact that no such permit was applied for or issued does not negate the physical facts on the ground of a reversion of the Site to a tidal marsh, or operate as an obstacle to BCDC's ability to take otherwise

appropriate regulatory action in light of such a reversion. For more than 20 years prior to Mr. Sweeney purchasing the Site, the property was not operated as a managed wetland. Thus, use of the Site as a managed wetland was abandoned even though no prior owner applied for or obtained a permit from BCDC.

8. **The Site Allegedly Was Not a Tidal marsh.** Respondents argue that in April 2011 when Mr. Sweeney purchased the Site it was not a tidal marsh. SOD at 6:9-28 and 27:1-32:3. In support of this defense Respondents rely on what they characterize as "four lines of evidence," each of which is addressed below.

First, Respondents rely upon "evidence of the white debris line [also known as the "wrack line"] at the island." In Respondents' view, because aerial photography of the Site before Respondents' construction of the new levee shows the "debris" or "wrack" line outboard of the remnant levee, this means that "the high tide did not overtop the old levee and flow into the center of the island." In a supplemental report, the Regional Board's independent experts carefully analyzed the merits of this argument. *See* Experts' Response to July 11, 2016 Evidence Package (July 21, 2016)(Experts' Response), at 29-31. Essentially, their conclusion is that the position that "overtopping of levees would necessarily result in deposition of driftlines in the interior of Pt. Buckler Island" is unsupportable because, among other things, the levee and fringing tidal marsh...filter and trap most floating tidal litter even during highest tides that overtop levees." In addition, the wrack line is not a static line, as readily evidenced in Figure J-3 of the experts' May 2016 Technical Assessment Report. In that figure, which compares air photos of 2011 and 2016, the debris wrack line has moved further inland along the tidal marsh on the outside of the newly constructed levee, evidencing the dynamic versus static nature of this field indicator.

Second, Respondents rely on the personal observations of Mr. Sweeney who, in a declaration, states that on the many days that he worked on the Site, he "never saw the island under water." Again, the Regional Board's experts conducted a careful evaluation of Mr. Sweeney's claims. Their conclusion was that, given the relative infrequency of full tidal

inundation, it was unremarkable that Mr. Sweeney may not have observed the island in an inundated condition. Experts' Response, at 4-5. Respondents also claim that the use of heavy machinery on the Site is inconsistent with the status of Pt. Buckler as a tidal marsh. The Regional Board's experts also evaluated this argument, and found that, given the nature and circumstances, particularly the load-bearing capacity, of the vegetative cover on the island, the fact that heavy machinery never got "stuck in the mud," to use Respondents' terminology, was not inconsistent with Pt. Buckler's status as a tidal marsh. *Id.* at 28-29.

Third, Respondents rely on available aerial photography, and on one particular infrared photo (NOAA, 2013) "taken at mean high water," and argue that the absence of visible ponding on such photography is inconsistent with Pt. Buckler's status as a tidal marsh. The 2013 infrared NOAA photograph, as attached to the analysis prepared by Respondents' consultant, Applied Water Resources, entitled "Conditions at Pt. Buckler" and dated October. 16, 2015, has no date or time stamp affixed to it, nor does the table in the report provide any time information beyond "2013," so it is impossible to verify if or whether it was in fact "taken at mean high water" and how the consultant purportedly determined the photo to represent mean high water. Moreover, as the Regional Board's experts note in their response, "the type of tall vegetation on [Pt. Buckler] can readily obscure tidal inundation." Experts' Response, at 6. Therefore, the absence of visible ponding in the subject aerial photographs neither conclusively refutes nor even offers any contrary evidence whatsoever regarding the status of Pt. Buckler as a tidal marsh.

Fourth, and finally, Respondents argue that the Regional Boards' experts acknowledgement that the areas on Pt. Buckler's interior marsh plain outside of channels and ditches do not experience "daily tidal inundation" means that such areas do not meet the definition of "tidal marsh" set forth in the SRCD's Suisun Marsh Management Plan, which defines "tidal marsh" as "areas…which are subject to daily tidal action." However, under widely accepted principles of tidal marsh hydrology, "tidal inundation" does not represent the only way in which a tidal marsh can be considered to be "subject to daily tidal action." Specifically,

the daily ebb and flow of tidal waters in a tidal marsh renourishes and supports a high water table that in turn results in the saturated soil conditions that make it possible for obligate and facultative salt marsh vegetation to propagate and grow. Thus, in this sense tidal marsh vegetation can legitimately be considered to be "subject to daily tidal action" even in the absence of daily inundation of the marsh plain surface soils. *See* Letter from Stuart Siegel to Marc Zeppetello, September 21, 2016 (re: Role of Daily Ebb and Flow of the Tides in Establishing Tidal Marsh).

B. **Potential Mitigating Factors**

1. **BCDC Staff Is Allegedly Partially Responsible for Respondents' Violations.**

Respondents argue that, for a number of reasons, BCDC staff is "at least partially responsible for the problems that have arisen at [the Site]" SOD at 12:19.

First, Respondents claim that BCDC staff allegedly told Mr. Sweeney in 2011 that the Site was not in "BCDC territory." SOD at 5:22-6:8. Specifically, Mr. Sweeney claims that BCDC's Chief of Enforcement, Adrienne Klein, informed him that Point Buckler is not located in BCDC's jurisdiction. However, Ms. Klein never made such a statement, and believes that Ms. Sweeney drew false conclusions from second-hand information from others. Declaration of Adrienne Klein (September 23, 2016) at ¶¶ 1-14.

The evidence relied on by Respondents for this claim includes an August 31, 2011, email from Zachary Cohn, of Salt River Dredge, to Mr. Sweeney, which simply states that Ms. Klein had unofficially informed Mr. Cohn that the docks being placed upland on Mr. Sweeney's property at Chipps Island are "OK," and says nothing about BCDC's jurisdiction. BCDC staff objects to consideration of the handwritten notations on the email, stating that "Chipps & Buckler not in BCDC territory," on the grounds of both self-serving hearsay and unreliability; Mr. Sweeney provides no explanation as to why there would have been any reason from him to ask Ms. Klein at that time whether Pt. Buckler was in BCDC's jurisdiction, given that the docks

were proposed to be moved to Chipps Island.[2] Respondents also rely on a BCDC enforcement report that refers to Chipps Island and says noting about Pt. Buckler.

Second, Respondents complain that BCDC observed levee construction activity at the Site in March 2014, when only a small portion of the levee work had been done, but did not contact Mr. Sweeney for seven months, until October 2014, when the levee work was effectively completed, to request a Site visit. SOD at 8:1-16. In March 2014, BCDC staff observed, from the western levee on Simmons Island, located approximately 100 yards east of the Site, that heavy machinery was on the Site and that substantial landform alternation had occurred. However, it was impossible for staff to know that Respondents were just beginning extensive levee construction and excavation work around the entire perimeter of the Site that would continue for months. Following their observations in March 2014, BCDC staff conducted research and consulted with other agencies in an effort to determine whether the work on the Site was being done as part of an authorized restoration or mitigation project. Staff contacted Mr. Sweeney in due course after determining that was not the case.

Finally, Respondents argue that BCDC staff changed position between the November 2014 Site visit and staff's January 30, 2015 letter describing numerous violations at the Site. SOD at 8:18-28. Respondents claim that during the Site visit staff told Mr. Sweeney "that *if his work was done in accordance with* the [Annie Mason IMP] it was OK," SOD at 8 :19-20 (emphasis added), but in their subsequent letter staff stated that the Site had never been managed in accordance with the Annie Mason IMP or satisfied the definition of managed wetland, and had long ago reverted to tidal marsh. However, there is no inconsistency between staff's general statement that work specified in an IMP does not require a permit and

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[2] BCDC staff also objects to the assertion in Respondents' Statement of Defense that "the previous owner told [Mr. Sweeney] that DWR was requiring that the levee be repaired." SOD at 5:21. Mr. Sweeney's declaration, cited in support of this assertion, does not include such a claim. On a related point, there is substantial evidence that, notwithstanding Mr. Sweeney's unsupported hearsay claim to the contrary, DWR never installed a pump at the Site. Chappell Declaration at ¶ 8; Annie Mason Unit Regulatory History, Complied by Kristin Garrison, DWR (Jan. 20, 2016); Regional Board Memorandum re: DWR Confirms Point Buckler is Not Required Mitigation and No Pump Installed (June 30, 2016).

staff's subsequent determination, based on consideration of all available information, that the Site had reverted to tidal marsh and that the work performed by Respondents was not authorized by the Annie Mason IMP.

During the Site visit, staff was focused on gathering information regarding Site conditions and Mr. Sweeney's activities at the Site. It would not have been appropriate for staff to make a determination on the spot regarding the status of the Annie Mason IMP or the Respondents violations of the law. In any case, Respondents' unsupported claim that staff changed position between the Site visit and the January 30, 2015 letter is irrelevant because Respondents had already substantially completed the levee construction and excavation work at the time of the Site visit. Respondents' do not, and cannot, claim that they somehow relied to their detriment on BCDC staff's statements during the November Site visit.

Respondents suggest that if BCDC staff had acted more quickly "to inform Mr. Sweeney of their concerns in March 2014, things would have been very different." SOD at 8:12-13. However, Respondents do not dispute that they continued to perform unauthorized work at the Site after receiving BCDC staff's January 30, 2015 letter requesting that Respondents stop work and directing them to apply for a permit. Respondents' complete disregard of that enforcement letter strongly demonstrates that BCDC staff bears no responsibility for Respondents' violations.

2. **Respondents' Argue that Mr. Sweeney Did What He Thought He Was Supposed to Do.** Respondents argue that because BCDC allegedly told Mr. Sweeney that the Site was not within BCDC's jurisdiction, it can hardly be surprising that he did not apply for a BCDC permit. SOD at 36:11-12. Mr. Sweeney's unsupported and erroneous claim that BCDC informed him that the agency did not have jurisdiction over the Site is discussed above. In addition, there is substantial independent evidence that demonstrates Mr. Sweeney could not reasonably have believed in 2012, before he started construction work at the Site, that no permit was required, from any regulatory agency, for the work he planned to do. To the contrary, before Mr. Sweeney began conducting levee construction and excavation activities at the Site, he knew

that the placement of fill on levees in managed wetlands in the Suisun Marsh, including levee repair work, requires authorization from multiple agencies.

Specifically, in June 2011, Mr. Sweeney contacted the SRCD and the USACE regarding proposed levee repair work at Chipps Island (Club 915) in the Suisun Marsh. SRCD provided Mr. Sweeney with copies of the USACE's Regional General Permit (RPG) and a relevant Biological Opinion prepared by the National Marine Fisheries Services, and Mr. Sweeney completed a USACE Wetlands Maintenance Permit Application. Working with SRCD through the permitting process, Mr. Sweeney obtained authorization from the USACE to perform the levee repair under the RGP. However, Mr. Sweeney did not adhere to the conditions of the RGP, and on October 24, 2011, the USACE issued a Notice of Violation to Mr. Sweeney regarding his unauthorized work at Chipps Island that resulted in an illegal discharge of fill. Email message from David Wickens, USACE, dated June 23, 2011; USACE Wetlands Maintenance Permit Application prepared by John Sweeney and approved by the USACE on June 24, 2011; letter from Steve Chappell, SRCD to David Wickens, USACE, dated September 2011; USACE Notice of Violation issued to John Sweeney, dated October 24, 2011.

BCDC staff believes that when Mr. Sweeney contemplated the nature and extent of the levee construction, excavation, and other work that he planned to perform at the Site, based on his experience working with SRCD and the USACE to obtain authorization for a levee repair at Chipps Island, he made a knowing and intentional decision to proceed without contacting SRCD, the USACE, or BCDC, and without applying for any of the permits that he knew or should have known were required. Staff further believes that Mr. Sweeney intentionally proceeded without contacting any regulatory agency to avoid the expense and delay of the permitting process, including the costs that would have been associated with providing mitigation for adverse impacts to tidal marsh, biological resources, and water quality. Although Mr. Sweeney may have considered that he might later have to obtain after-the-fact authorization for his work, by proceeding without applying for the necessary permits, Respondents benefitted economically by being able to conduct their kiteboarding business, and

to expand their kiteboarding operations in the northwestern portion of the Site, for the past two years without having those operations disrupted or damaged from tidal action, including tidal flooding from periodic overtopping of the remnant levees.

3. **Respondents claim Mr. Sweeney truly wants to restore a duck club.** Respondents argue that Mr. Sweeney's purpose in reconstructing the levee was to restore duck ponds and that this work was not needed for kiteboarding. SOD at 7:12-15. However, Mr. Sweeney admits that he did not even have a copy of the Annie Mason IMP until BCDC staff gave him a copy during a Site inspection in November 2014, after Mr. Sweeney had completed construction of the levee around the entire perimeter of the island. BCDC staff believes that Mr. Sweeney's claim that he wants to restore a duck club, or managed wetland, at the Site is one that he adopted as a post-hoc rationalization, only after his legal counsel advised him that doing so was the only way he could evade responsibility for his unlawful actions – by arguing that no BCDC permit was required because his work was allegedly consistent with the Annie Mason IMP.

As noted above, reconstruction of the levee around the Site enabled Respondents to conduct their kiteboarding business, and to expand their kiteboarding operations in the northwestern portion of the Site, without having those operations disrupted or damaged from tidal action, including tidal flooding from periodic overtopping of the remnant levees. On the other hand, Respondents' development activities at the Site are not consistent with operating the property as a managed wetland for duck hunting. For example, cyclic flooding and draining of the Site as a managed wetland would require at least two water control structures (as specified in the Annie Mason IMP), yet Respondents installed only one tide gate. Moreover, the poor water and sediment quality in the four crescent ponds Respondents' excavated are inconsistent with managed waterfowl pond objectives. *See* Experts' Response, at 20-23 (Sweeney Site Management Actions Are Inconsistent with Suisun Marsh Duck Club Management Strategies).

To support their claim that Mr. Sweeney wants to restore a duck club, Respondents also argue that they did not drain the island and there has been no significant change in vegetation. SOD at 32:4-21. However, according to the Regional Board's experts, following levee construction in 2014, the newly-diked wetlands were permanently drained, rather than being flooded periodically according to the water management recommendation in the Annie Mason IMP. Experts' Response at 20. Moreover, there is abundant evidence of a massive change in the nature and abundance of vegetation on the Site as a result of the Respondents' activity, which the experts characterize as a "mass dieback (mortality)." *Id.* at 27-28.

4. **The Suisun Marsh Protection Plan Emphasizes the Importance of Duck Ponds.** Respondents argue that Mr. Sweeney should not be penalized for his efforts to restore the managed wetlands at the Site because the Suisun Marsh Protection Plan (SMPP) emphasizes the importance of duck clubs and the waterfowl habitat they provide. SOD at 32:22-35:9. Respondent cites a number of findings and policies from the SMPP that describe the important role that duck clubs, and their associated waterfowl habitatt, in the overall ecology of the Suisun Marsh. However, these SMPP provisions cannot be considered in isolation, as Respondents do. Rather, they must be considered together with other provisions of the SMPP that place equal importance on preservation of the tidal marsh areas of the Suisun Marsh. For example:

a. Tidal marsh is an important habitat for many wildlife species, including the endangered salt marsh harvest mouse and the Suisun shrew. Tidal marshes also contribute to the maintenance of water quality in the San Francisco Bay. SMPP at 12 (Environment, Finding 4).

b. The tidal marshes of the Suisun Marsh are an important wildlife habitat and also contribute to the maintenance of water quality in the San Francisco Bay. SMPP at 34 (Land Use and Marsh Management, Finding 1).

c. The tidal marshes in the primary management area should be preserved. *Id.* (Land Use and Marsh Management, Policy 3).

Most importantly, there is no provision in the SMPA or the SMPP that authorizes the conversion of, or even contemplates circumstances under which it might be permissible to convert, an area of tidal marsh into a duck club or managed wetland. In fact, the SRCD's Suisun Marsh Management Program, as certified by the BCDC, expressly states that "the policies of the [SMMP] prohibit future conversion of tidal marsh or open water areas to managed wetland or agricultural status." SMPP at 13 (§ II.C.1).

5. **Respondents Argue That They Should Not Be Penalized Because BCDC Gave Another Managed Wetland Additional Time to Repair A Levee.** Respondents complain that BCDC has not been even-handed because it gave another duck club an opportunity to repair a levee that had been breached for as long as 15 years. SOD, at 20:8-24. However, as described in a letter from a representative of the owner of that duck club (Dante Farms, Club # 910 on Chipps Island) there are critically important factual distinctions between the alleged analogous situation referred to there and the circumstances of Pt. Buckler. First, the damaged portion of the levee at Dante Farms represented a relatively small proportion, no greater than 20%, of the entire length of the exterior perimeter levee for that duck club, as shown on an aerial photograph that accompanied the letter. Second, as stated in the letter, the "tidal action [resulting from the damages to the levee] affects only a portion of the property, predominantly in the southwestern side." Finally, the letter ascribes the cause of the damages to the levee to actions by other parties, specifically to "wave action from passing ships of larger draft travelling to the Port of Stockton [through the Stockton Ship Channel]." Letter from Joel Ellinwood to Ming Yeung (December 11, 2009).

There are significant differences between the circumstances presented at Dante Farms and those involved in the Pt. Buckler situation, including but not limited to: (1) degradation of almost the entire perimeter levee; (2) the introduction of tidal influence to essentially the entire island; and (3) principal causal factors in the form of owner neglect and inactivity. Moreover, the owner of Dante Farms contacted BCDC in advance of performing the

levee repair to work out an acceptable resolution of the situation at that property, whereas Respondents proceeded unilaterally, without contacting BCDC or any other regulatory agency, to conduct extensive levee construction work without authorization.

6. **Staff Has Proposed Penalties Under the MPA, Not the SMPA.** The Complaint proposes an administrative penalty of $952,000 under Government Code Section 66641.5(e). At the outset, it is important to note that although the Complaint alleges numerous violations of both the MPA and the SMPA, staff proposed the penalty solely for violations of the MPA. Specifically, the penalty was proposed for a number of listed violations of Government Code Section 66632, which requires any person wishing to place fill, to extract materials, or to make any substantial change in use of any water, land, or structure within the area of the Commission's jurisdiction, including the Site, to obtain a permit from the Commission. No penalty is proposed for Respondents violations of the SMPA.

7. **Staff Has Not Improperly Counted the Violations.** Noting that Government Code Section 66641.5(e) authorizes a maximum penalty of $30,000 per violation, Respondents argue that staff has improperly counted the violations. SOD at 14:7-27. Respondents' primary complaint is that staff improperly counted the levee construction, interior ditch excavation, and associated work as eleven violations rather than one violation. Similarly, Respondents' claim that staff improperly counted the construction of four crescent-shaped ponds as four violations and the installation of a dock, followed by installation of an expanded dock, as two violations. There is no merit to Respondents' argument that staff over-counted the violations.

Before turning to the violations at issue, consider the hypothetical situation of a property owner placing, without a permit, 100 cubic yards of fill in the Bay at location A on a parcel of property. The placement of such fill would be a single violation of the MPA. If the property owner then placed another 100 cubic yards of fill in the Bay at location B, at the other side of the property, that would be a separate, second violation. The placement of fill at two discrete locations is properly considered to be two violations because each violation involved discrete actions on the part of the property owner, at discrete times, and because each

instance of the unauthorized placement of fill would result in discrete impacts at the different locations. Moreover, the placement of fill at two discrete locations is appropriately considered two violations because, if the property owner had applied for a permit for this work, the permit would have separately authorized the placement of fill at each of the two locations.

As applied to Respondents' unauthorized conduct, their placement of fill in the Bay at each of seven discrete locations, at various points on the Site, to close seven different tidal breaches, and resulting in adverse impacts to biological resources and water quality at each location, is properly considered to be seven violations. Similarly, constructing four crescent ponds, at four different locations at the Site, is properly considered to be four violations, and the installation of a dock, followed later by installation of an larger dock, thereby resulting in additional Bay fill, is properly considered to be two violations.

The Complaint treats as a single violation the placement of fill in the Bay to construct new levees around the Site at all locations other than the discrete locations where Respondents placed fill to close a tidal breach. The Complaint treats as a single violation Respondents' excavation of the ditch interior to the levees around the Site. In these cases, given that these activities could not reasonably be considered to constitute a number of discrete violations, they were each considered a single, indivisible violation. Similarly, the Complaint treats as a single violation the removal, mowing, and/or destruction of tidal marsh vegetation even though Respondents conducted these activities at various locations around the Site and at various times. However, the placement of fill in the Bay to construct two land bridges over culverts installed in the interior ditch, on opposite sides of the Site, were properly considered two violations. Similarly, each and every army trailer or storage container, and each of the two helicopter landing pads, each constituting a separate and discrete placement of fill, were properly considered to be separate violations.

8. **The Proposed Penalties Account for the Statutory Factors.** There is no merit to Respondents' argument that the proposed penalties do not account for the statutory factors the Commission is required to consider in determining the amount of administrative civil liability. SOD at 15:1-17:28.

Government Code Section 66641.9(a) states:

> *In determining the amount of administrative civil liability, the commission shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the violation is susceptible to removal or resolution, the cost to the state in pursuing the enforcement action, and with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary removal or resolution efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require.*

In addition, Government Code Section 66641.5(e) provides that the Commission may administratively impose civil liability for any violation of the MPA in an amount of which shall not be less than $10 nor more than $2,000 for each day in which the violation occurs or persists, but may not administratively impose a penalty of more than $30,000 for a single violation.

The Complaint includes a table describing each violation, explaining how the work or activity violates the MPA (*i.e.,* Govt Code § 66632), and the amount of the penalty sought for each violation. The chart demonstrates that staff carefully considered the penalty factors specified in Government Code Section 66641.9(e) because different penalty amounts are proposed for each violation as appropriate, depending on the circumstances associated with each violation. In particular, a penalty at the high end of the range authorized by Government Code Section 66641.5(e), $2,000 per day, is proposed for certain violations, such as the

placement of fill in the Bay for levee construction, whereas violation-specific penalties of $1,500 per day, $1,000 per day, $500 per day, $200 per day, and $100 per day are proposed for other violations.

The Complaint does not include a detailed analysis of the statutory penalty factors because none is required. Rather, if staff is proposing that the Commission impose an administrative civil penalty, BCDC's regulations require only that the Complaint state "the amount of the proposed penalty." 14 C.C.R. § 11321(a)(2) and Appendix H, paragraph 8. However, because the Commission is required to take into consideration the factors specified in Government Code Section 66641.9(a) in determining an appropriate penalty, proposed findings on those penalty factors are set forth in the proposed Cease and Desist and Civil Penalty Order for the Enforcement Committee's, and the Commission's, consideration.

9. **Respondents' Other Objections to the Proposed Penalties for Specific Violations.** Most of Respondents arguments challenging the proposed penalties for specific violations are addressed above in response to Respondents' erroneous claim that staff improperly counted the violations. Staff's responses to a number of additional arguments raised by Respondents as to particular violations are discussed below.

a. **Penalties are appropriate for the multiple trailers and containers.** Respondents argue that a token penalty, at most, should be imposed for the numerous trailers and containers that Respondents placed on tidal marsh at the Site. SOD at 36:25-37:18. Respondents claim that at most the multiple trailers and containers should be treated as a single violation and also suggest they are being treated unfairly because BCDC had not taken enforcement action against any other duck club in the Suisun Marsh for the placement of containers.

First, as stated above, each individual trailer or container is properly considered a separate violation because each is a separate placement of fill within the Commission's MPA jurisdiction, resulting in discrete impacts, and each also represents a change in use from undeveloped Site conditions to accessory structures associated with Respondents' kiteboarding operations.

Second, Respondents are incorrect in claiming that BCDC has not pursued enforcement against any other duck club in the Suisun Marsh for the placement of containers (although were that in fact true it would not preclude the Commission from issuing a cease and desist and civil penalty order in this case). In response to a recent Public Records Act request from Respondents, BCDC produced documents showing that, on a number of occasions, it notified the owners of managed wetlands in the Suisun Marsh that the trailers or containers on their property were unauthorized and directed those owners to apply for a permit. See Declaration of Adrienne Klein at ¶ 15 (BCDC has issued two cease and desist orders, entered into one settlement agreement, and written six enforcement letters regarding unauthorized activities in Suisun Marsh).

Third, the containers and trailers that other property owners in the Suisun Marsh may have placed on their property are presumably associated in some way associated with the use and management of their property as a managed wetland. What distinguishes Respondents' containers and trailers is that they are associated with a use of the Site for a different purpose – kiteboarding -- that is entirely unrelated to the uses to which reference is made in the SMPA's definition of a "managed wetland." The association of Respondents trailers and containers with a change in use that is completely foreign to the framework of the SMPA distinguishes them from the similar structures on other properties.

b. **Penalties are appropriate for excavation of the four crescent ponds.**

Respondents argue that no penalty should be imposed for the four crescent ponds because the ponds are consistent with the Annie Mason IMP, duck ponds are favored by the SMPA and Suisun Marsh Protection Plan, and the ponds did no harm. SOD at 38:17-39:7. Staff disagrees.

First, neither the ponds Respondents excavated nor any other ponds are specified in the Annie Mason IMP. Therefore, a permit was required to construct each pond.

Second, Respondents' generalized claim that duck ponds are favored in the Suisun Marsh is irrelevant. Whether or not duck clubs are "favored" in managed wetlands, a permit is required for the excavation of material, placement of fill, and a substantial change of use of land or water.

Third, as discussed above, the Suisun Marsh Protection Plan also contains policies calling for the protection of tidal marsh – policies that Respondents violated by excavating the ponds in tidal marsh at the Site.

Fourth, the excavation of each of pond (and the placement of the excavated fill adjacent to each pond) caused discrete impacts and is properly considered a separate violation.

c. **A penalty is appropriate for kiteboarding as a substantial change of use.** Respondents argue that a penalty for kiteboarding as a substantial change of use is over-counting in light of the penalties proposed for the trailers (club house) and "associated facilities." SOD at 37:19-22. However, before Respondents began their unauthorized activities, the Site was undeveloped tidal marsh. Respondents' kiteboarding operation is a substantial change in use under Government Code Section 66632 and is properly considered a separate violation from the unauthorized placement of fill associated with Respondents' levee construction, trailers and containers, and other work.

d. **A penalty is appropriate for construction of roads.** Respondents claim that staff is mistaken in claiming that fill was placed for the construction of roads in both the northwestern portion of the Site and across the entire Site. SOD at 39:8:14. According to Respondents, they made the roads by cutting vegetation, not by the placement of fill. Assuming Respondents are correct, and that no fill was placed, the violations alleged in the Complaint associated with the road are for both the placement of fill and a substantial change in use. As noted above, before Respondents began their unauthorized activities, the Site was

undeveloped tidal marsh. The construction of two roads that allow vehicle access throughout the Site are substantial changes of use that are properly considered as two violation, even if the roads were constructed by destroying vegetation rather than by the placement of fill.

e. **A penalty is appropriate for installation of a new water control structure.** Respondents cite no evidence in support of their claim that no new water control structure was installed in the western portion of the Site. SOD at 39:23-40:2. Respondents' Statement of Defense cites Mr. Sweeney's declaration in support of this claim, but without reference to a specific paragraph of the declaration, and the declaration itself does not make this assertion. In any case, the Annie Mason IMP identifies two water control structures (one on the north side and one on the east side of the Site), but neither was located on the western portion of the Site. Moreover, the aerial photographs show that the new water control structure was installed in an area where, in 2011, the prior remnant levee no longer existed, demonstrating that the new water control structure was in fact installed by Respondents in conjunction with their unauthorized levee construction work in 2014. A penalty is appropriate for this violation of the MPA.

f. **A penalty is appropriate for the removal of a former water control structure.** Respondents argue that a penalty should not imposed for removal of a non-functional water control structure as part of Respondents levee construction work because it makes no difference whether the structure was removed, as opposed to having been left in place and buried by unauthorized fill. SOD at 40:3-8. However, the violation associated with removal of the water control structure is a substantial change in use, not placement of fill. Although Respondents claim that Mr. Sweeney "truly wants to restore the duck club," their actions in removing one of the water control structure identified in the Annie Mason IMP was a substantial change in use that demonstrates that Mr. Sweeney had no intention of planning to operate the Site as a managed wetland.

10. **Respondents Other Arguments for Mitigating the Proposed Penalty.** Respondents make a number of additional arguments challenging the proposed penalty as inappropriate that are not related to specific alleged violations. Those arguments include: (1) penalties should be waived or stayed because Respondents have agreed to apply for a permit (*Id.* at 18:12-18); (2) it would be inappropriate to impose a penalty when staff refused to negotiate (*Id.* at 18:1-11); (3) Mr. Sweeney should not be penalized for exercising his constitutional rights (*Id.* at 42:3-44:19); and (4) every dollar spent on penalties is a dollar that cannot be spent on restoration (*Id.* at 18:22-19:24). Each of these arguments is discussed below.

a. **Penalties Should Not Be Waived or Stayed Because Respondents Have Agreed to Apply for a Permit.** BCDC staff strongly disagrees with Respondents' argument that penalties are inappropriate because Respondents have agreed to apply for permits, or that any penalties should be waived or stayed as long as permitting is proceeding. As a threshold matter, the appropriateness of penalties for Respondents' ongoing violations of the MPA is an entirely separate issue from whether Respondents may apply for a permit to seek after-the-fact authorization for their construction activities and other work at the Site. Moreover, it should be noted that Respondents' agreed to apply to BCDC for a permit only after they were ordered to do so -- after the Executive Director issued a cease and desist order on April 22, 2016 that, among other provisions, requires Respondents to submit a permit application to seek after-the-fact authorization for the work they performed at the Site.

To put in context Respondents' claim that their willingness to apply for a permit should be a mitigating factor in imposing a penalty, BCDC first requested that Respondents' apply to BCDC for a permit in a letter dated January 30, 2015, almost 20 months ago. Respondents failed to do so. On April 22, 2016, the Executive Director issued a cease and desist order that, among other requirements, directed Respondents to submit a permit application within 60 days, or by no later than June 21, 2016, to request authorization from the Commission for the placement of fill, substantial change in use and/or development activities that they have conducted or performed at the Site at any time since Mr. Sweeney purchased

the Site. Respondents failed to do so. Instead, at Respondents' request, BCDC staff twice extended and ultimately suspended the deadline for Respondents' to submit a permit application pursuant to the Executive Director's order.

Respondents have met twice in recent months with the staffs of BCDC, the Regional Board, and the USEPA to discuss restoration of the Site and permitting issues, and at the second meeting, in July, Respondents submitted a conceptual proposal for both restoration and development of the Site. None of the agencies has either rejected or endorsed Respondents' proposal. Rather, the agencies found that the conceptual proposal did not provide a productive basis for discussion, because the proposal was not supported by any technical analysis regarding what amount of tidal action would be necessary to restore tidal marsh at the Site. Moreover, Respondents have consistently refused to discuss mitigation for the unauthorized placement of fill at the Site, and the associated impacts to biological resources and water quality, which will be critical to consideration of any permit application, on the grounds that Respondents and the agencies are likely too far apart on the issue of mitigation. The primary reason Respondents and the agencies will disagree on mitigation requirements is that Respondents continue to dispute that the Site was a tidal marsh in 2011 and claim instead that the areas impacted by Respondents' construction activities were upland.

Thus, while Respondents will eventually submit a permit application to BCDC – the proposed Cease and Desist and Civil Penalty Order would require them to do so by March 10, 2017 -- the issue of an appropriate penalty for Respondents' violations is distinct from permitting and should be resolved now.

b. **Staff Has Not Refused to Negotiate.** Respondents complain that BCDC refused to discuss potential resolution of the violations in response to a letter from Respondents' counsel in February 2016. BCDC staff has at all times been agreeable to meeting with Respondents together with the Regional Board staff to discuss potential resolution of the violations, including restoration and permitting issues. BCDC staff felt strongly that it was important that the Regional Board staff also participate in any meetings with Respondents to

provide a coordinated response to Respondents. The February 16, 2016 letter from Respondents, while expressing interest in resolution, also notified BCDC that a meeting among the agencies and Respondents which had been scheduled for February 22nd had been postponed because the Regional Board wanted to collect certain additional Site information on its own, after Respondents had failed to collect the information as required by the Regional Board's initial Cleanup and Abatement Order (issued in September 2015). A few months later, On May 18th, Respondents cancelled another scheduled meeting, on the morning of the meeting, after the Regional Board issued its tentative Cleanup and Abatement Order and Administrative Civil Liability Complaint.

As noted above, more recently, BCDC staff has participated in two meetings with Respondents and the staffs of the Regional Board and USEPA to discuss Site restoration and permitting issues, and another such meeting is scheduled for October, but the discussions provide no basis for deferring issuance of the proposed Cease and Desist and Civil Penalty Order.

BCDC did not offer to attempt to negotiate a stipulated penalty with Respondents prior to issuance of the Complaint. However, in September 2016, prior to Respondents' submission of their Statement of Defense, BCDC's Chief Counsel raised with Respondents' counsel the possibility of negotiating an agreement regarding a proposed penalty. Respondents' counsel responded that it was likely that BCDC staff and Respondents are too far apart on an appropriate penalty and did not pursue the matter.

c. **BCDC Staff Is Not Penalizing Mr. Sweeny for Exercising His Constitutional Rights.** Respondents argue that Mr. Sweeney is being penalized for exercising his constitutional rights when he sued the Regional Board regarding its issuance of its initial Cleanup and Abatement Order in September 2015. According to Respondents, BCDC and Regional Board staffs are being vindictive and "have colluded" to impose substantial penalties and "take away everything [Mr. Sweeney] has." SOD at 42:17-18. Respondents cite no evidence in support of these conclusory assertions, and there is none. The fact that BCDC and the Regional Board

staffs are independently pursuing enforcement actions for some of the most egregious violations of the statutes that each agency, respectively, administers, in the collective professional experience of their staffs, is not evidence of vindictiveness or that the staffs are in collusion to penalize Mr. Sweeney for exercising his constitutional rights.

BCDC and Regional Board staffs have coordinated in investigating Respondents' unauthorized activities at the Site, sharing evidence in support of their respective enforcement actions, and in meeting with Respondents to discuss restoration and permitting issues. However, BCDC and Regional Board staffs have not coordinated or even consulted with one another regarding the penalties that each has proposed under its authorizing statute – respectively, the MPA for BCDC and the Porter Cologne Water Quality Control Act for the Regional Board. BCDC staff has proposed appropriate penalties for Respondents' violations of the MPA based on consideration of the appropriate penalty factors set forth in Government Code Section 66641.9. The proposed penalties do not violate constitutional protections.

d. **Respondents' Claim that Mr. Sweeney's Money Should be Spent on Restoration, not Penalties.** Respondents argue that Mr. Sweeney is an individual with limited assets and that every dollar he has to spend on penalties, or on legal fees challenging BCDC and the Regional Board's enforcement orders, is a dollar that will not be available to restore and improve the Site. SOD at 18:22-19:24.

The Regional Board staff investigated and analyzed Respondents' financial resources, and determined that Respondents had the ability to pay a substantial penalty. Regional Board Prosecution Team's Staff Summary Report, Administrative Civil Liability Complaint R2-2016-1008 (September 2, 2016), at 6-7. Respondents claim that the Regional Board made a number of factual errors in its analysis of their assets, but have submitted no evidence of Mr. Sweeney's assets, or the assets of Point Buckler Club, LLC, to establish that they would be unable to pay the penalty proposed by BCDC staff in the Complaint.

If Respondents were to provide evidence of Mr. Sweeney's and Point Buckler Club, LLC's assets, and if that financial information were to demonstrate that Respondents may not be able to pay the proposed penalty and also restore the Site, BCDC staff would consider proposing that a portion of the penalty be suspended subject to certain conditions. Those conditions would include, but might not be limited to, requiring Respondents to deposit any portion of the penalty that is suspended into an escrow account and to agree that the funds in the escrow account would be used solely for implementation of the Restoration Plan at the Site, as required by the Commission's Cease and Desist and Civil Penalty Order (as further discussed in the Recommendation section, below), and that funds would be disbursed from the escrow account for these purposes only upon the written approval of the Executive Director).

V. EXECUTIVE DIRECTOR CEASE AND DESIST ORDER ISSUED APRIL 22, 2016

On April 22, 2016, the Executive Director issued a Cease and Desist Order to Respondents directing them, among other provisions, to cease and desist from further violating the MPA and SMPA at the Site. Respondents and BCDC staff have stipulated to two extensions to the 90-day expiration date of the Executive Director's order (Govt. Code § 66637(c)), which, unless further extended, will expire on November 17, 2016.

VI. RECOMMENDATION

The Executive Director recommends that the Enforcement Committee adopt the accompanying proposed Cease and Desist and Civil Penalty Order No. CCD 2016.02 (Order) to Point Buckler Club, LLC and John Donnelly Sweeny. In summary, the proposed Order would require Respondents to:

A. Cease and desist from:

1. Placing any fill within, or making any substantial change in use of, any area subject to tidal action, or that was subject to tidal action before Respondent performed the unauthorized activities described in the Order, at the Site without securing a permit from the Commission under the MPA, and

2. Conducting or engaging in any activity on the Site constituting "development," as defined in the SMPA, without securing a marsh development permit from the Commission under the SMPA.

B. Submit a Point Buckler Restoration Plan, acceptable to the Executive Director, by no later than February 10, 2017, that includes: (1) a Restoration Plan describing corrective actions designed to restore, at a minimum, the water quality functions and values of the tidal marsh existing at the Site prior to Respondents' unauthorized activities; and (2) a Restoration Monitoring Plan that includes monitoring methods and performance criteria designed to monitor and evaluate the success of the implemented restoration objectives. This condition of the proposed Order is identical to a condition in the Regional Board's Cleanup and Abatement Order No. R2-2016-0038 issued to Respondents on August 10, 2016 (Regional Board Order).

C. Submit a Mitigation and Monitoring Plan, acceptable to the Executive Director, by no later than February 10, 2017, that includes a proposal to provide compensatory mitigation to compensate for any temporal and permanent impacts to wetlands and other waters of the State that resulted from Respondents unauthorized activities at the Site. This condition of the proposed Order is identical to a condition in the Regional Board Order.

D. By no later than March 10, 2017, apply for a permit to request authorization from the Commission for the placement of fill, extraction of materials, substantial change of use, and/or development activities that Respondents have conducted or performed at the Site at any time from April 19, 2011 through the date of the Order.

E. Apply for and obtain a permit from the Commission prior to any placement of fill, extraction of materials, substantial change in use, or development activities that Respondents propose to undertake or conduct at the Site after the date of the Order.

49d. BCDC Enforcement Committee Recommended Enforcement Decision, November 4, 2016

San Francisco Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

November 4, 2016

TO: Commissioners and Alternates

FROM: Enforcement Committee

SUBJECT: **Enforcement Committee's Recommended Enforcement Decision Regarding Proposed Cease and Desist and Civil Penalty Order No. CDO 2016.02; Point Buckler Club, LLC and John D. Sweeney**
(For Committee consideration on November 17, 2016)

Recommendation

The Enforcement Committee recommends that the Commission adopt the Recommended Enforcement Decision by adopting and issuing proposed Cease and Desist and Civil Penalty Order No. CDO 2016.02 (Order) to Point Buckler Club, LLC and John D. Sweeney.

This enforcement proceeding involves alleged violations of the McAteer-Petris Act (MPA) and the Suisun Marsh Preservation Act (SMPA) at Point Buckler Island, which is located in the primary management area of the Suisun Marsh in Solano County (the Site). Point Buckler Club, LLC owns the Site. Mr. Sweeney is a principal of Point Buckler Club, LLC and owned the Site from approximately April 19, 2011, to October 27, 2014, when he conveyed the Site to Point Buckler Club, LLC. (Mr. Sweeney and Point Buckler Club, LLC are collectively referred to as Respondents.)

This matter arises out of an enforcement action commenced on April 22, 2016, by the Executive Director's issuance of a Cease and Desist Order to Respondents directing them, among other provisions, to cease and desist from further violating the MPA and SMPA at the Site. Respondents and BCDC staff have stipulated to two extensions to the 90-day expiration date of the Executive Director's order (Govt. Code § 66637(c)), which, unless further extended, will expire on November 17, 2016.

On May 23, 2016, the Executive Director issued a Violation Report/Complaint for the Administrative Imposition of Civil Penalties (Complaint) to Respondents and for the same violations of the MPA and the SMPA as alleged in the Executive Director's order. The Complaint proposed a civil penalty of $952,000 for 35 separate violations of the MPA.

On September 12, 2016, Respondents submitted their Statement of Defense and accompanying documents including but not limited to Declarations of Respondent John Sweeney and Respondents' counsel, Larry Bazel, both with exhibits. Respondents generally admitted or did not dispute that they performed certain work and activities at the Site, as alleged in the Complaint, but raised a number of defenses challenging the Commission's jurisdiction or the principal allegations in the Complaint as to their liability. Among other defenses, Respondents argued that their work was exempt from permit requirements because the Commission, in 1984, certified a managed wetland individual management plan for the Site. Respondents also made numerous arguments as to mitigating factors that they contend make it unfair, unreasonable, or inequitable to hold them responsible for the violations through the assessment of civil penalties.

On October 6, 2016, the Enforcement Committee held a public hearing on this matter. The Committee considered the staff's presentation of its recommended enforcement decision, which was to adopt the proposed Order, and Respondents' presentation, which included testimony under oath by Respondent John Sweeney. The Committee also considered public comment by a number of parties, including testimony under oath by Dr. Stuart Siegel, an expert retained by the San Francisco Bay Regional Water Quality Control Board (Regional Board), in connection with its separate enforcement action against Respondents, and author of a Technical Assessment Report concerning the Site.

The Enforcement Committee adopted the staff's recommended enforcement decision with one modification. The Committee determined that the placement of fill to close each of seven tidal breaches of the remnant levee at the Site should be treated as a single violation, rather than seven violations as proposed by staff, and on the basis, reduced the proposed penalty by $180,000, from $952,000 to $772,000.

Staff Report

Background. The MPA requires any person wishing to place fill, extract materials, or make any substantial change in use of any water, land, or structure, within the area of the Commission's jurisdiction, including the Site, to obtain a permit from the Commission. Govt Code § 66632(a).

The SMPA generally requires any person wishing to perform or undertake any "development," as that term is broadly defined in Public Resources Code Section 29114(a), in the primary management area of the Suisun Marsh, including the Site, to obtain a marsh development permit from the Commission. Pub. Res. Code §§ 29500, 29501. However, no permit is required for any development specified in the component of the local protection program (LPP) for the Suisun Marsh prepared by the Suisun Resource Conservation District (SRCD) and certified by the Commission.

The SRCD's component of the LLP, known as the Suisun Marsh Management Program (SMMP), consists of a number of elements including, but not limited to, individual water management programs (commonly referred to as individual management plans or IMPs) for each privately-owned "managed wetland" within the primary management area of the Suisun Marsh. The SMPA defines the term "managed wetland" to mean "those diked areas in the marsh in which water inflow and outflow is artificially controlled or in which waterfowl food plants are cultivated, or both, to enhance habitat conditions for waterfowl and other water-associated birds, wildlife, or fish…." Pub. Res. Code. § 29105.

In 1984, IMPs were developed for each privately-owned managed wetland in the primary management area of the Suisun Marsh, including the Site, and were certified by the Commission. The IMP for the Site, denominated the "Annie Mason Point Club" (Annie Mason IMP), states that the club is contained within a single levee surrounded by Grizzly Bay to the north and Suisun Cutoff to the south, and describes two water control structures, one on the east side and another on the north side of the Site. The Annie Mason IMP further states that it is "necessary that the club follows a regular program of water management," and that:

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

Substantial evidence demonstrates that since at least the late-1980s, the Site was never managed in accordance with the Anne Mason IMP. For more detail, see the proposed Order at Section II (Findings), ¶¶ J through N.

Beginning no later than August 1988, with a first levee breach, the areas of the Site formerly consisting of managed wetlands began reverting to tidal marsh due to: (a) the lack of maintenance of the levees and water control structures; (b) the constant exposure of the Site to daily tides and the forces of the waves and winds; and (c) the periodic exposure of the Site to storm events. The reversion to and persistence of the Site as tidal marsh continued after May 1991 from three levee breaches, after August 1993 from five levee breaches, and after August 2003 from seven levee breaches, which provided daily tidal exchange between the Bay waters

and the interior channels and ditch, and provided internal tidal circulation throughout the Site. During this same period, due to the progressive erosion and deterioration of the remnant levees, portions of the Site interior to the levees were subject periodically to the inflow and outflow of tidal waters from overtopping of the levees.

Thus, over an approximately 20-year period before Mr. Sweeney purchased the Site, it was subject to tidal action and consisted of tidal marsh, and the Site did not contain managed wetlands as defined in the SMPA. See proposed Order, Section II, ¶¶ P through R. For these reasons, when Mr. Sweeney purchased the Site, the Annie Mason IMP no longer applied to the Site and, therefore, no potential development at the Site was specified in the SRCD's component of the LLP. Therefore, at the time Mr. Sweeney purchased the Site, a marsh development permit from the Commission was required pursuant to the SMPA to authorize any "development" (as defined in Pub. Res. Code § 29114(a)) at the Site, and a permit was required by the Commission, pursuant to the MPA (Government Code § 66632(a)), to authorize the placement of any fill or to make any substantial change in use of any water, land, or structure at the Site.

An aerial photograph taken in April 2011, and attached hereto as Exhibit A, shows that when Mr. Sweeney purchased the Site the levees were breached at seven different locations and the entire Site was intersected by countless tidal channels that, together with the remnant interior ditch and combined with overland flow of tidal waters, provided internal tidal circulation throughout the entire Site.

Before Mr. Sweeney began conducting levee construction and excavation activities at the Site (as discussed further below), he knew that the placement of fill on levees in managed wetlands in the Suisun Marsh, including levee repair work, requires authorization from multiple agencies. In June 2011, Mr. Sweeney contacted the SRCD and the United States Army Corps of Engineers (USACE) regarding proposed levee repair work at Chipps Island (Club 915) in the Suisun Marsh. SRCD provided Mr. Sweeney with copies of the USACE's regional general permit (issued pursuant to Section 404 of the Clean Water Act) and a relevant Biological Opinion prepared by the National Marine Fisheries Services, and Mr. Sweeney completed a USACE Wetlands Maintenance Permit Application. Working with SRCD through the permitting process, Mr. Sweeney obtained authorization from the USACE to perform the levee repair under the regional general permit. However, he did not adhere to the permit's conditions, and on October 24, 2011, the USACE issued a Notice of Violation to Mr. Sweeney regarding his unauthorized work at Chipps Island that resulted in an illegal discharge of fill.

The evidence suggests that when Mr. Sweeney contemplated the nature and extent of the levee construction, excavation, and other work that he planned to perform at the Site, based on his experience with SRCD and the USACE to authorize a levee repair at Chipps Island, he made a knowing and intentional decision to proceed without contacting SRCD, the USACE, or BCDC, and without applying for any of the permits that he knew or should have known were required. The evidence further suggests that Mr. Sweeney intentionally proceeded without contacting any regulatory agency to avoid the expense and delay of the permitting process, including the costs that would have been associated with providing mitigation for adverse impacts to tidal marsh, biological resources, and water quality.

Beginning by no later than May 2012, and without contacting or applying for a permit from BCDC (and without contacting SRCD or the USACE), Mr. Sweeney began excavating trenches and ditches in tidal marsh, rebuilding eroded levees, and placing fill on tidal marsh to construct new levees at the Site. This work included but may not have been limited to constructing new levees by excavating material from the ditch inside the eroded levees and placing such material on (a) the remnants of the eroded levees in locations where the eroded levees remained; and (b) tidal marsh and waters of the State inside former levee locations where the former levees had completely eroded and disappeared and had been replaced by tidal marsh. In addition, without applying for or obtaining a permit from BCDC, Mr. Sweeney removed one of the former water control structures from the Site and, in approximately September 2013, replaced a sunken dock located in the southeast portion of the Site with a larger dock at the same location. Each of these unauthorized activities constitutes "development" as defined in Public Resources Code Section 29114, and the construction of new levees and installation of a replacement dock constitute placement of fill, extraction of materials and/or a substantial change of use of land and water under Government Code Section 66632(a).

Some time in or about 2014, and without applying for a permit from BCDC, Respondents began operating the Site as a "Private Sport and Social Island located in the California Delta. Ideally suited for the Bay Area / Silicon Valley Executives who want to get away and enjoy kiting in a safe and secluded environment without boarding a plane." www.pointbucklerisland.com. *See* www.facebook.com/pointbucklerclubVIP. Such activities constitute both a "substantial change of use of land and water" under the MPA (Govt Code § 66632(a)) and "development" (as defined in Pub. Res. Code § 29114) under the SMPA.

On November 14, 2014, BCDC staff inspected the Site and identified a number of violations of the SMPA and the MPA. During the Site inspection, BCDC staff provided Mr. Sweeney with a copy of the Annie Mason IMP because he had previously informed BCDC staff that he did not have a copy of that document and had requested a copy.

The unauthorized work Respondents performed at the Site from May 2012 to January 29, 2015, as shown in a series of aerial photographs and Google Earth images, includes the following:

1. Initiated trench excavation and filling activities by no later than May 2012;
2. Installed a large dock in Annie Mason Slough and began grading in the southeastern corner of the Site by February 3, 2014;
3. Conducted levee construction and ditch excavation activities along the southern and southwestern portion of the Site, closing two of the tidal breaches, by March 24, 2014;
4. Conducted levee construction and ditch excavation activities in a clockwise direction around to the northeastern portion of the site, closing off the five remaining tidal breaches and cutting off all tidal channel connectivity to the interior of the Site, by August 6, 2014;
5. Completed the final segment of levee construction and ditch excavation activities along the eastern portion of the Site by October 28, 2014; and

6. Excavated three crescent ponds in tidal marsh in the interior of the Site by January 29, 2015.

On January 30, 2015, BCDC sent a letter to Respondents regarding the unauthorized work observed during the November 14, 2014 Site inspection. The letter discussed the regulatory framework governing the Suisun Marsh and, in particular the Site, and explained that based on available information, the history of the Site, and the recent Site visit, the Site had never been managed in accordance with the Annie Mason IMP and had long ago reverted to a tidal marsh due to neglect, abandonment, and/or the forces of nature. The letter advised Respondents that a marsh development permit from BCDC was required prior to performing any development at the Site, and that any work that could not be retroactively approved through such a permit would likely need to be removed, restoring the Site to tidal marsh. BCDC staff recommended that Respondents restore the Site, following BCDC approval of a professionally prepared plan, or begin compiling a permit application. Furthermore, BCDC staff requested that Respondents stop work at the Site.

Respondents continued to perform unauthorized work at the Site after receiving BCDC's letter dated January 30, 2015 directing them to stop work. See proposed Order Section II, ¶¶ DD, JJ, MM, PP, and QQ. An aerial photograph dated February 10, 2016, attached hereto as Exhibit B, shows certain unauthorized work performed by Respondents after receiving BCDC's letter dated January 30, 2015, including but not limited to installation of two helicopter landing pads and placement of three wind-break platforms, all on tidal marsh.

On July 28, 2015, the Regional Board sent Respondent Point Buckler, LLC a Notice of Violation for Filling Waters of the United States and State at the Site, alleging violations of both the federal Clean Water Act and the California Water Code.

On August 10, 2016, the Regional Board issued Cleanup and Abatement Order No. R2-2016-0038 to Respondents for unauthorized activities conducted at the Site (Regional Board Order). Among other terms and conditions, the Regional Board Order:

1. Prohibits the discharge of fill material except as allowed by plans accepted or approved by the Regional Board;
2. Prohibits the removal or destruction of tidal marsh vegetation in a manner that adversely impacts water quality or beneficial uses;
3. Requires Respondents to submit an Interim Corrective Plan including specified measures by no later than November 10, 2016;
4. Requires Respondents to submit a Point Buckler Restoration Plan including specified actions by no later than February 10, 2017; and
5. Requires Respondents to submit a Mitigation and Monitoring Plan including specified information by no later than February 10, 2017.

In addition, the Regional Board issued a Complaint for Administrative Civil Liability Complaint No. R2-2016-1008 to Respondents seeking $4,600,000 in civil fines for violating: (1) San Francisco Bay Basin Water Quality Control Plan Discharge Prohibition No. 9; and (2) Clean

Water Act section 301 for unauthorized discharge of fill to waters of the State and United States on the Site. The Regional Board is scheduled to hold a hearing on the Administrative Civil Liability Complaint on December 14, 2016.

Violations of the MPA and SMPA. Respondents have violated and continue to violate the MPA by conducting the unpermitted activities at the Site, including but not limited to:

1. Placing fill in waters of San Francisco Bay, including tidal marsh, by constructing and rebuilding levees, excavating ditches and four crescent shaped ponds, installing a new dock in Annie Mason Slough, constructing roads, and placing numerous containers, trailers, and other structures and two helipads on tidal marsh; and
2. Making substantial changes in the use of water, land, or structures within the area of the Commission's jurisdiction by: (a) closing all the tidal breaches that existed in 2011 when Mr. Sweeney purchased the Site and thereby cutting off all tidal activity to the interior of the Site; (b) installing a new water control structure in the western portion of the Site; (c) draining the Site to further alter the pre-existing tidal marsh hydrology; (d) removing or destroying tidal marsh vegetation by the placement of fill, excavation activities, mowing activities, drainage activities, and bringing goats to the Site and allowing them to graze on the tidal marsh vegetation; (e) installing numerous trailers and containers and two mobile helipads at the Site; and (f) developing and operating the Site for intensive recreational uses including but not necessarily limited to kite-boarding.

Respondents have violated and continue to violate the SMPA by conducting unpermitted development at the Site as described herein, including but not limited to: (a) placing fill in waters of San Francisco Bay, including tidal marsh, by constructing and rebuilding levees; (b) excavating ditches and four crescent shaped ponds; (c) installing a new water control structure in the western portion of the Site; (d) installing a new dock in Anne Mason Slough; (e) constructing roads on tidal marsh; (f) placing numerous containers, trailers and other structures and two mobile helipads on tidal marsh; (g) removing or destroying tidal marsh vegetation by the excavation activities, mowing activities, and bringing goats to the Site and allowing those goats to graze on the tidal marsh vegetation; and (h) developing and operating the Site for intensive recreational uses including but not necessarily limited to kiting.

Requirements of Proposed Cease and Desist Order. The proposed Order would require Respondents to:

1. Cease and desist from:
    a. Placing any fill within, or making any substantial change in use of, any area subject to tidal action, or that was subject to tidal action before Respondent performed the unauthorized activities described in the Order, at the Site without securing a permit from the Commission under the MPA, and
    b. Conducting or engaging in any activity on the Site constituting "development," as defined in the SMPA, without securing a marsh development permit from the Commission under the SMPA.

2. Submit a Point Buckler Restoration Plan, acceptable to the Executive Director, by no later than February 10, 2017, that includes: (a) a Restoration Plan describing corrective actions designed to restore, at a minimum, the water quality functions and values of the tidal marsh existing at the Site prior to Respondents' unauthorized activities; and (b) a Restoration Monitoring Plan that includes monitoring methods and performance criteria designed to monitor and evaluate the success of the implemented restoration objectives. This condition of the proposed Order is identical to a condition in the Regional Board Order.
3. Submit a Mitigation and Monitoring Plan, acceptable to the Executive Director, by no later than February 10, 2017, that includes a proposal to provide compensatory mitigation to compensate for any temporal and permanent impacts to wetlands and other waters of the State that resulted from Respondents unauthorized activities at the Site. This condition of the proposed Order is identical to a condition in the Regional Board Order.
4. By no later than March 3, 2017, apply for a permit to request authorization from the Commission for the placement of fill, extraction of materials, substantial change of use, and/or development activities that Respondents have conducted or performed at the Site at any time from April 19, 2011 through the date of the Order.
5. Apply for and obtain a permit from the Commission prior to any placement of fill, extraction of materials, substantial change in use, or development activities that Respondents propose to undertake or conduct at the Site after the date of the Order.

Proposed Civil Penalty Order. The proposed Order addresses violations of both the MPA and the SMPA, but the proposed penalty is solely for violations of the MPA. There is no statutory authority for the imposition of administrative penalties under the SMPA, and, therefore, no penalty is proposed for Respondents violations of the SMPA.

Government Code Section 66641.5(e) provides that the Commission may administratively impose civil liability for any violation of the MPA in an amount of which shall not be less than $10 nor more than $2,000 for each day in which the violation occurs or persists, but may not administratively impose a penalty of more than $30,000 for a single violation.

The Complaint includes a table, attached hereto as Exhibit C, describing each violation, explaining how the work or activity violates the MPA, and the amount of the penalty sought for each violation. Staff proposed a total penalty of $952,000 for 35 separate violations of the MPA. The Enforcement Committee determined that the placement of fill to close each of seven tidal breaches of the remnant levee at the Site, considered by staff to be seven violations (as shown in the first row of the Exhibit C table), should be treated as a single violation, and on the basis, reduced the proposed penalty by $180,000, from $952,000 to $772,000.

Government Code Section 66641.9(a) states:

> *In determining the amount of administrative civil liability, the commission shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the violation is susceptible to removal or resolution, the cost to the state in pursuing the enforcement action, and with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary removal or resolution efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require.*

The proposed Order includes the following findings concerning the statutory penalty factors:

1. **Nature, circumstances, extent, and gravity of the violations.** Excavation of tidal marsh at the Site physically removed estuarine habitat and the placement of fill eliminated surface water and wetland habitats. The harm from Respondents' unauthorized filling, destruction of tidal marsh, and cutting-off of tidal action at the Site was and is substantial, has adversely impacted beneficial uses of Suisun and Grizzly Bays, and likely resulted in the illegal take of threatened or endangered species protected under the California and federal Endangered Species Acts. Unauthorized filling and excavation activities occurred outside work activity windows established to protect sensitive species in the Suisun Marsh. Blocked tidal channels at the Site are preventing longfin smelt from being able to access spawning grounds, young salmonids from accessing feeding grounds, and have cut off the export of food material from the Site's interior wetlands needed to support the threatened Delta smelt.
2. **Whether the violations are susceptible to removal or resolution.** Respondents' unauthorized filling and other unauthorized construction activities at the Site are potentially susceptible to removal or resolution, but to date, Respondents have taken no action to remove the unauthorized work or to restore tidal action or tidal marsh at the Site. Moreover, the temporal impacts to tidal marsh habitat and biological resources from Respondents' unauthorized activities are unavoidable, continuing, and potentially increasing with every passing day.
3. **The costs to the state in pursuing the enforcement action.** BCDC staff has incurred substantial staff costs in pursuing this enforcement action. These costs consist of time spent by numerous staff members on two Site visits; two meetings with Respondents and their counsel at BCDC's offices; numerous meetings among BCDC, Regional Board, and USEPA staff, including two multi-agency meetings together with Respondents and their counsel; preparation of an Executive Director Cease and Desist Order and a Violation Report/Complaint for the Administrative Imposition of Civil Penalties (Complaint); reviewing

Respondents' Statement of Defense and preparing a recommended enforcement decision, and preparing for and participating in a contested hearing before the Enforcement Committee.

4. **Ability to pay and effect on ability to continue in business.** The Regional Board staff investigated and analyzed Respondents financial resources, and determined that Respondents have the ability to pay a substantial penalty. Respondents claim that the Regional Board made a number of factual errors in its analysis of Respondents' ability to pay. However, Respondents have submitted no evidence of Mr. Sweeney's assets, or the assets of Point Buckler Club, LLC, to establish that they would be unable to pay the penalty proposed by BCDC staff in the Complaint.

5. **Any voluntary removal or resolution efforts.** As noted above, Respondents have taken no action to remove the unauthorized fill or other work or to restore tidal action or tidal marsh at the Site, and they continued to develop the Site for their kiteboarding operations after BCDC staff requested that they stop work and apply for a permit, in a letter dated January 30, 2015. Respondents claim that they intend to apply for a BCDC permit to seek authorization for certain completed work or proposed future work at the Site. However, BCDC staff first requested that Respondents apply for a permit in a letter dated January 30, 2015, over 20 months ago, but to date that they have failed to do so. Respondents recently proposed to BCDC staff a conceptual plan for future use and partial restoration of the Site. However, Respondents did not prepare the conceptual plan based on a technical analysis of the nature and extent of tidal exchange that would be necessary to restore tidal marsh and associated habitat values at the Site. Furthermore, Respondents have declined to discuss mitigation for temporal impacts resulting from the unauthorized work at the Site and for Respondents proposed future uses of the Site. Respondents have been only minimally cooperative.

6. **Any prior history of violations; the degree of culpability.** Before commencing unauthorized work at the Site, Mr. Sweeney knew that the placement of fill on levees in the Suisun Marsh requires authorization from multiple agencies. In June 2011, Mr. Sweeney contacted SRCD and the USACE to obtain authorization for levee repair work at Chipps Island in the Suisun Marsh (Club 915). Mr. Sweeney did not adhere to the conditions of the USACE's Regional General Permit, and on October 24, 2011, the USACE issued a Notice of Violation to Mr. Sweeney regarding his unauthorized work at Chipps Island that resulted in an illegal discharge of fill. Based on Mr. Sweeney's experience with the SRCD and the USACE at Chipps Island, he may have made a knowing and intentional decision to proceed with unauthorized construction activities and other work at the Site without contacting any regulatory agency and without applying for any of the permits he knew or should have known were required. At a minimum,

Respondents' conduct at the Site was unreasonable and demonstrated a willful indifference to the regulatory permitting process that is intended to protect water quality, beneficial uses, and to prevent illegal discharges.

7. **Economic savings resulting from the violations.** By conducting filling, excavation, and other activities at the Site without authorization, Respondents avoided the costs of obtaining permits from BCDC and USACE, a Clean Water Act Section 401 water quality certification from the Regional Board, and perhaps other local approvals or permits, as well as the costs of complying with resource agency requirements to protect endangered or threatened species (such as, at a minimum, performing certain work only during work activity windows). Respondents also avoided the costs of mitigation for filling portions of the Site and for associated adverse impacts to biological resources. In addition, Respondents have benefitted economically from their unauthorized activities. The new levees Respondents constructed around the perimeter of the Site have provided an economic benefit by allowing them to conduct their commercial kiteboarding business, and expand kiteboarding operations in the northwestern portion of the Site, for the past two years without having those operations disrupted or damaged from tidal action, including tidal flooding from periodic overtopping of the former remnant levees.

Attachments to this Recommendation include: (1) Aerial photograph dated April 2011; (2) Aerial Photograph dated February 10, 2016; (3) table showing staff's proposed penalty for 35 violations of the MPA; and (4) proposed Cease and Desist and Civil Penalty Order No. CDO 2016.02.

The Administrative Record in this matter consists of: (1) Violation Report/Compliant for the Administrative Imposition of Civil Penalties; (2) Respondents' Statement of Defense and accompanying documents; (3) Staff's Recommended Enforcement Decision; (4) all documents listed in the Index of Administrative Record, attached as Exhibit A to the Proposed Order. All of these materials are available to review on the Commission's website at http://www.bcdc.ca.gov/enforcement/20161006Agenda.html.

49e. BCDC Final Cease and Desist Order No. 2016.02, November 18, 2016

San Francisco Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

Issued BCDC

Point Buckler Club, LLC 171 Sandpiper Drive Pittsburg, CA 94565 and John Donnelly Sweeney 171 Sandpiper Drive Pittsburg, CA 94565, Respondents.	COMMISSION CEASE AND DESIST AND CIVIL PENALTY ORDER NO. CDO 2016.02 Effective Date: November 18, 2016

TO JOHN DONNELLY SWEENEY AND POINT BUCKLER CLUB, LLC:

I. CEASE AND DESIST

Pursuant to California Public Resources Code Section 29601 and California Government Code Section 66638, John Donnelly Sweeney and Point Buckler Club, LLC, all of their agents and employees, and any other persons acting in concert with them (collectively "Respondents") are hereby ordered to cease and desist all activity in violation of the Suisun Marsh Preservation Act (SMPA) and the McAteer-Petris Act (MPA) at Point Buckler Island in Solano County, as described herein. Specifically, Respondents are ordered to:

1. Cease and desist from placing any fill within, or making any substantial change in use of, any area subject to tidal action, or that was subject to tidal action before Mr. Sweeney commenced the unauthorized activities described herein, including marshlands lying between mean high tide and five feet above mean sea level, without securing a permit from the San Francisco Bay Conservation and Development Commission (Commission or BCDC) as required under Government Code Section 66632(a);
2. Cease and desist from conducting or engaging in any "development" (defined in Public Resources Code Section 29114(a) as including but not being limited to the placement or erection of any solid material or structure; discharge or disposal of any dredged material; grading, removing, dredging, or extraction of any materials; change in the density or intensity of use of land or intensity of use of water; construction, reconstruction, alteration in the size of any structure; and the removal or harvesting of major vegetation other than for agricultural purposes) without securing a marsh development permit from the Commission as required under Public Resources Code Sections 29500 and 29501(a); and
3. Fully comply with requirements of Sections III and IV of this order.

II. FINDINGS

This Order is based on the following findings. The administrative record in support of these findings and this Order includes: (1) all documents and other evidence cited herein; and (2) all additional documents listed in the Index of Administrative Record attached hereto as Exhibit A.

A. Point Buckler Club, LLC is the owner of approximately 39 acres of land at Point Buckler Island (Assessor's Parcel No. 0090-020-010), which is located off the western tip of Simmons Island in the Suisun Marsh, Solano County (the Site). John Donnelly Sweeney (Mr. Sweeney) is a principal of Point Buckler Club, LLC and owned the Site from approximately April 19, 2011, to October 27, 2014, when he conveyed the Site to Point Buckler Club, LLC. Point Buckler Club, LLC and Mr. Sweeney are hereafter jointly referred to as Respondents.

B. In 1965, the Legislature enacted the McAteer-Petris Act (MPA), which is codified, as amended, at Government Code Sections 66600-66694. The Site is located in the jurisdiction of the Commission as established by Government Code Section 666610. Specifically, the Site is in the Commission's "San Francisco Bay" jurisdiction as defined in Government Code Section 666610(a). Any person wishing to place fill, to extract materials, or to make any substantial change in use of any water, land, or structure, within the area of the Commission's jurisdiction, including at the Site, is required to obtain a permit from the Commission. Government Code § 66632(a).

C. In 1977, the Legislature enacted the Suisun Marsh Preservation Act (SMPA), which is codified, as amended, at Public Resources Code Sections 29000-29612. The Site is located in the "primary management area" of the "Suisun Marsh," as those terms are defined in Public Resources Code Sections 29102 and 29101, respectively.

D. Any person wishing to perform or undertake any "development," as that term is broadly defined in Public Resources Code Section 29114(a), at the Site is required to obtain a marsh development permit from the Commission, in addition to obtaining any other permit required by law from any local government or from a state, local, or regional agency. Public Resources Code §§ 29500, 29501.

E. The Commission has prepared and adopted the "Suisun Marsh Protection Plan," as that term is defined in the SMPA (Public Resources Code Section 29113(a)). In addition, the Commission has certified, the "local protection program" (LPP) as defined in Public Resources Code Section 29111, consisting of a number of components prepared by, or submitted to, Solano County or prepared by the Suisun Resource Conservation District (SRCD), that meet the requirements of, and implement, the SMPA and the Suisun Marsh Protection Plan at the local level.

F. One component of the certified local protection program is the Suisun Marsh Management Program (SMMP) prepared by the SRCD pursuant to the SMPA (Public Resources Code Sections 29401(d) and 29412.5). The SMMP consists of the following principal elements:

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

   In Public Resources Code Section 29105, the SMPA defines the term "managed wetland" to mean "those diked areas in the marsh in which water inflow and outflow is artificially controlled or in which waterfowl food plants are cultivated, or both, to enhance habitat conditions for waterfowl and other water-associated birds, wildlife, or fish…." *See also* Declaration of Steven Chappell (April 21, 2016) at ¶¶ 7, 9.

G. Nothwithstanding the otherwise applicable provisions of Public Resources Code Section 29500 regarding the need to obtain a Marsh Development Permit (MDP), in Public Resources Code Section 29501.5 the SMPA states that within the PMA of the Suisun Marsh, no MDP is required for any development specified in the component of the LPP prepared by SRCD and certified by the Commission.

H. In or about 1984, individual management programs (commonly referred to as individual management plans or IMPs) were developed for each privately-owned managed wetland in the primary management area of the Suisun Marsh, including the Site, and were reviewed by the California Department of Fish and Game (now California Department of Fish and Wildlife or CDFW) and certified by the Commission. Suisun Marsh Protection Program at 34 and 70-71 (map); Chappell Declaration at ¶ 11.

I. The IMP for the Site, denominated the "Annie Mason Point Club" (Annie Mason IMP), states that the club is contained within a single levee surrounded by Grizzly Bay to the north and Suisun Cutoff to the south, and describes two water control structures: (a) a main flood gate on the east side that functions to bring water into the club via a perimeter ditch system; and (b) a structure on the north side used to drain the club into Grizzly Bay. The Annie Mason IMP further states, in a subsection addressing Water Management, Needed Improvements, that it is "necessary that the club follows a regular program of water management," and that:

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

The Annie Mason IMP also contains a subsection addressing Vegetation Management, Needed Improvements, that discusses removal of undesirable vegetation to provide for the establishment of new vegetation more preferred by waterfowl. *See* Chappell Declaration at ¶ 11.

J. In September 1989, the owner of the Site at that time, John Taylor, submitted an application to the Commission to place approximately 50,000 cubic yards of dredged material from the Port of Oakland on levees at the Site to improve water control. In October 1989, Commission staff determined that the application was incomplete and requested additional information from the applicant. No additional information was provided to staff, the application was never filed as complete, and no permit was issued by the Commission for this proposed work.

K. On or about January 29, 1990, a "Wetlands Maintenance Management Report" was prepared that proposed the following work at the Site: (a) clearing ditches, 1,000 cubic yards, approximately 1,200 linear feet; (b) interior levee repair, 2,000 cubic yards, 500 linear feet; and (c) exterior levee repair, 2,000 cubic yards, 750 linear feet. There is no record documenting that this work was commenced or completed. Chappell Declaration at ¶ 14.

L. At all times subsequent to certification of the Annie Mason IMP in 1984, all owners of property within the Suisun Marsh, including the Site, have been subject to certain regulatory requirements imposed by the United States Army Corps of Engineers (USACE) under the Clean Water Act and/or the Rivers and Harbors Act of 1899. These requirements are, and typically have been, set forth in a series of Regional General Permits (RGPs) issued by the USACE for successive five-year terms. The RGP currently in effect, RGP3 dated July 8, 2013, regulates, among other things: "<u>2) ACTIVITIES ON LEVEES</u>: <u>a. Repair of Interior and Exterior Levees</u>...to repair damage from storms and to counteract subsidence of the levees." Under Section 6, "<u>PERMIT ADMINISTRATION</u>," the current RGP requires property owners who intend to perform repair and other work activities that are regulated by the RGP to prepare and submit to the SRCD a report (called a "work request form") that describes the proposed activities. The RGP gives to the SRCD the responsibility to compile and submit to the USACE the reports that the SRCD receives from property owners. Previous versions of the RGP contained regulatory requirements of similar scope and content. The records of the SRCD since 1994 reveal no reports submitted by any owner of the Site for purposes of compliance with an RGP regarding repair or maintenance of the levees at the Site. Chappell Declaration at ¶¶ 15-16.

M. An aerial photograph dated April 30, 1985, shortly after preparation of the Annie Mason IMP, shows that the levees at the Site were intact at that time, precluding tidal action except via the authorized water control structures, and provided the necessary infrastructure to control water levels at the Site for managed wetlands conditions. Notwithstanding the foregoing, in an analysis performed in 1984 by the California Department of Water Resources (CDWR), the CDWR determined that "Levees about Annie Mason Island are not now in good repair." Chappell Declaration at ¶ 12.

N. In contrast, a series of aerial photographs taken from July 1988 to September 2011 show the progressive levee breaches that conveyed tidal waters from Grizzly Bay into and from the interior ditch and channel network, and thus the reversion of the Site to tidal marsh. The first levee breach (in the north) had occurred by August 1988, and two more breaches (one in the southwest and another in the northeast) had occurred by May 1991. Two more levee breaches (one in the south and another in the northeast) had occurred by August 1993, and two more levee breaches (both in the northwest) had occurred by the Summer 2003. Beginning in or about 1988 with the first levee breach, continuing between 1988 to 2003 with the six additional levee breaches that occurred over this period, and continuing from in or about 2003 to 2011 with all seven levee breaches, these breaches provided daily tidal exchange between the Bay waters and the tidal marsh that comprised the Site, and the interior channels and ditch provided internal tidal circulation throughout the Site. Aerial photographs dated: April 30, 1985; July 14, 1988; August 18, 1988; June 13, 1990; May 28, 1991; August 23, 1993; Summer 2003; October 20, 2003; Summer 2006; April 2011; and September 1, 2011. Siegel Environmental, Point Buckler Technical Assessment of Current Conditions and Historic Reconstruction Since 1985 (May 12, 2016) (Point Buckler Technical Assessment Report), Appendix G (Opening of Tidal Connectivity and Establishment of Tidal Marsh, 1985 to 2011), Section G-3.1.

O. Beginning no later than August 1988, with the first levee breach, the areas of the Site formerly consisting of managed wetlands began reverting to "tidal marsh," as that term is defined in Section II, Exhibit C of the SMMP due to: (a) the lack of maintenance of the levees and water control structures at the Site; (b) the constant exposure of the Site to daily tides and the forces of the waves and winds; and (c) the periodic exposure of the Site to storm events. The reversion and persistence of the Site as tidal marsh continued after May 1991 from three levee breaches, after August 1993 from five levee breaches, and after August 2003 from seven levee breaches, which provided daily tidal exchange between the Bay waters and the interior channels and ditch, and provided internal tidal circulation throughout the Site. Point Buckler Technical Assessment Report, Appendix G (Opening of Tidal Connectivity and Establishment of Tidal Marsh, 1985 to 2011).

P. During this same period (1988 –2011), due to the progressive erosion and deterioration of the remnant levees over this period, portions of the Site interior to the levees were subject to the inflow and outflow of tidal waters in the form of "overtopping" of the

levees during "about half of the high tides." This form of tidal influence on the Site is referred to as "'overland' flow of tidal waters to the interior tidal marsh." Pt. Buckler Technical Assessment Report, App. G, Section G-3.2.

Q. Mr. Sweeney purchased the Site on or about April 19, 2011. An aerial photograph taken in April 2011 shows that at that time the levees at the Site were breached at seven different locations and the entire Site was intersected by countless tidal channels that, together with the remnant interior ditch and combined with overland flow of tidal waters, provided internal tidal circulation throughout the entire Site. These same conditions are shown in an aerial photograph taken on September 1, 2011. Aerial photographs dated: April 2011; and September 1, 2011; Point Buckler Technical Assessment Report, Appendix G (Opening of Tidal Connectivity and Establishment of Tidal Marsh, 1985 to 2011).

R. The status of the Site as constituting, over the overwhelming preponderance of its area, a tidal marsh is also confirmed by CDFW Suisun Marsh vegetation data sets which show virtually the entire Site to be dominated by the growth of vegetation types characteristic of tidal wetland areas. Pt. Buckler Technical Assessment Report, Appendices G (Section G-3.2) and H (Fig. H-2).

S. Over an approximately 20-year period before Mr. Sweeney purchased the Site in April 2011: (a) the levees and water control structures at the site were not maintained; (b) the site was subject to tidal action and consisted of tidal marsh, including in the areas interior to the progressively eroded, deteriorated and breached levees; and (c) the Site did not contain managed wetlands as defined in the SMPA (Public Resources Code Section 29105). For these reasons, when Mr. Sweeney purchased the Site, the Annie Mason IMP no longer applied to the Site and any potential development at the Site was not specified in the SRCD's component of the local protection program. Therefore, at the time Mr. Sweeney purchased the Site, a MDP from the Commission was required pursuant to the SMPA (Public Resources Code Section 29500-29501), to authorize any "development" (as defined in Public Resources Code Section 29114(a)) at the Site, and a permit was required by the Commission, pursuant to Government Code § 66632(a), to authorize the placement of any fill or to make any substantial change in use of any water, land, or structure at the Site. Chappell Declaration at ¶¶ 17-21.

T. Before Mr. Sweeney began conducting levee construction and excavation activities at the Site, he knew that the placement of fill on levees in the Suisun Marsh, including levee repair work, requires authorization from multiple agencies. Specifically, in June 2011, Mr. Sweeney contacted the SRCD and the USACE regarding proposed levee repair work at Chipps Island (Club 915) in the Suisun Marsh. SRCD provided Mr. Sweeney with copies of the USACE's Regional General Permit (RPG3) and a relevant Biological Opinion prepared by the National Marine Fisheries Services, and Mr. Sweeney completed a USACE Wetlands Maintenance Permit Application. Working through the permitting process with SRCD, Mr. Sweeney obtained authorization from the USACE to perform the

levee repair under the RGP. However, Mr. Sweeney did not adhere to the conditions of the RGP, and on October 24, 2011, the USACE issued a Notice of Violation to Mr. Sweeney regarding his unauthorized work at Chipps Island that resulted in an illegal discharge of fill. Email message from David Wickens, USACE, dated June 23, 2011; USACE Wetlands Maintenance Permit Application prepared by John Sweeney and approved by the USACE on June 24, 2011; letter from Steve Chappell, SRCD to David Wickens, USACE, dated September 2011; USACE Notice of Violation issued to John Sweeney, dated October 24, 2011.

U. Beginning by no later than May 2012, and without applying for or obtaining a permit from BCDC under either the MPA or the SMPA, Mr. Sweeney began excavating trenches and ditches in tidal marsh, rebuilding eroded levees, and placing fill on tidal marsh to construct new levees at the Site. This work included but may not have been limited to constructing new levees by excavating material from the ditch inside the eroded levees and placing such material on (a) the remnants of the eroded levees in locations where the eroded levees remained; and (b) tidal marsh and waters of the State inside former levee locations where the former levees had completely eroded and disappeared and had been replaced by tidal marsh. In addition, without applying for or obtaining a permit from BCDC under either the MPA or the SMPA, Mr. Sweeney removed one of the former water control structures from the Site and, in approximately September 2013, replaced a sunken dock located in the southeast portion of the Site with a larger dock at the same location. Declaration of John D. Sweeney in Support of Ex Parte Application, Sonoma County Superior Court Case No. FCS046410 (December 28, 2015), at ¶ 4; Email from Mr. Sweeney to Jim Starr, CDFW, dated November 19, 2014. Aerial photographs or Google Earth images dated May 19, 2012, February 3, 2014, March 24, 2014, May 22, 2014, August 6, 2014, October 29, 2014, and January 29, 2015. Point Buckler Technical Assessment Report, Appendix K (Fill and Excavation in Wetlands and Waters Since 2011). Each of these unauthorized activities constituted "development" as defined in Public Resources Code Section 29114, and the construction of new levees, and installation of a replacement dock each constituted both placement of fill and a substantial change of use of land and water under Government Code Section 66632(a).

V. Even if the Annie Mason IMP still applied to the Site at the time Mr. Sweeney engaged in the above-described activities, which it did not, said activities were not described in and thus were not authorized by the Annie Mason IMP. Specifically, as noted above in ¶ I, the Annie Mason IMP authorized the "inspection and maintenance" of existing levees, not the construction of an entirely new levee to replace a previously existing levee that had eroded away to the point that it no longer served any effective water control function. Moreover, the Annie Mason IMP does not authorize any improvements or other work to occur in any portion of the Site that qualifies as a "tidal marsh." See Chappell Declaration at ¶ 19.

W. On March 19, 2014, while two BCDC staff members and Steve Chappell, Executive Director of SRCD, were touring the Suisun Marsh, one of the locations they visited was Simmons Island, located approximately 100 yards east of the Site across Annie Mason Slough. From the western levee on Simmons Island, directly east of the Site, they observed that a significant amount of heavy machinery was on the Site and that substantial landform alteration (*i.e.,* excavation and redeposit of excavated material) had occurred, which appeared to have as its purpose the construction of a new levee. BCDC staff and Mr. Chappell also observed a floating dock and pier at the southeastern portion of the Site. The levee construction work observed at the Site was a surprise to Mr. Chappell because the Site met the SMMP's definition of a "tidal marsh" and he knew that work of this nature was clearly subject to the USACE, Regional Water Quality Control Board, and BCDC permitting requirements. Mr. Chappell knew of his own personal knowledge that: there had been no such permit authorizations; that a "work request form" under the USACE's RGP3 had not been submitted to SRCD or approved by the USACE for the construction activity observed on the Site; and that such a request could not have been authorized by the USACE under the RGP3 for the construction activity observed at the Site. Chappell Declaration at ¶ 17.

X. On or about October 27, 2014, Mr. Sweeney transferred title to the Site to the Point Buckler Club, LCC.

Y. Some time in or about 2014, and without applying for and obtaining from the BCDC a permit under the MPA or a MDP under the SMPA, Respondents began operating the Site as a "Private Sport and Social Island located in the California Delta. Ideally suited for the Bay Area / Silicon Valley Executives who want to get away and enjoy kiting in a safe and secluded environment without boarding a plane." www.pointbucklerisland.com. *See also* www.facebook.com/pointbucklerclubVIP. Such activities constituted both a "substantial change of use of land and water" under the MPA (Government Code Section 66632(a)) and "development" (as defined in Public Resources Code Section 29114) under the SMPA.

Z. On November 14, 2014, BCDC staff inspected the Site, accompanied by Jim Starr of CDFW, and identified a number of violations of the SMPA and the MPA (as described in a letter dated January 30, 2015; *see* ¶BB, below), including but not limited to:

1. During unpermitted construction of new levees, three major tidal channels were filled, thus removing tidal flow to the interior of the island. Further, it appeared from the extent of the levee construction that Respondents were in the process of draining this once tidally active marshland in order to convert the Site to upland.

2. Unpermitted levee construction work had been conducted outside the appropriate work windows for the following protected species: Chinook Salmon, Delta Smelt, Clapper Rail, and Salt Marsh Harvest Mouse.

3. Unauthorized installation of an approximately 288-square-foot dock on the eastern portion of the Site in Anne Mason Slough, which sometime between the Fall of 2013 and Spring of 2014 was enlarged to roughly 1,400 square feet.
4. Unauthorized placement of two mobile army trailers on the northwest side of the Site and one on the southeast side of the Site.
5. Unauthorized placement of two shipping containers on the southeast side of the Site.

During the Site inspection, BCDC staff provided Mr. Sweeney with a copy of the Annie Mason IMP because he had previously informed BCDC staff that he did not have a copy of that document and had requested a copy.

AA. The unauthorized work Respondents performed at the Site from May 2012 to January 29, 2015 is shown in a series of aerial photographs and Google Earth images. The photographs and images show that Respondents:

1. initiated trench excavation and filling activities by no later than May 2012;
2. installed a large dock in Annie Mason Slough and began grading in the southeastern corner of the Site by February 3, 2014;
3. conducted levee construction and ditch excavation activities along the southern and southwestern portion of the Site, closing two of the tidal breaches, by March 24, 2014;
4. conducted levee construction and ditch excavation activities in a clockwise direction around to the northeastern portion of the site, closing off the five remaining tidal breaches and cutting off all tidal channel connectivity to the interior of the Site, by August 6, 2014;
5. completed the final segment of levee construction and ditch excavation activities along the eastern portion of the Site by October 28, 2014; and
6. excavated three crescent ponds in tidal marsh in the interior of the Site by January 29, 2015.

Aerial photographs or Google Earth images dated: May 19, 2012; February 3, 2014; March 24, 2014; May 22, 2014; August 6, 2014; October 29, 2014; and January 29, 2015. Point Buckler Technical Assessment Report, Appendix K (Fill and Excavation in Wetlands and Waters Since 2011).

BB. On January 30, 2015, BCDC sent a letter to Respodents regarding the unauthorized work observed during the November 14, 2014 Site inspection. The letter discussed the regulatory framework governing the Suisun Marsh and, in particular, the Site, including the Suisun Marsh Protection Plan and IMPs, and explained that based on available information, the history of the Site, and the recent Site visit, the Site had never been

managed in accordance with the Annie Mason IMP and had long ago reverted to a tidal marsh due to neglect, abandonment, and/or the forces of nature. The letter advised Respondents that a marsh development permit from BCDC was required prior to performing any development at the Site, and that any work that could not be retroactively approved through such a permit would likely need to be removed, restoring the Site to tidal marsh. BCDC staff recommended that Respondents restore the Site, following BCDC approval of a professionally prepared plan, or begin compiling a MDP application. Furthermore, BCDC staff requested that Respondents stop work at the Site. Finally, the letter advised Respondents of potential future BCDC enforcement options, including an Executive Director Cease and Desist Order (CDO), Commission CDO, and Civil Penalty Order.

CC. On March 25, 2015, Respondents' counsel wrote to BCDC questioning the applicability to the Site of the SMPA requirements for a marsh development permit. By letter dated May 7, 2015, BCDC staff once again explained that because conditions at the Site had fundamentally changed as a result of years of neglect, failed attempts at management, and natural forces, the Site had reverted to a tidal marsh and was no longer a managed wetland as defined in the SMPA, and, therefore, the Anne Mason IMP no longer applied to the Site. BCDC staff reaffirmed that given the fundamental change in Site conditions, any future work at the Site would require a MDP. Furthermore, BCDC staff recommended that Respondents restore the Site to tidal marsh or begin the MDP application process.

DD. A Google Earth image dated April 1, 2015 shows that Respondents continued to perform unauthorized work at the Site after receiving BCDC's letter dated January 30, 2015 directing that Respondents stop work. The referenced image shows new work (since an aerial photograph taken on January 29, 2015) including, but not limited to: (a) excavating a fourth crescent pond in tidal marsh in the interior of the Site; (b) placing fill in the ditch for a road to cross the ditch at the west side of the Site; (c) placing fill on tidal marsh for a road to the water's edge at the northwestern corner of the Site; (d) mowing vegetation and grading for a road on tidal marsh across the Site; (e) installing containers and trailers on tidal marsh in the western portion of the Site; and (f) installing another trailer or container on the east side of the Site. Google Earth image dated April 1, 2015; Point Buckler Technical Assessment Report, Appendix K (Fill and Excavation in Wetlands and Waters Since 2011).

EE. On or about July 21, 2015, San Francisco Bay Regional Water Quality Control Board (Regional Board) staff provided notice to BCDC and other state and federal agencies of potential violations of state and federal laws protecting wetlands and special status species at the Site. Email from Xavier Fernandez, Regional Board, dated July 21, 2015, with attachments.

FF. On July 28, 2015, the Regional Board sent to Point Buckler, LLC a Notice of Violation for Filling Waters of the United States and State at the Site, alleging violations of both the federal Clean Water Act and the California Water Code.

GG. On August 11, 2015, BCDC staff met with Mr. Sweeney and his counsel to discuss the violations of the SMPA and MPA at the Site. At that meeting, Respondents' counsel offered to provide additional information to BCDC regarding the historic conditions at the Site and Mr. Sweeney's recent activities there. By letter dated August 18, 2015, BCDC staff provided guidance on what the additional information should focus on to be useful to staff in determining whether or not to proceed with an enforcement action. In summary, staff suggested that the additional information include: (a) a historical perspective of the inflow and outflow of tidal water at the Site since 1984; (b) a biological Site assessment; (c) documentation of Mr. Sweeney's cultivation of waterfowl food plants at the Site; and (d) any reports submitted by Mr. Sweeney to the SRCD describing any actions which he had taken to implement the Annie Mason IMP. Staff requested that, as discussed at the August 11, 2015 meeting, Respondents' counsel provide any additional information to BCDC by no later than October 10, 2015.

HH. On September 11, 2015, the Executive Officer of the Regional Board issued Cleanup and Abatement Order No. R2-2015-0038 to Point Buckler LLC, as named Discharger, for unauthorized levee construction activities at the Site. Order R2-2015-0038 found that Point Buckler LLC's "levee construction activities included construction of a levee around the perimeter of the Site resulting in the diking off of the tidal channels located on the northeast, northwest, and southwest portions of the Site," and had adversely impacted tidal marsh vegetation and tidal marshlands that constitute waters of the State and the United States.

II. On October 12, 2015, Respondents' newly-retained counsel requested that BCDC provide additional time for Respondents to submit information and analysis responsive to BCDC's allegations of unpermitted activities at the Site, which Respondents' prior counsel had offered to provide and as discussed in BCDC's August 18, 2015 letter. Respondents' counsel indicated that Sweeny would provide BCDC with copies of submissions to the Regional Board required by Order R2-2015-0038, and suggested that those submissions would provide answers to most of the questions raised by BCDC.

JJ. On October 21, 2015, representatives of BCDC, the Regional Board, United States Environmental Protection Agency, and USACE inspected the Site, together with Mr. Sweeney and his counsel. The purposes of the inspection were to observe and document Site conditions and obtain a better understanding of: (a) the nature and extent of construction activities performed by Respondents; (b) whether the work performed by Respondents was within the purview of the USACE RGP3; and (c) the extent of waters of the Bay, the State and the United States and tidal marsh habitat that

was adversely impacted by the work performed by Respondents. During this Site inspection, BCDC staff observed that Respondents had performed additional work since the November 14, 2014 Site inspection including:

1. installed a dirt "land bridge" over culverts by placing fill at two locations across the drainage ditch to provide access to portions of the Site;
2. constructed a road across the interior of the Site;
3. excavated four semi-circular ponds in the interior of the Site;
4. installed a new, unauthorized water-control structure in the western portion of the Site;
5. moved two storage containers from the northwestern portion of the Site, where they were located during the November 14, 2014, Site inspection, to the interior of the Site and added two additional storage containers;
6. installed a goat pen and brought a number of goats to the Site;
7. removed, mowed, grazed, and/or flattened tidal marsh vegetation throughout the interior of the Site; and
8. planted approximately 14 trees on the Site, all of which had died, apparently due to high salinity levels.

KK. On December 17, 2015, BCDC wrote to Respondents' counsel and agreed to provide additional time, as requested on October 12, 2015, for Respondents to provide information responsive to BCDC's allegations of unpermitted activities at the Site. BCDC extended to February 16, 2016, the deadline for Respondents to provide information and analysis responsive to the questions raised in BCDC's letter of August 18, 2015.

LL. On January 5, 2016, the Executive Officer of the Regional Board rescinded Order R2-2015-0038 in order to address procedural due process claims asserted by Respondents. The rescission was without prejudice to Regional Board staff's ability to propose, or the Regional Board's ability to issue, a Cleanup and Abatement Order and/or other orders or permits covering the subject matter of Order R2-2015-0038.

MM. An aerial photograph dated February 10, 2016, shows that Respondents continued to perform unauthorized work at the Site after receiving BCDC's letter dated January 30, 2015 directing that Respondents stop work. The referenced image shows new work (since the Google Earth image dated April 1, 2015) including, but not limited to, installation of two helicopter landing pads and placement of three wind-break platforms, all on tidal marsh. Aerial photograph dated February 10, 2016; Point Buckler Technical Assessment Report, Appendix K (Fill and Excavation in Wetlands and Waters Since 2011).

NN. On February 16, 2016, Respondents' counsel submitted a letter to BCDC and an enclosed technical report, prepared by Applied Water Resources Corporation, entitled *Conditions at Point Buckler, Response to Cleanup and Abatement Order R2-2015-0038*, dated October 16, 2015 ("Conditions Report"), which, counsel indicated, provided some of the information regarding the Site requested by BCDC in its letter dated August 18, 2015. The Conditions Report establishes that the Site was a tidal marsh before Respondents began performing unauthorized work there and provides evidence that they violated the MPA and SMPA at the Site. According to the Conditions Report:

1. In 2013, two years after Mr. Sweeney purchased the Site, aerial photographs show that there were eight tidally-influenced channels that bisected the eroded levees and through which tidal water flowed to or toward the interior of the Site. Conditions Report at 9.
2. "Recent activities at the Island has [sic] resulted in the placement of fill material into waters of the State." Conditions Report at 4. This work involved rebuilding and constructing the exterior levees, which placed fill into sections of the former ditch system and tidal channels.
3. Respondents constructed over 40% of the existing exterior levee inland of the location of the former eroded levee by placing fill on tidal marsh. Conditions Report at 3.
4. Respondents excavated approximately 68% of the existing ditch, interior of the newly constructed and rebuilt levee, inland of the location of the former ditch, which no longer existed due to erosion of the former levees or had become silted in, and Respondents used the excavated soil as a source of fill for constructing and rebuilding the exterior levee. Conditions Report at 4.
5. Respondents excavated two arc-like shaped ponds in late-2014, and had partially dug two more ponds. *Id.*
6. Respondents installed two 24-inch diameter steel pipe culverts in and across the new ditch system, over fill, on the eastern and western sides of the Site to allow vehicular and pedestrian passage over the ditch. Conditions Report at 3.
7. "Recent activities at the Island has [sic] resulted in the removal or coverage of vegetation." Conditions Report at 6. Respondents removed at least 4.74 acres of tidal marsh vegetation as a result of excavation or filling activities. Conditions Report at 6, 7.
8. Respondents disturbed tidal marsh vegetation at the Site by rotary mowing activities that commenced in 2012 and were conducted on the west, north, and southeastern portions of the island. Respondents also disturbed tidal marsh vegetation by moving track-mounted machines and rubber tired vehicles across the island. Conditions Report at 4.

OO. Neither the Conditions Report nor the February 16, 2016 letter from Respondents' counsel contain any of the following information requested in BCDC in its August 18, 2015 letter: a biological Site assessment; documentation of cultivation of waterfowl food plants at the Site; and any reports submitted by Mr. Sweeney to the SRCD describing any actions which he had taken to implement the Annie Mason IMP.[1]

PP. On February 17, 2016, representatives of the Regional Board performed a boat survey with the Solano County Sheriff Marine Patrol around the perimeter of the Site and observed, among other things: (a) recent unauthorized grading on the east site of the Site that appeared to be maintenance or repair to the levee; and (b) placement of two mobile helicopter landing pads. In the Matter of the Inspection at Point Buckler Island, Affidavit for Inspection Warrant (of Benjamin Martin, Regional Board), dated February 19, 2016, at 11 (Affidavit for Inspection Warrant).

QQ. On March 4, 2016, representatives of the Regional Board, escorted by the Solano County Sheriff's Department, inspected the Site pursuant to an Inspection Warrant issued by Solano County Superior Court. The inspection consisted of conducting: (a) a topographic survey of the Site; (b) a forensic wetland survey designed to identify and characterize the extent of wetlands and other waters of the State and current conditions at the Site; and (c) in situ water quality measurements. Affidavit for Inspection Warrant, at 5. During this Site inspection, Regional Board staff observed that Respondents had performed additional work since the October 21, 2015 Site inspection including: (a) installed three white flat-rack containers around two green closed freight containers to create an enclosure; (b) installed four flat-rack containers (two red and two blue), painted with a yellow "H," as two helicopter landing pads, one landing pad on the eastern side and one on the western side of the Site; (c) installed a green gate and posts across the ditch crossing on the eastern side of the Site; and (d) mowed tidal marsh vegetation throughout an approximately 1.5-acre area on the eastern side of the Site (this area had not been mowed on October 21, 2015). In addition, Regional Board staff observed that the water in the ditch was bright green in color, and notably different in color compared to the water in Suisun Bay, indicative of stagnant and eutrophic conditions, in contrast to observation during the October 21, 2015 Site inspection when the water in the ditch was greenish brown in color and not noticeably different in color in comparison to the water in Suisun Bay. Regional Board, Inspection Report (April 19, 2016), Exhibit A, at A-2 to A-3.

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[1] In his transmittal letter, Respondents' counsel asserted that the statutory exemption from the requirement to obtain a marsh development permit (Pub. Resources Code § 29501.5) turns on the existence of a certified IMP and suggested that it was irrelevant whether the Site was a managed wetland or a tidal marsh. However, as a component of SRCD's local protection program, an IMP may be prepared only for a "managed wetland in private ownership within the primary management area." Pub. Res. Code § 29412.5; SMMP at 23.

RR. On April 22, 2016, the Executive Director issued a Cease and Desist Order (ED CDO) directing Respondents to, among other things, (a) cease and desist from (i) placing any fill within, or making any substantial change in use of any area subject to tidal action, or that was subject to tidal action before Respondents performed the unauthorized activities described in the ED CDO, and (ii) engaging in any activity on the Site constituting "development," as defined in the SMPA, without applying for and obtaining a permit under both the MPA and the SMPA, (b) apply for and obtain permits for all prior work at the Site for which such permits are required under either the MPA or the SMPA, or both, and (c) apply for and obtain any and all permits under both the MPA and the SMPA prior to undertaking any future activities at the Site for which such permits are required, including but not limited to any productive use of the Site in which Respondents may wish to engage.

SS. On May 17, 2016, the Regional Board issued to Respondents (a) a Complaint for Administrative Civil Liability Complaint No. R2-2016-1008 seeking $4,600,000 in civil fines for violating: (i) San Francisco Bay Basin Water Quality Control Plan Discharge Prohibition No. 9 and Clean Water Act section 301 for unauthorized discharge of fill to waters of the State and United States on the Site, and (ii) Clean Water Act Section 401 for failure to obtain a Water Quality Certification, and (b) a tentative Clean Up and Abatement Order, which, if issued, would require Respondents to restore the Site to its pre-development condition.

TT. On May 23, 2016, the Executive Director issued a Violation Report/Complaint for the Administrative Imposition of Civil Penalties against Respondents. Also on May 23, 2016, Respondents' counsel informed BCDC staff that he had filed in Solano County Superior Court a Petition for a Writ of Mandate and Complaint for Injunctive Relief (Petition and Complaint) against BCDC and its Executive Director challenging the ED CDO. Respondents' Petition and Complaint alleges, among other things that in issuing the ED CDO the Executive Director acted in excess of his legal authority, and asks for relief in the form of a judicial order invalidating the ED CDO.

UU. On August 10, 2016, the Regional Board issued Cleanup and Abatement Order No. R2-2016-0038 to Respondents for unauthorized activities conducted at the Site ("Regional Board Order"). Among other terms and conditions, the Regional Board Order:

1. prohibits the discharge of fill material except as allowed by plans accepted or approved by the Regional Board;
2. prohibits the removal or destruction of tidal marsh vegetation in a manner that adversely impacts water quality or beneficial uses;
3. requires Respondents to submit an Interim Corrective Plan including specified measures by no later than November 10, 2016;

4. requires Respondents to submit a Point Buckler Restoration Plan including specified actions by no later than February 10, 2017; and
5. requires Respondents to submit a Mitigation and Monitoring Plan including specified information by no later than February 10, 2017.

VV. Pursuant to Government Code Section 66638 and Public Resources Code Section 29601, when the Commission determines that any person has undertaken, or is threatening to undertake, any activity that may require a permit or a marsh development permit from the Commission without securing such a permit, the Commission may issue an order directing that person to cease and desist. The Commission's order may be subject to such terms and conditions may determine are necessary to ensure compliance with the MPA and SMPA, including the immediate removal of any fill or other material where that removal is necessary to avoid irreparable injury to any area within the Commission's jurisdiction or setting of a schedule with, which steps must be taken to obtain a permit or marsh development permit.

WW. Respondents have violated and continue to violate the MPA by conducting the unpermitted activities at the Site as described herein, including but not limited to:

1. Placing fill in waters of San Francisco Bay, including tidal marsh, by constructing and rebuilding levees, excavating ditches and four crescent shaped ponds, installing a new dock in Anne Mason Slough, constructing roads, and placing numerous containers, trailers, and other structures and two helipads on tidal marsh; and
2. Making substantial changes in the use of water, land, or structures within the area of the Commission's jurisdiction by:
    a. closing all the tidal breaches that existed in 2011 when Mr. Sweeney purchased the Site and thereby cutting off all tidal activity to the interior of the Site;
    b. installing a new water control structure in the western portion of the Site;
    c. draining the Site to further alter the pre-existing tidal marsh hydrology;
    d. removing or destroying tidal marsh vegetation by the placement of fill, excavation activities, mowing activities, drainage activities, and bringing goats to the Site and allowing those goats to graze on the tidal marsh vegetation;
    e. installing numerous trailers and containers and two mobile helipads at the Site; and
    f. developing and operating the Site for intensive recreational uses including but not necessarily limited to kite-boarding.

XX. Respondents have violated and continue to violate the SMPA by conducting unpermitted development at the Site as described herein, including but not limited to: (a) placing fill in waters of San Francisco Bay, including tidal marsh, by constructing and

rebuilding levees; (b) excavating ditches and four crescent shaped ponds; (c) installing a new water control structure in the western portion of the Site; (d) installing a new dock in Anne Mason Slough; (e) constructing roads; (f) placing numerous containers, trailers and other structures and two mobile helipads on tidal marsh; (g) removing or destroying tidal marsh vegetation by the excavation activities, mowing activities, and bringing goats to the Site and allowing those goats to graze on the tidal marsh vegetation; and (h) developing and operating the Site for intensive recreational uses including but not necessarily limited to kiting.

III. CONDITIONS

A. No later than February 10, 2017, the Respondents shall submit a Point Buckler Restoration Plan, acceptable to the Executive Director, that includes the following:

1. A Restoration Plan describing corrective actions designed to restore, at a minimum, the water quality functions and values of the tidal marsh, including the length of channel and area of marsh, existing prior to the Respondents' unauthorized activities, including:

   a. Restoring tidal flow into the channels and ditches;

   b. Restoring tidal circulation throughout the interior of the Site; and

   c. Restoring overland tidal connection to the Site's interior marsh during higher tides.

   The Restoration Plan shall include a workplan and implementation time schedule. The workplan shall identify all necessary permits and approvals and a process to obtain them. The Respondents shall initiate implementation in accordance with the approved implementation time schedule within 60 days of written acceptance of the Point Buckler Restoration Plan by the Executive Director. If the Plan proposes any alteration of the Site such that it is not returned to pre-existing conditions, such alterations must be addressed in the Mitigation and Monitoring Plan.

2. A Restoration Monitoring Plan (RMP) shall include monitoring methods and performance criteria designed to monitor and evaluate the success of the implemented restoration actions. Performance criteria shall include targets for water quality, soil and hydrologic conditions, and vegetation composition including invasive species control. The RMP shall monitor the success of the restoration actions until performance criteria have been successfully achieved, and for at least five years following completion of the restoration actions.

B. No later than February 10, 2017, the Respondents shall submit a Mitigation and Monitoring Plan, acceptable to the Executive Director, that includes the following:

1. A proposal to provide compensatory mitigation to compensate for any temporal and permanent impacts to wetlands and other waters of the State that resulted from unauthorized activities at the Site. The Mitigation and Monitoring Plan (MMP) shall:
    a. Describe existing site conditions at the proposed mitigation site;
    b. Describe implementation methods used to provide compensatory mitigation;
    c. Include monitoring that will be implemented and performance criteria that will be used to evaluate the success of the compensatory mitigation; and
    d. Include an implementation schedule. The Respondents shall initiate implementation in accordance with the accepted implementation time schedule within 60 days of written acceptance of the MMP by the Executive Director.

C. By no later than March 3, 2017, Respondents shall apply for a permit to request authorization from the Commission for the placement of fill, extraction of materials, substantial change in use, or development activities that Respondents have conducted or performed at the Site at any time from April 19, 2011 through the date of this Order. The application must be prepared in compliance with the Commission's regulations governing major permits. *See* 14 C.C.R. §§ 10300-10316.

D. Respondents shall apply for a permit from the Commission prior to the placement of fill, extraction of materials, substantial change in use, or development activities that Respondents propose to undertake or conduct at the Site after the date of this Order. Any such application must be prepared in compliance with the Commission's regulations governing major permits. *See* 14 C.C.R. §§ 10300-10316.

E. Respondents must cease and desist from any further actions at the Site that would damage or destroy marsh vegetation at the Site, including mowing vegetation, discing soil or vegetation, or grazing goats at the Site.

F. Respondents must cease and desist from any further actions that would drain surface water or groundwater, or otherwise further alter the hydrology, of the Site.

IV. CIVIL PENALTY ORDER

A. Government Code Section 66641.5(e) provides that the Commission may administratively impose civil liability for any violation of the MPA in an amount of which shall not be less than $10 nor more than $2,000 for each day in which the violation occurs or persists, but may not administratively impose a penalty of more than $30,000 for a single violation.

B. Government Code Section 66641.9(a) states:

> *In determining the amount of administrative civil liability, the commission shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the violation is susceptible to*

removal or resolution, the cost to the state in pursuing the enforcement action, and with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary removal or resolution efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require.

C. Nature, circumstances, extent, and gravity of the violations. Excavation of tidal marsh at the Site physically removed estuarine habitat and the placement of fill eliminated surface water and wetland habitats. The harm from Respondents' unauthorized filling, destruction of tidal marsh, and cutting-off of tidal action at the Site was and is substantial, has adversely impacted beneficial uses of Suisun and Grizzly Bays, and likely resulted in the illegal take of threatened or endangered species protected under the California and federal Endangered Species Acts. Unauthorized filling and excavation activities occurred outside work activity windows established to protect sensitive species in the Suisun Marsh. Blocked tidal channels at the Site are preventing longfin smelt from being able to access spawning grounds, young salmonids from accessing feeding grounds, and have cut off the export of food material from the Site's interior wetlands needed to support the threatened Delta smelt.

D. Whether the violations are susceptible to removal or resolution. Respondents' unauthorized filling and other unauthorized construction activities at the Site are potentially susceptible to removal or resolution, but to date, Respondents have taken no action to remove the unauthorized work or to restore tidal action or tidal marsh at the Site. Moreover, the temporal impacts to tidal marsh habitat and biological resources from Respondents' unauthorized activities are unavoidable, continuing, and potentially increasing with every passing day.

E. The costs to the state in pursuing the enforcement action. BCDC staff has incurred substantial staff costs in pursuing this enforcement action. These costs consist of time spent by numerous staff members on two Site visits; two meetings with Respondents and their counsel at BCDC's offices; numerous meetings among BCDC, Regional Board, and USEPA staff, including two multi-agency meetings together with Respondents and their counsel; preparation of an Executive Director Cease and Desist Order and a Violation Report/Complaint for the Administrative Imposition of Civil Penalties (Complaint); reviewing Respondents' Statement of Defense and preparing a recommended enforcement decision, and preparing for and participating in a contested hearing before the Enforcement Committee.

F. Ability to pay and effect on ability to continue in business. The Regional Board staff investigated and analyzed Respondents financial resources, and determined that Respondents have the ability to pay a substantial penalty. Respondents

claim that the Regional Board made a number of factual errors in its analysis of Respondents' ability to pay. However, Respondents have submitted no evidence of Mr. Sweeney's assets, or the assets of Point Buckler Club, LLC, to establish that they would be unable to pay the penalty proposed by BCDC staff in the Complaint.

G. Any voluntary removal or resolution efforts. As noted above, Respondents have taken no action to remove the unauthorized fill or other work or to restore tidal action or tidal marsh at the Site, and they continued to develop the Site for their kiteboarding operations after BCDC staff requested that they stop work and apply for a permit, in a letter dated January 30, 2015. Respondents claim that they intend to apply for a BCDC permit to seek authorization for certain completed work or proposed future work at the Site. However, BCDC staff first requested that Respondents apply for a permit in a letter dated January 30, 2015, over 20 months ago, but to date that they have failed to do so. Respondents recently proposed to BCDC staff a conceptual plan for future use and partial restoration of the Site. However, Respondents did not prepare the conceptual plan based on a technical analysis of the nature and extent of tidal exchange that would be necessary to restore tidal marsh and associated habitat values at the Site. Furthermore, Respondents have declined to discuss mitigation for temporal impacts resulting from the unauthorized work at the Site and for Respondents proposed future uses of the Site. Respondents have been only minimally cooperative.

H. Any prior history of violations; the degree of culpability. Before commencing unauthorized work at the Site, Mr. Sweeney knew that the placement of fill on levees in the Suisun Marsh requires authorization from multiple agencies. In June 2011, Mr. Sweeney contacted SRCD and the USACE to obtain authorization for levee repair work at Chipps Island in the Suisun Marsh (Club 915). Mr. Sweeney did not adhere to the conditions of the USACE's Regional General Permit, and on October 24, 2011, the USACE issued a Notice of Violation to Mr. Sweeney regarding his unauthorized work at Chipps Island that resulted in an illegal discharge of fill. Based on Mr. Sweeney's experience with the SRCD and the USACE at Chipps Island, he may have made a knowing and intentional decision to proceed with unauthorized construction activities and other work at the Site without contacting any regulatory agency and without applying for any of the permits he knew or should have known were required. At a minimum, Respondents' conduct at the Site was unreasonable and demonstrated a willful indifference to the regulatory permitting process that is intended to protect water quality, beneficial uses, and to prevent illegal discharges.

I. Economic savings resulting from the violations. By conducting filling, excavation, and other activities at the Site without authorization, Respondents avoided the costs of obtaining permits from BCDC and USACE, a Clean Water Act Section 401 water quality certification from the Regional Board, and perhaps other local approvals or permits, as well as the costs of complying with resource agency requirements to protect endangered or threatened species (such as, at a minimum, performing certain work only during work activity windows). Respondents also avoided the costs of mitigation for filling portions of the Site and for associated adverse impacts to biological resources. In addition, Respondents have benefitted economically from their unauthorized activities. The new levees Respondents constructed around the perimeter of the Site have provided an economic benefit by allowing them to conduct their commercial kiteboarding business, and expand kiteboarding operations in the northwestern portion of the Site, for the past two years without having those operations disrupted or damaged from tidal action, including tidal flooding from periodic overtopping of the former remnant levees.

J. Based on consideration of the relevant factors set forth in Government Code Section 66641.9(a), the penalty amounts authorized by Government Code Section 66641.5(e), and the preceding findings, the Commission hereby finds that an administrative penalty of $772,000 is justified to resolve this matter.

K. Pursuant to Government Code Section 66647, within 30 days of the Effective Date of this Order, Respondents shall remit the penalty payment to the Commission, by cashier's check, in the amount of $772,000 payable to the San Francisco Bay Conservation and Development Commission – Bay Fill Clean-Up and Abatement Fund.

V. TERMS

1. Under Government Code Section 66641 and Public Resources Code Section 29601, any person who intentionally or negligently violates any cease and desist order issued by the Commission may be liable civilly in the sum of up to $6,000 for each day in which such violations persist. In addition, upon the failure of any person to comply with any cease and desist order issued by the Commission and upon the request of the Commission, the Attorney General of the State of California may petition the superior court for the issuance of a preliminary or permanent injunction, or both, restraining the person or persons from continuing any activity in violation of the cease and desist order.

2. This order does not affect any duties, right, or obligations under private agreements or under regulations of other public bodies.

3. Mr. Sweeney and Point Buckler, LLC must conform strictly to this order.

4. This order does not constitute a recognition of property rights.

5. This order is effective upon issuance thereof.

VI. OPPORTUNITY FOR JUDICIAL REVIEW

Under Government Code Section 66639 and Public Resources Code Section 29601, within thirty (30) days after service of a copy of a cease and desist order issued by the Commission, any aggrieved party may file with the superior court a petition of writ of mandate for review of the order pursuant to Section 1094.5 of the Code of Civil Procedure. Failure to file such an action shall not preclude a party from challenging the reasonableness and validity of the order in any judicial proceedings brought to enforce the order or for other civil remedies.

DATED: November 18, 2016

LAWRENCE J. GOLDZBAND
Executive Director
San Francisco Bay Conservation and
Development Commission

List of Exhibits

Exhibit A: Index of Administrative Record

Commission Cease and Desist and Civil Penalty Order No. CDO 2016.02
Index of Administrative Record

	Document Description	Date
1	Suisun Marsh Protection Plan	Dec-76
2	Suisun Marsh Management Program	Sep-80
3	Annie Mason Point Club Management Plan	11/15/84
4	Annie Mason Point Club Management Plan and Supplemental Materials	11/15/1984 - 1/29/1990
5	Letter from SRCD to Mr. James Taylor re: DWR Pump Facility	9/13/88
6	Application for BCDC Marsh Development Permit	9/18/89
7	BCDC Response to Application for BCDC Marsh Development Permit	10/12/89
8	SRCD Wetlands Maintenance Management Report	1/29/90
9	Department of the Army, Regional General Permit 3	7/8/13
10	Email from Mr. John Sweeney to Jim Starr, CDFW	11/19/14
11	BCDC Letter to Mr. John Sweeney re: Point Buckler Island Unauthorized Project, Suisun Marsh	1/30/15
12	Letter from Miller Starr Regalia to BCDC re: Point Buckler, LLC; Performance of Maintenance Activities Purusuant to Annie Mason Point Club Individual Management Plan, Club No. 801	3/25/15
13	BCDC Letter to Miller Starr Regalia re: Point Buckler Island Unauthorized Project, Suisun Marsh	5/7/15
14	Regional Board Notice to BCDC and other agencies re: Potential Violation for Unauthorized Diking of Suisun Tidal Marsh at Point Buckler Island	7/21/15
15	Regional Board Letter to Mr. John Sweeney re: Notice of Violation for Filling Waters of the United States and State, Point Buckler Island in the Suisun Marsh, Solano County	7/28/15
16	BCDC Letter to Miller Starr Regalia re: Point Buckler Island (BCDC Enforcement File No. ER2012.038)	8/18/15
17	Regional Board to Mr. John Sweeney re: Cleanup and Abatement Order No. R2-2015-0038 for Unauthorized Levee Construction Activities at Point Buckler Island in the Suisun Marsh, Solano County	9/11/15
18	Letter from Briscoe Ivester and Bazel, LLP to BCDC re: Notice of Replacement of Counsel	10/12/15
19	Applied Water Resources, Conditions Report at Point Buckler, Response to Cleanup and Abatement Order R2-2015-0038	10/16/15
20	BCDC Letter to Briscoe Ivester and Bazel re: Point Buckler Island; BCDC Enforcement File No. ER2012.038 (Pt. Buckler, LLC; John Sweeney, Principal)	12/17/15
21	Declaration of John D. Sweeney in Support of Ex Parte Application	12/28/15
22	Regional Board Letter to Mr. John Sweeney re: Recission of Cleanup and Abatement Order No. R2-2015-0038 for Point Buckler Island, LLC	1/5/16
23	Letter from Briscoe Ivester and Bazel, LLP to BCDC re: Point Buckler Island; BCDC Enforcement File No. ER2012.038	2/16/16
24	In the Matter of the Inspection at Point Buckler Island, Affadavit for Inspection Warrant	2/19/16
25	Solano County Inspection Warrant	2/19/16
26	Regional Board Inspection Report	2/19/16
27	Declaration of Steven Chappell	4/21/16

	Document Description	Date
28	**Grant Deed**	7/27/04
29	**Grant Deed**	4/19/11
30	**Grant Deed**	10/27/14
31	**Business Entity Detail for Point Buckler Club, LLC Showing Sweeney As Registered Agent**	2/19/16
32	**Property Detail Report for Point Buckler Club, LLC**	3/7/16
33	**Screenshot of Point Buckler Website**	
34	**Screenshot of Point Buckler Facebook Page**	
35	**Point Buckler Technical Assessment Report of Current Conditions and Historic Reconstruction Since 1985**	5/12/16
36	**BCDC Executive Director Cease and Desist Order**	4/22/16
37	**Regional Board Complaint for Administrative Civil Liability Complaint No. R2-2016-1008**	5/17/16
38	**Aerial Photos or Google Earth Images**	4/30/1985, 7/14/1988, 8/18/1988, 6/13/1990, 5/28/1991, 8/23/1993, Summer 2003, Summer 2003 (annotated), 10/20/2003, Summer 2006, April 2011, April 2011 (annotated),9/1/2011, 5/19/2012, 2/3/2014, 3/24/2014, 5/22/2014, 8/6/2014, 10/29/2014, 1/29/2015, 4/1/2015, 2/10/2016
39	**Violation Report and Complaint for the Administrative Imposition of Civil Penalties**	5/23/17
	Records Added to the Administrative Record After Issuance of Violation Report	
40	**Letter, Joel Ellinwood to Ming Yeung (BCDC) Re. Levee Maintenance; Extension of BCDC's "Bay Jurisdiction (BCDC Inquiry File No. SL.VS.7136.1 – Chipps/ Van Sickle Island)**	12/11/09
41	**Email, David Wickens (USACE) to John Sweeney Re. Chipps Island Levee Breach**	6/23/11
42	**USACE RGP3 Application, Chipps Island Sport and Social Club, LLC, John Sweeney**	6/24/11
43	**Letter, Steve Chappell (SRCD) to David Wickens (USACE)**	9/22/11
44	**USACE Notice of Violation to John Sweeney Re. property identified as "Club 915"**	10/24/11
45	**Expert's Response to July 11, 2016 Evidence Package; Prepared by Stuart Siegel, Peter Baye, and Bruce Herbold**	7/21/16
46	**Regional Board Cleanup and Abatement Order No. R2-2016-0038**	8/12/16
47	**Regional Board Prosecution Team's Staff Summary Report, Administrative Civil Liability Complaint R2-2016-1008**	9/2/16
48	**Statement of Defense, Larry Bazel Declaration with Exhibits, John Sweeney Declaration with Exhibits, Petition for Review with State Board**	9/12/16
49	**Letter to Marc Zeppetello from Stuart Siegel re: Role of Daily Ebb and Flow of the Tides in Establishing Tidal Marsh**	8/10/16
50	**Declaration, Adrienne Klein**	9/23/16

Administrative Civil Liability Complaint
No. R2-2016-1008

John D. Sweeney and
Point Buckler Club, LLC

Description of Exhibit Provided by Hard Copy and Electronically
(Court Proceedings)

Exhibit 50

50a. Solano County Superior Court Order for Stay of 2015 CAO, December 29, 2015

50b. Solano County Superior Court Order Sustaining State's Demurrer, July 1, 2016

50c. Solano County Superior Court Formal Dismissal, July 20, 2016

50a. Solano County Superior Court Order for Stay of 2015 CAO,
December 29, 2015

By Fax

FILED
Clerk of the Superior Court
DEC 29 2015
By Clare Stevenson
DEPUTY CLERK

JOHN BRISCOE (053223)
LAWRENCE S. BAZEL (114641)
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
Tel (415) 402-2700
Fax (415) 398-5630
jbriscoe@briscoelaw.net
lbazel@briscoelaw.net

Attorneys for Plaintiff
POINT BUCKLER CLUB, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SOLANO

POINT BUCKLER CLUB, LLC, Petitioner and Plaintiff, v. BRUCE H. WOLFE, Executive Officer of the California Regional Water Quality Control Board, San Francisco Bay Region; CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN FRANCISCO BAY REGION; and DOES 1 through 20; Respondents and Defendants.	No. FCS046410 [~~PROPOSED~~] ORDER

Petitioner and plaintiff Point Buckler LLC ("Plaintiff") has applied for a stay of Cleanup and Abatement Order No. R2-2015-0038 (the "Order") or, in the alternative, a temporary restraining order enjoining implementation of that Order and an order to show cause regarding a preliminary injunction.

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED THAT:

STAY

The Order is stayed pending judgment in this matter.

ORDER TO SHOW CAUSE

Respondents and defendants California Regional Water Quality Control Board, San Francisco Bay Region (the "Regional Board") and Bruce H. Wolfe, in his capacity as Executive

Officer of the Regional Board (collectively "Defendants") are hereby ordered to appear on JAN. 12, 2016 at 9:30 AM in Department 3 of this Court located at 600 Union Avenue, Fairfield, California, to show cause why a preliminary injunction should not be ordered restraining and enjoining them and their employees and agents, or any other persons acting with them or on their behalf, from enforcing the Order pending judgment in this action.

TEMPORARY RESTRAINING ORDER

Pending a hearing on the order to show cause, above, Defendants, their employees and agents, and any other persons acting with them or on their behalf, are restrained and enjoined from enforcing the Order.

IT IS FURTHER ORDERED THAT:

The restraining order granted herein shall expire on when the Court decides whether to issue the requested preliminary injunction.

This Order and supporting papers shall be served on Defendants no later than [redacted] 12/31/15 by personal service, facsimile transmission, or overnight mail. Proof of such service shall be filed at least 5 court days prior to the hearing.

Any opposition papers to the Order to Show Cause shall be filed and served on Plaintiff by personal service, facsimile transmission, or overnight mail no later than 1·8·16. Any reply papers shall be filed and served on Defendants by personal service, facsimile transmission, or overnight mail no later than 1·11·16.

This temporary restraining order is effective upon the filing by Plaintiff of an undertaking in the sum of $ 0.

IT IS SO ORDERED.

Date: 12/29/15

Judge of the Superior Court

PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. I am employed in the City and County of San Francisco, and my business address is 155 Sansome Street, Suite 700, San Francisco, California 94104.

On December 28, 2015, at San Francisco, California, I served the following document(s):

[PROPOSED] ORDER

on the following parties:

Bruce H. Wolfe
Executive Officer
California Regional Water Quality Control Board, San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, CA 94612
Telephone: (510) 622-2300
Facsimile: (510) 622-2460

California Regional Water Quality Control Board, San Francisco Bay Region
c/o Bruce Wolfe
1515 Clay Street, Suite 1400
Oakland, CA 94612
Telephone: (510) 622-2300
Facsimile: (510) 622-2460

Christiana Tiedemann
Supervising Deputy Attorney General
Office of the Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612
Telephone: (510) 622-2124
Facsimile: (510) 622-2270

☒ **BY HAND:** On the date written above, I provided the documents to a professional process server for service to the persons shown on the service list.

Arlene Won

50b. Solano County Superior Court Order Sustaining State's Demurrer,
July 1, 2016

ENDORSED FILED
Clerk of the Superior Court

JUL 1 - 2016

By Clare Stevenson
DEPUTY CLERK

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SOLANO

DEPARTMENT THREE

POINT BUCKLER CLUB, LLC, Petitioner and Plaintiff, vs. BRUCE H. WOLFE, Executive Officer of the California Regional Water Quality Control Board, San Francisco Bay Region; CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN FRANCISCO BAY REGION; and DOES 1 through 20; Respondents and Defendants.	CASE No. FCS046410 Assigned for all purposes to Judge Harry S. Kinnicutt Department Three ORDER AFTER HEARING

The above-captioned matter came on calendar June 23, 2016, on Respondents' Demurrer To Plaintiff's First Amended Complaint. Plaintiff appeared by counsel Lawrence Solomon Bazel. Defendants appeared by counsel Matthew Bullock. Arguments were presented to the Court and the Court thereafter took the matter under submission.

The Court finds and orders as follows:

Respondents' demurrer to Petitioner's first amended complaint is sustained without leave to amend.

Petitioner's sole remedy against Respondents is to petition the Court for administrative mandamus in order to set aside any final order or decision of the administrative agency. (Water Code § 13330(a); Code Civ. Proc. § 1094.5(f); *Agins v. Tiburon* (1979) 24 Cal.3d 266, 273; *City of Santee v. Superior Court* (1991) 228 Cal.App.3d 713, 718; *Walter H. Leimert Co. v. Cal. Coastal Comm'n* (1983) 149 Cal.App.3d 222, 231-232.) Petitioner concedes that Respondents have rescinded the order being challenged by their petition. (FAC, ¶ 9.) When a challenged order of an administrative governmental agency is revoked, a petition or complaint challenging that order is moot. (*Nat'l Ass'n of Wine Bottlers v. Paul* (1969) 268 Cal.App.2d 741, 746.) Regardless of whether any exception to mootness could be found to apply in this case, Petitioner has failed to provide any compelling reason why this Court should exercise its discretion to consider the merits of the petition. (See, *Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479-480 [exceptions to the rules regarding mootness are ***discretionary***].)

Dated: June 30, 2016

HARRY S. KINNICUTT
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SOLANO
DEPARTMENT THREE

* * * * *

Case No. FCS046410

CERTIFICATE OF MAILING

I, Clare Stevenson, certify under penalty of perjury that I am a judicial assistant/deputy clerk of the above-entitled court; that I am over the age of 18 years and not a party to the within action; that I am familiar with the County of Solano's procedure for collection and processing of correspondence for mailing with the United States Postal Service. This document will be deposited with the United States Postal Service on the date shown below in the ordinary course of business. This document was sealed and placed for collection and mailing on the date shown below at the address given for deposit in the United States Postal Service and following ordinary business practices. Said envelopes were addressed to the attorneys for the parties, or the parties, as shown below:

Document Mailed: ORDER AFTER HEARING

LAWRENCE S. BAZEL, ESQ.
BRISCOE IESTER & BAZEL LLP
155 SANSOME ST., SEVENTH FL.
SAN FRANCISCO, CA 94104
(Counsel for Petitioner and Plaintiff)

MATTHEW G. BULLOCK, ESQ.
DEPUTY ATTORNEY GENERAL
455 GOLDEN GAE AVE., SUITE 11000
SAN FRANCISCO, CA 94102-7004
(Counsel for Respondents and Defendants)

Dated: JUL 1 - 2016

Clare Stevenson
CLARE STEVENSON - DECLARANT

50c. Solano County Superior Court Formal Dismissal, July 20, 2016

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
Matthew Bullock (Bar # 243377)
Office of the California Attorney General
455 Golden Gate Ave., Suite 11000, San Francisco, CA 94102
TELEPHONE NO.: (415) 703-1678 FAX NO. (Optional): (415) 703-5480
E-MAIL ADDRESS (Optional): Matthew.Bullock@doj.ca.gov
ATTORNEY FOR (Name): Reg. Water Quality Control Bd, SF Bay Region and Bruce H. Wolfe, Respondents

FOR COURT USE ONLY

ENDORSED FILED
Clerk of the Superior Court
JUL 20 2016
D. Cimmino
By _____ DEPUTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SOLANO
STREET ADDRESS: 600 Union Ave.
MAILING ADDRESS:
CITY AND ZIP CODE: Fairfield 94533
BRANCH NAME:

PLAINTIFF/PETITIONER: Point Buckler Club, LLC
DEFENDANT/RESPONDENT: Reg. Water Quality Control Bd, SF Bay Region, et al.

REQUEST FOR DISMISSAL

CASE NUMBER: FCS046410

A conformed copy will not be returned by the clerk unless a method of return is provided with the document.

This form may not be used for dismissal of a derivative action or a class action or of any party or cause of action in a class action. (Cal. Rules of Court, rules 3.760 and 3.770.)

1. TO THE CLERK: Please **dismiss** this action as follows:
   a. (1) [X] With prejudice (2) [ ] Without prejudice
   b. (1) [ ] Complaint (2) [X] Petition
   (3) [ ] Cross-complaint filed by *(name)*: on *(date)*:
   (4) [ ] Cross-complaint filed by *(name)*: on *(date)*:
   (5) [X] Entire action of all parties and all causes of action
   (6) [X] Other *(specify)*:* Following demurrer sustained without leave as to all causes of action

2. *(Complete in all cases except family law cases.)*
   The court [ ] did [X] did not waive court fees and costs for a party in this case. *(This information may be obtained from the clerk. If court fees and costs were waived, the declaration on the back of this form must be completed).*

Date: July 7, 2016

Matthew Bullock
(TYPE OR PRINT NAME OF [X] ATTORNEY [ ] PARTY WITHOUT ATTORNEY)

▶ Matthew Bullock
(SIGNATURE)

*If dismissal requested is of specified parties only of specified causes of action only, or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.

Attorney or party without attorney for:
[ ] Plaintiff/Petitioner [X] Defendant/Respondent
[ ] Cross-Complainant

3. **TO THE CLERK:** Consent to the above dismissal is hereby given.**
   Date:

(TYPE OR PRINT NAME OF [ ] ATTORNEY [ ] PARTY WITHOUT ATTORNEY)

▶
(SIGNATURE)

** If a cross-complaint – or Response (Family Law) seeking affirmative relief – is on file, the attorney for cross-complainant (respondent) must sign this consent if required by Code of Civil Procedure section 581 (i) or (j).

Attorney or party without attorney for:
[ ] Plaintiff/Petitioner [ ] Defendant/Respondent
[ ] Cross-Complainant

(To be completed by clerk)

4. [✓] Dismissal entered as requested on *(date)*: JUL 20 2016
5. [ ] Dismissal entered on *(date)*: as to only *(name)*:
6. [ ] Dismissal **not entered** as requested for the following reasons *(specify)*:
7. a. [ ] Attorney or party without attorney notified on *(date)*:
   b. [ ] Attorney or party without attorney not notified. Filing party failed to provide
   [ ] a copy to be conformed [ ] means to return conformed copy.

Date: JUL 20 2016

Clerk, by D. Cimmino, Deputy

Form Adopted for Mandatory Use
Judicial Council of California
CIV-110 [Rev. Jan. 1, 2013]

Code of Civil Procedure, § 581 et seq.;
Gov. Code, § 68637(c); Cal. Rules of Court, rule 3.1390
www.courts.ca.gov

LexisNexis® Automated California Judicial Council Forms

Administrative Civil Liability Complaint
No. R2-2016-1008

John D. Sweeney and
Point Buckler Club, LLC

Description of Exhibit Provided by Reference
(Water Board 401 Certifications)

Exhibit 51

51a. Conditional Water Quality Certification for Blacklock Restoration Project, SRCD Ownership #635, Suisun Marsh, Solano County, CA; Corps File No. 303850N, September 7, 2006
http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/PointBuckler/Water%20Board%20Orders/New/Correspondences%20from%20the%20WB/Blacklock_WQC_Sept2006.pdf

51b. Conditional Water Quality Certification for the Suisun Marsh Exterior Levee Maintenance Dredging Program, Solano County, June 4, 2014
http://www.suisunrcd.org/documents/2014Dredging401Cert..pdf

51c. Conditional Water Quality Certification for the Roaring River Distribution System Fish Screens Sediment Removal Project, Montezuma Slough, Solano County, December 16, 2015
http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/PointBuckler/Water%20Board%20Orders/New/Correspondences%20from%20the%20WB/Fish_Screens_Sediment_Removal_WQC_815147_Dec2015.pdf

51d. Conditional Water Quality Certification for the Tule Red Tidal Restoration Project, Solano County, July 19, 2016
http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/PointBuckler/Water%20Board%20Orders/New/Correspondences%20from%20the%20WB/R2_Tule_Red_Tidal.pdf

Administrative Civil Liability Complaint
No. R2-2016-1008

John D. Sweeney and
Point Buckler Club, LLC

Description of Exhibit Provided by Hard Copy and Electronically

Exhibit 52

Point Buckler Survey Memo, November 9, 2016

CASE FILE MEMO

To: Point Buckler Club, LLC Case File
Place ID 816826

From: Benjamin Martin
NPDES Division – Enforcement Section

Date: November 9, 2016

Subject: October 4, 2016, Point Buckler Survey – Point Buckler Island, Suisun Marsh, Solano County

Summary

This case file memo documents my observations during inspection of a topographic survey at Point Buckler Island (Island) and adjacent islands (Simmons and Grizzly Islands) by Kjeldsen, Sinnock, and Neudeck, Inc. (KSN), on behalf of Point Buckler Club, LLC (Club). KSN collected survey data to determine elevations for various features on the Island, determine low tide water elevations, and obtain borrow ditch cross sections. Attachments to this memo include a photo log of the inspection and pertinent emails related to correspondence prior to the inspection.

Background

The Club determined to survey both the Island and control and monument points on nearby Simmons and Grizzly Islands. However, the Club provided less than a 24-hour notice of its survey work to the Water Board. I was not aware of the communications about site access or coordination prior to the inspection. Afterwards, I learned from Brian Thompson, Senior Engineering Geologist with the Water Board, that in a September 15, 2016, email, Christopher Martin, KSN project surveyor, contacted the Suisun Resource Conservation District to gain access to private property on Simmons Island, Suisun Marsh (Club #802 – Rich Island Duck Club) so that benchmark controls at the property could be surveyed. These benchmark controls would allow for survey results to be compared to the topographic survey conducted by CLE Engineering on March 2, 2016,[1] on behalf of Board staff. In a September 29, 2016, email, Marc Zeppetello, counsel for San Francisco Bay Conservation and Development Commission (BCDC), communicated to the Club that Jim Waters, owner of Club #802, would not agree to property access without a request from a regulatory agency. Brian Thompson notified Mr. Waters in an email on September 30, 2016, that Water Board staff and staff at BCDC (copied)

[1] The March 2, 2016, topographic survey was performed on Point Buckler Island by CLE Engineering and results are found in the May 12, 2016, technical assessment of Point Buckler Island, prepared for the Water Board by Siegel Environmental (Prosecution Team Exhibit 11, Appendices E and F).

did not object to him granting the Club the same access provided to Water Board staff for their March 2, 2016, survey. Mr. Thompson's e-mail included that it was not clear if a representative would be present to observe the topographic survey on behalf of the agencies. In an October 3, 2016, email, Larry Bazel, counsel for the Club, asked Christopher Martin to coordinate their site visit with Brian Thompson (copied) of the Water Board. The email was sent at 3:01 p.m., providing less than a 24-hour notice to mobilize with no information concerning the timing of the survey activities. Due to this inadequate notice, I was unable to observe the entire survey.

Inspection

I first received notification concerning a site inspection when Mr. Thompson left a voice message for me after receiving the 3:01 p.m. email from Mr. Bazel. He informed me that I should be prepared to perform an inspection at the Island on October 4, 2016, to monitor a survey crew, and that no details concerning timing of the survey or how to access the Island were known as they had not yet been communicated to him. On the morning of October 4, 2016, I spoke with Jim Waters on the phone to reconfirm permission to access his property on Simmons Island. At approximately 10:30 a.m., I contacted John Sweeney, president and manager of the Club, by phone and he agreed to provide boat service for me from Mr. Waters' property to the Island.

Upon arrival onto Grizzly Island in Suisun Marsh, I first met with Joe Pilatti, assistant surveyor for KSN, who was surveying a control monument (Photograph 1) on Grizzly Island. Mr. Pilatti explained that the survey crew included himself and Brian Frame, survey party chief for KSN who was currently on the Island, after which he led me to an entrance to access Mr. Water's property as he continued to survey monuments on Grizzly Island. At approximately 12:10 p.m., I observed survey equipment at two locations on Mr. Waters' property (Photographs 2 and 3).

At approximately 12:30 p.m., Mr. Sweeney ferried me to the Island, and I confirmed permission for access from Mr. Sweeney. Mr. Sweeney's response to permission for access included statements that he had filed for bankruptcy, he will not pay the $10 million required to fix the Island, and the State can do with the Island whatever it pleases. I asked for clarification regarding his response and he agreed that I had permission to access the Island. Mr. Sweeney then explained that the surveyor had completed collection of low tide water elevations for the Island and it would be helpful in determining the validity of a tidal multiplier developed by NOAA for the Island in relation to the Port Chicago Tide Station.

Mr. Sweeney then introduced me to Mr. Frame, who explained that he had already collected water elevations to document the low tide line for the Island, was validating control points on the Island and a subset of the survey points from the March 2, 2016, topographic survey, and that he would survey cross sections of former levee breaches. Mr. Sweeney then left us and proceeded to the clubhouse area on the western end of the Island.

I started walking the perimeter levee to observe the current status of the Island while Mr. Frame was completing a survey transect of the Island's interior marsh plain. The perimeter levee walk took approximately 15 minutes and I photo-documented my observations while still able to see Mr. Frame working on the interior transect. I reconvened with Mr. Frame as he completed the transect and loaded his equipment into an all-terrain vehicle before we drove towards the

clubhouse to continue the survey. Mr. Sweeney was walking from the clubhouse area towards the eastern levee and flagged us down to inform me that I was required to remain in the immediate proximity of the surveyor and was only permitted to document photographs while with Mr. Frame. Mr. Sweeney further mentioned that the Island had already been documented extensively and requested that I delete photographs documented during my levee walk before leaving the Island or surrender my camera. I offered to delete the photographs immediately but Mr. Sweeney reiterated deleting the photographs before leaving the Island. Shortly afterwards I deleted all photographs collected from the time I arrived on the Island until Mr. Sweeney expressed his objection. I then collected new photographs while accompanying Mr. Frame for the remainder of the survey as he completed final validation and cross sections of former levee breaches around the Island (Photographs 4 through 9).

At approximately 2:30 p.m., Mr. Frame completed the survey and we met with Mr. Sweeney on the eastern levee before he ferried us back to Mr. Waters' property.

Other Observations

During the time I accompanied Mr. Frame, we traveled along the interior access road and perimeter levee of the Island with use of an all-terrain vehicle. I observed that the borrow ditch water was transparent brown with floating mats of what appeared to be algae (as can also be seen in Photograph 6) and some small unidentified fish (≤ 25 mm). I also observed a red ground-to-dock steel ramp on the eastern levee (as can also be seen in Photograph 7) marked with a 20,000 pound capacity and a landing craft (labeled Deltalandingcraft.com and LCU1528) berthed at the north end of the Island (as can also be seen in Photograph 8). Vegetation interior of the levee was primarily brown compared with vegetation exterior of the levee, which was green (as can also be seen in Photographs 7 through 9). Additionally, vegetation was observed growing on top of southeast and northeast portions of the levee. Lastly, I observed significant exterior levee erosion at a former levee breach (as can also be seen in Photograph 9; Breach 1) on the southeast portion of the Island.

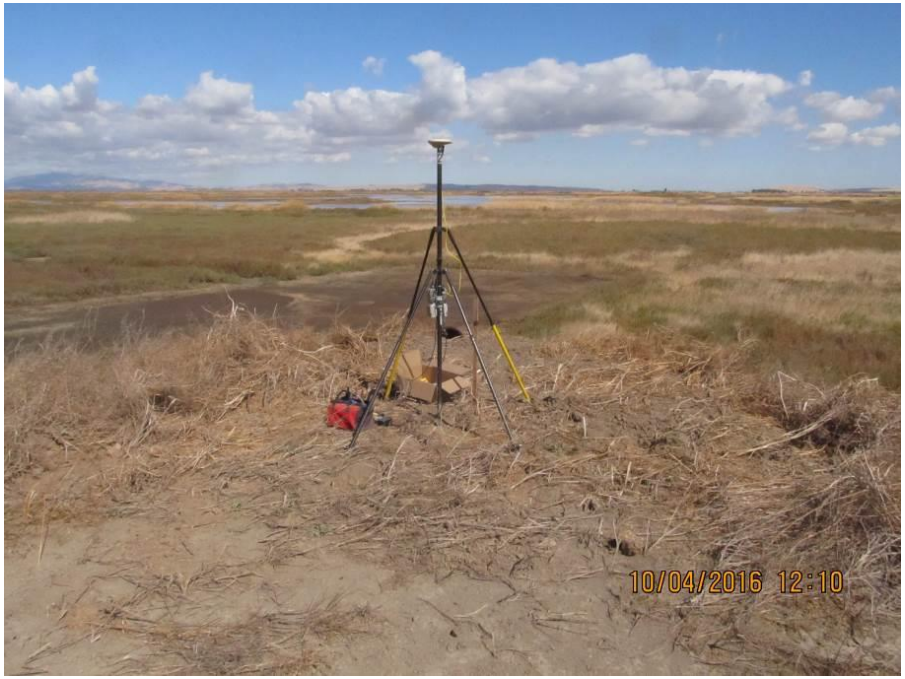
Attachments:

- Attachment A – Photo Log
- Attachment B – Email: "Fwd - Property Access to Rich Island for Point Buckler Survey"
- Attachment C – Email: "Re - Rich Island and Grizzly Island Access"

Attachment A – Photo Log

Photograph 1

Joe Pilatti, assistant surveyor of KSN, Inc., surveying a control monument on Grizzly Island, Suisun Marsh.

Photograph 2	Photograph 3
	

KSN survey equipment set at two benchmark control locations on Jim Waters' property (Club #802).

Photograph 4	Photograph 5

Brian Frame, survey party chief of KSN Inc., surveying portions of the perimeter levee along the western end of Point Buckler Island. The clubhouse and artificial grass area can be seen in the background of photograph 5.

Photograph 6

Brian Frame surveying a cross section of the borrow ditch for a former levee breach on Point Buckler Island. Brown mats of what appeared to be algae were observed floating in the borrow ditch water (transparent brown) around Mr. Frame.

Photograph 7

Brian Frame surveying the marsh plain of Point Buckler Island, interior of the levee and borrow ditch. Vegetation on the Island interior appeared brown and a ground-to-dock ramp was observed (arrow) on the eastern levee.

Photograph 8

Brian Frame surveying a borrow ditch cross section on Point Buckler Island. Green vegetation was observed exterior of the borrow ditch and levee (solid arrows) compared with brown vegetation observed in the interior (hollow arrows). Additionally, a landing craft was observed berthed at the north end of the Island (dashed circle).

Photograph 9

Brian Frame surveying a portion of the borrow ditch on the southeast portion Point Buckler Island. The levee appeared to have significant erosion where a former levee breach existed (arrow). Additionally, vegetation observed exterior of the levee appeared green compared to brown vegetation observed on the Island interior.

Attachment B – Email:

“Fwd - Property Access to Rich Island for Point Buckler Survey”

Martin, Benjamin@Waterboards

From: Lawrence S. Bazel <lbazel@briscoelaw.net>
Sent: Monday, October 03, 2016 3:01 PM
To: cmartin@ksninc.com
Cc: Thompson, Brian@Waterboards
Subject: Fwd: Property Access to Rich Island for a Point Buckler Club Survey

Chris,

Pls coordinate with Brian so that he can have an observer present.

Thanks,

Larry

LAWRENCE S. BAZEL
155 Sansome Street, Seventh Floor
San Francisco, California 94104
Office: (415) 402-2700 Direct: (415) 402-2711

Begin forwarded message:

> **From:** "Thompson, Brian@Waterboards" <Brian.Thompson@waterboards.ca.gov>
> **Date:** October 3, 2016 at 1:36:10 PM PDT
> **To:** "Lawrence S. Bazel" <lbazel@briscoelaw.net>
> **Cc:** "Martin, Benjamin@Waterboards" <Benjamin.Martin@Waterboards.ca.gov>, "Drabandt, Laura@Waterboards" <Laura.Drabandt@waterboards.ca.gov>, "Zeppetello, Marc@BCDC" <marc.zeppetello@bcdc.ca.gov>
> **Subject: RE: Property Access to Rich Island for a Point Buckler Club Survey**
>
> Hi Larry,
>
> I just want to follow up on your invitation to observe the survey and on my request for dates or a timeframe for the work. It sounded like you were pushing to have people in the field tomorrow. We would like to coordinate for one of our surveyors to observe the work, or alternatively, have someone from our office observe the survey. Can you please let me know your plans?
>
> Brian Thompson, CHG, CEG
> Senior Engineering Geologist
> San Francisco Bay Regional Water Board
> 1515 Clay Street, Suite 1400
> Oakland, CA 94612
> (510) 622-2422

From: Lawrence S. Bazel [mailto:lbazel@briscoelaw.net]
Sent: Saturday, October 01, 2016 10:01 AM
To: Thompson, Brian@Waterboards
Subject: RE: Property Access to Rich Island for a Point Buckler Club Survey

Thanks.

Larry

LAWRENCE S. BAZEL
155 Sansome Street, Seventh Floor
San Francisco, California 94104
Office: (415) 402-2700 Direct: (415) 402-2711

From: Thompson, Brian@Waterboards [mailto:Brian.Thompson@waterboards.ca.gov]
Sent: Friday, September 30, 2016 3:15 PM
To: jewaters@pacbell.net
Cc: Lawrence S. Bazel <lbazel@briscoelaw.net>; Bowers, John@BCDC <John.Bowers@bcdc.ca.gov>; Drabandt, Laura@Waterboards <Laura.Drabandt@waterboards.ca.gov>; Zeppetello, Marc@BCDC <marc.zeppetello@bcdc.ca.gov>
Subject: Property Access to Rich Island for a Point Buckler Club Survey

Hi Jim,

I am sending this email to confirm what was expressed to you on the phone today. Staff at the Regional Water Board and BCDC (copied) do not object to Point Buckler Club, LLC doing a survey and being given the same access to Rich Island that we were provided on March 2, 2016, for our survey. It is not clear at this time whether someone from the agencies will be present to observe the survey work. That is something we are discussing at this time.

Brian Thompson, CHG, CEG
Senior Engineering Geologist
San Francisco Bay Regional Water Board
1515 Clay Street, Suite 1400
Oakland, CA 94612
(510) 622-2422

Attachment C – Email:

“Re - Rich Island and Grizzly Island Access”

Martin, Benjamin@Waterboards

From: Lawrence S. Bazel <lbazel@briscoelaw.net>
Sent: Friday, September 30, 2016 1:35 PM
To: Thompson, Brian@Waterboards; Zeppetello, Marc@BCDC
Cc: Drabandt, Laura@Waterboards; Bowers, John@BCDC
Subject: RE: Rich Island and Grizzly Island Access

Brian,

We'd like to have KSN go out next Tuesday. They're available then, and it should take only a few minutes to put together an approval letter.

The week after is too late. I have a hearing before the BCDC enforcement committee next Thursday, and I'd like to have at least some preliminary information by then. I also have a deadline of 17 October to file a brief for the Regional Board penalty hearing. I also have a meeting scheduled with the Regional Board, BCDC, and EPA on 18 October, and I'm supposed to circulate written documentation long enough before that meeting so staff can evaluate it. If you don't allow our consultants to get out right away, my consultants aren't going to be able to produce the information needed for that meeting. In any case, the Regional Board shouldn't be preventing me from collecting important data that's necessary for my defense. Since there's no valid objection to conducting the survey, I'd appreciate a short letter to the landowner requesting that we be provided access.

If CLE isn't available next week, I'm sure someone from the Regional Board can go along. We have no objection to anyone other than Stuart Siegel. Even if no one is available, you should let us gather the data, and then arrange for a discussion between our consultants. What surveyors do, I gather, isn't very exciting to watch, and not much is to be gained by accompanying them.

Please let our consultants gather the data. Once the data are collected, the consultants can meet to discuss any differences they may have found, and take any other action useful towards ascertaining the true elevations.

Thanks very much,

Larry

LAWRENCE S. BAZEL
155 Sansome Street, Seventh Floor
San Francisco, California 94104
Office: (415) 402-2700 Direct: (415) 402-2711

From: Thompson, Brian@Waterboards [mailto:Brian.Thompson@waterboards.ca.gov]
Sent: Friday, September 30, 2016 1:16 PM
To: Lawrence S. Bazel <lbazel@briscoelaw.net>; Zeppetello, Marc@BCDC <marc.zeppetello@bcdc.ca.gov>
Cc: Drabandt, Laura@Waterboards <Laura.Drabandt@waterboards.ca.gov>; Bowers, John@BCDC <John.Bowers@bcdc.ca.gov>
Subject: RE: Rich Island and Grizzly Island Access

Larry,

Can you please let me know some target days or dates for the survey so I can schedule something with CLE and we can coordinate access with Mr. Watters. It would be best if you could provide me with a rough scope of work and timeframe for the survey with availability over the next two weeks. I am currently reaching out to CLE about their schedule. Monday is too soon to coordinate a plan that was decided on today, and it looks like CLE is pretty booked next week.

Brian Thompson, CHG, CEG
Senior Engineering Geologist
San Francisco Bay Regional Water Board
1515 Clay Street, Suite 1400
Oakland, CA 94612
(510) 622-2422

From: Lawrence S. Bazel [mailto:lbazel@briscoelaw.net]
Sent: Friday, September 30, 2016 10:19 AM
To: Zeppetello, Marc@BCDC
Cc: Thompson, Brian@Waterboards; Drabandt, Laura@Waterboards; Bowers, John@BCDC
Subject: RE: Rich Island and Grizzly Island Access

Marc,

We're fine with an employee of CLE accompanying the surveyors. Our goal is to get correct elevations, and if CLE has anything to say about our surveyor's method (including anything that our surveyor might be doing that CLE thinks is wrong), that's fine with us. We don't want Stuart Siegel to accompany them.

I'm out of the office Monday, and would like to get the scheduling done today, preferably for surveying next Monday or Tuesday. Can we get a call made to Jim Waters today telling him the letter is coming, along with a letter by early Monday?

Thanks,

Larry

LAWRENCE S. BAZEL
155 Sansome Street, Seventh Floor
San Francisco, California 94104
Office: (415) 402-2700 Direct: (415) 402-2711

From: Zeppetello, Marc@BCDC [mailto:marc.zeppetello@bcdc.ca.gov]
Sent: Thursday, September 29, 2016 5:29 PM
To: Lawrence S. Bazel <lbazel@briscoelaw.net>
Cc: Thompson, Brian@Waterboards <Brian.Thompson@waterboards.ca.gov>; Drabandt, Laura@Waterboards <Laura.Drabandt@waterboards.ca.gov>; Bowers, John@BCDC <John.Bowers@bcdc.ca.gov>; Zeppetello, Marc@BCDC

<marc.zeppetello@bcdc.ca.gov>
Subject: Re: Rich Island and Grizzly Island Access

Larry,

I have spoken with Jim Waters regarding Chris Martin's request to access Rich Island on behalf of Mr. Sweeney (and/or the Point Buckler Club). Jim said his club would grant access to its property at the request of a regulatory agency, but not at the request of a private party. I've consulted with the Regional Board staff regarding Jim's request that an agency request access on your client's behalf. Neither BCDC nor the Regional Board wants to be an obstacle to your client collecting additional data, and certainly we have no objection to your client doing so. On the other hand, if one of our agencies is going to request access, it would be both necessary and appropriate for an agency representative to accompany Chris (and/or his crew). More broadly, we propose and request that an agency representative (most likely an employee of CLE Engineering, the firm retained by the Regional Board) be allowed to accompany Chris (and/or his crew) and observe whatever surveying and data collection work they will be doing at Grizzly Island, Rich Island, and/or Pt. Buckler, and any other locations. If this would be acceptable to your client, the Regional Board is willing to write to Jim to request access to Rich Island. The Regional Board's request would state that a Regional Board representative will accompany the surveyor retained by your client.

Regards, Marc

Marc A. Zeppetello
Chief Counsel
San Francisco Bay Conservation
and Development Commission
455 Golden Gate Avenue, Suite 10600
San Francisco, CA 94102

Telephone: (415) 352-3655
marc.zeppetello@bcdc.ca.gov

From: "Lawrence S. Bazel" <lbazel@briscoelaw.net>
Date: Friday, September 23, 2016 at 3:35 PM
To: Marc Zeppetello <Marc.Zeppetello@bcdc.ca.gov>
Subject: FW: Rich Island and Grizzly Island Access

LAWRENCE S. BAZEL
155 Sansome Street, Seventh Floor
San Francisco, California 94104
Office: (415) 402-2700 Direct: (415) 402-2711

From: Christopher S. Martin [mailto:cmartin@ksninc.com]
Sent: Friday, September 16, 2016 10:33 AM
To: schappell@suisunrcd.org
Cc: 'James Waters' <jewaters@pacbell.net>; 'BWickland' <BWickland@Suisunrcd.org>; Lawrence S. Bazel <lbazel@briscoelaw.net>
Subject: RE: Rich Island and Grizzly Island Access

Steve,

Thank you for the information. It is looking like the survey date is getting pushed back later in the week. We will contact Mr. Waters and let him know we won't be out Monday and also answer any questions he may have regarding the survey process and what equipment we will be using. If you would like me to contact DFW and let them know we won't be out Monday, and also coordinate the access, please provide their contact information. We received Mr. Wickland's voicemail we will have our crew stop by the main office in the morning prior to commencing any work.

Thank you,

KSN inc. KJELDSEN SINNOCK NEUDECK CIVIL ENGINEERS & LAND SURVEYORS
CELEBRATING 60 YEARS

Christopher S. Martin, P.L.S.
Project Surveyor

711 N. Pershing Ave Stockton CA 95203
209 946-0268 | fax: 209 946-0296 |
cmartin@ksninc.com |
http://www.ksninc.com

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From: Steve Chappell [mailto:schappell@suisunrcd.org]
Sent: Thursday, September 15, 2016 4:32 PM
To: Christopher S. Martin <cmartin@ksninc.com>
Cc: 'James Waters' <jewaters@pacbell.net>; 'BWickland' <BWickland@Suisunrcd.org>
Subject: RE: Rich Island and Grizzly Island Access

Mr. Martin,

The survey control sites that you have requested access are located on the California Department of Fish and Wildlife (DFW) property and private property #802 - Rich Island.

SRCD has contacted DFW and they are willing to provide access to their site, but it will require pre-access coordination to ensure safety for your surveyors during the current open elk hunting season. SRCD can provide this contact assistance.

SRCD is unable to provide you access for property #802 - Rich Island. You will have to coordinate your access request directly with the private property owner. The SRCD primary contact for this property is Mr. Jim Waters. He can be reached at (510) 409-3864 or JEWATERS@PACBELL.NET.

Let me know if you need any further assistance.

Sincerely,

Steven Chappell,
Executive Director, Suisun RCD

From: Bruce Wickland [mailto:bwickland@suisunrcd.org]
Sent: Thursday, September 15, 2016 3:30 PM
To: Steve Chappell
Subject: FW: Rich Island and Grizzly Island Access

From: Christopher S. Martin [mailto:cmartin@ksninc.com]
Sent: Thursday, September 15, 2016 10:46 AM
To: bwickland@suisunrcd.org
Cc: Lawrence S. Bazel; Kris F. Nehmer
Subject: Rich Island and Grizzly Island Access

Mr. Wickland,

Attached you will find our exhibits showing the locations of the control monumentation we need to access. It appears that the Grizzly Island monumentation may be on a private road as you suspected. Our crews will need to find the monumentation, set up and leave GPS equipment on it, and pick up the equipment at the end of the day. We anticipate being on site Monday morning around 9am and leaving by 5 pm. Please let me know if there is any protocol we need to follow for access to the control monuments shown on the exhibits.

Thank you,

KSN inc. KJELDSEN SINNOCK NEUDECK CIVIL ENGINEERS & LAND SURVEYORS
CELEBRATING 60 YEARS

Christopher S. Martin, P.L.S.
Project Surveyor

711 N. Pershing Ave Stockton CA 95203
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Administrative Civil Liability Complaint
No. R2-2016-1008

John D. Sweeney and
Point Buckler Club, LLC

Description of Exhibit Provided by Hard Copy and Electronically
(October 2016 Meeting and Discharger Workplan)

Exhibit 53

53a. October 25, 2016, Meeting Minutes – Point Buckler Island, Suisun Marsh, Solano County

53b. Final Interim Corrective Action Workplan, November 10, 2016

53c. Prosecution Team's Assessment of the Interim Corrective Action Plan for Point Buckler Island and Recommendations, November 18, 2016

53a. October 25, 2016, Meeting Minutes – Point Buckler Island, Suisun Marsh, Solano County

CASE FILE MEMO

To: Point Buckler Club, LLC Case File
Place ID 816826

Subject: October 25, 2016, Meeting Minutes – Point Buckler Island, Suisun Marsh, Solano County

Staff in Attendance:

Water Board
Brian Thompson
Keith Lichten
Laura Drabandt
Dyan Whyte
Agnes Farres
Ben Martin
Tamarin Austin (via phone)

BCDC
Adrienne Klein
Marc Zeppetello
John Bowers
Cody Aichele-Rothman

Department of Justice
Rochelle Russell

EPA
Bill Lee
Brett Moffatt

Point Buckler Club, LLC
Lawrence Bazel
Terry Huffman

I. Water Board and other agency staff, John Sweeney, and representatives of Point Buckler Club, LLC, previously met on July 22, 2016. At the July 22 meeting, Water Board staff asked John Sweeney and Point Buckler Club, LLC ("the Club") to bring the following information to the next meeting: (1) an interim corrective action plan; (2) mitigation proposals; (3) proposals for future plans at the island that maximize tidal restoration; and (4) technical justification, such as hydraulic modeling, to support proposed breaches/tidal restoration. However, only a Draft Interim Corrective Action Plan (Draft Plan) was provided for discussion.

II. Water Board staff stated the goal of the Draft Plan should be to prepare the site for tidal restoration. However, it is not clear that the intended goal is tidal restoration of the island because (1) proposed interim corrective actions are not compatible with tidal restoration, and (2) proposed recreational uses are not compatible with tidal restoration. The Draft Plan does not provide sufficient detail and technical justification for staff to be able to provide input. Water Board staff noted the proposed application of herbicides is not appropriate or approved for use at aquatic sites. Also, the Draft Plan lacks any hydraulic analysis 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 meeting and expressed concern that the November deadline for the Interim Corrective Action Plan would not be met given the failure to consider the goal of tidal restoration in designing corrective actions.

III. Terry Huffman stated that the increase of the invasive pepperweed found on the Island is directly connected to the constructed levee. Water Board staff agreed and noted that

the mechanism for invasion of pepperweed was the diking and ongoing drainage of the island.

IV. Larry Bazel discussed installing a tide gauge to collect more data before they can perform a hydraulic analysis. He stated the Club had retained a hydrologist, Robert Coats, and a fisheries biologist, David Mayer, but said they were having problems tying in existing data to Port Chicago. Also, Mr. Bazel stated the Club had a topographical survey performed in early October 2016 and there were no significant differences from the results of the survey performed by the Water Board Prosecution Team experts/survey crew in May 2016.

V. Water Board staff disagreed that substantial new data was needed, noting that there was sufficient precision with existing data, and that the Club has had ample time and sufficient data available to perform the needed hydraulic analysis. Water Board staff stated the Club is welcome to bring in its experts to meet with Water Board staff to discuss and resolve any new technical issues other than those resolved when the Board adopted the CAO in August 2016.

VI. Mr. Bazel stated that Pt. Buckler's and the Water Board's fisheries experts agreed that the island's tidal channels could be useful for endangered fish. He suggested the borrow ditch would be better habitat than the island's other tidal channels. Water Board staff agreed that the tidal channels provide habitat for endangered fish, but noted that the borrow ditch posed potentially significant threats to that beneficial use, including from potential striped bass predation and by inducing changes to sediment flows and tidal dynamics that could have harmful effects on the island's other tidal channels. Water Board staff encouraged Pt. Buckler to complete an evaluation of alternatives and propose designs that addressed those potential threats.

VII. Water Board staff noted that while staff was on the island to observe the Oct. 2016 topographical survey, a large dock-to-ground ramp was observed on the eastern levee. Water Board staff asked whether anything had been moved on or off the island. Larry Bazel declined to answer. Water Board staff noted the Interim Corrective Action Plan needed to address the disposition (e.g., removal, relocation, etc.) of structural fill on the island. Mr. Bazel asked what structural fill was, and Water Board and BCDC staff noted examples included items placed at the island, such as shipping containers, astroturf, the existing dock, the metal ramp, and other such items.

Post-meeting follow-up:

a. Water Board staff requested and Larry Bazel agreed to provide the results of the Oct. 2016 topographical survey.
b. Water Board staff expects a response on whether anything has been moved on or off the island. We note that there is a lack of an agreed-upon plan/schedule for removal of unauthorized structural fill in preparing the island for tidal restoration.
c. Water Board staff did not have the opportunity to discuss the Draft Plan's lack of an implementation time schedule as required by Provision 1 of CAO No. R2-2016-0038.

53b. Final Interim Corrective Action Workplan, November 10, 2016

Interim Corrective Action Plan
for
Point Buckler Club
(Club 801)

Prepared for:
San Francisco Bay Regional Water Quality Control Board

Prepared by:
Huffman-Broadway Group, Inc.
828 Mission Avenue
San Rafael, Ca 94901
Phone. (415)925-2000
http://www.h-bgroup.com/

Contact: Terry Huffman, PhD
thuffman@h-bgroup.com

November 2016

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Attachment 1 (Figures):

Figure 1: General Vicinity Map
Figure 2: Point Buckler Map
Figure 3: March 2016 Aerial Photograph of Point Buckler Island Showing Area to be Flooded

Attachment 2 (Exhibits):

Exhibit 1: Draft Restoration Plan and Mitigation and Monitoring Plan Outline
Exhibit 2: CLE Surveyor's Points with Aerial Photograph Dated February 2015

1.0 Introduction

Point Buckler Club (PBC) is located within the Suisun Marsh Primary Management Area, off the western tip of Simmons Island. It is bordered by Grizzly Bay to the north and west, by Suisun Cutoff to the south, and by Andy Mason Slough to the east (Attachment 1, Figures 1 and 2). It has been variously reported as being 51.51 acres,[1] 45 acres,[2] and 39 acres.[3] The smaller acreage figures have been attributed to erosion of the island over time. According to a technical assessment by Siegel Environmental (Siegel Report), ". . . it is evident that considerable shoreline retreat (erosion) has occurred around the entire island."[4] The resulting diked off area forming the interior of the island, measured from a polygon drawn along the inner edge (interior side) of the newly constructed dike using ESRI ArcGIS software, is approximately 27.5 acres.

The purpose of this Interim Corrective Action Plan (ICAP) is to respond to the San Francisco Regional Water Quality Control Board's (RWQCB) Cleanup & Abatement Order No. R2-2016-0038 (Order), issued to John D. Sweeney and Point Buckler Club, LLC on August 12, 2016. The Order asserts certain unauthorized activities on Point Buckler Island (PBI or Site), and includes the following Provision:

> 1. No later than November 10, 2016, the Dischargers shall submit an Interim Corrective Action Plan, acceptable to the Water Board Executive Officer, that includes the following:
>
> > a. An Interim Corrective Action Plan (ICAP) designed to prepare the Site for tidal restoration. The ICAP shall include measures that will be taken to manage water at the Site to (1) control the spread of perennial pepperweed, (2) reduce soil salinity, and (3) reverse soil acidification and peat decomposition. The ICAP shall include triggers or criteria that will be used to evaluate whether the Site has been sufficiently rehabilitated and is ready for tidal restoration. The ICAP shall include an implementation time schedule. The Dischargers shall initiate implementation in accordance with the accepted implementation time schedule within 60 days of written acceptance of the ICAP by the Executive Officer.

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[1] Solano County Assessor's Parcel Map Book 0090, page 02.
[2] Solano County Assessor's Office GIS system data.
[3] Water Board. 2016. Point Buckler Technical Assessment of Current Conditions and Historic Reconstruction Since 1985. Prepared by Siegel Environmental, San Rafael, CA, published by San Francisco Bay Regional Water Quality Control Board, Oakland, CA. May 12, Page 15 ("Siegel Report").
[4] Siegel Report, Appendix G, page G-3.

This ICAP is intended to respond to these specific requirements in the RWQCB's Order, and to bridge the gap between what is possible in the short term, and the ultimate, long-term approach to restoring tidal action at PBC.[5]

As a practical matter, other aspects of the Order, such as the Restoration Plan and Mitigation and Monitoring Plan (RP/MMP) are potentially dependent upon the final version of this ICAP, and will be submitted under separate cover, consistent with the RWQCB's Order requiring that the RP/MMP be submitted by February 10, 2017. Notwithstanding the Order's February deadline, RWQCB staff recently requested that information be provided regarding the connection between the ICAP and the RP/MMP be submitted with this ICAP. The relationship between the ICAP and the RP/MMP is discussed in subsection 2.3.2.

[5] Although not required under the Order, PBC intends to conduct a tidal study at the Site. Better knowledge of tidal hydrology at the site will be helpful in planning restoration goals during the transition from the ICAP to the RP/MMP. PBC intends to install a continuous recording tide gauge following the approval of the ICAP After a 30-day interval, following tide gauge installation, the data from this gauge will be compared to data from the Port Chicago Tide Station. This will allow the most accurate prediction of tides at PBI, based on historic data from Port Chicago.

2.0 Proposed ICAP Approach

2.1 RWQCB Order – Initial Corrective Actions

The RWQCB's Order indicates that this ICAP should "include measures that will be taken to manage water at the Site to: (1) control the spread of perennial pepperweed (*Lepidium latifolium*); (2) reduce soil salinity; and (3) reverse soil acidification and peat decomposition." This section includes discussions of environmental issues associated with current conditions within the diked-off interior portion of the island and proposed corrective actions, which are designed to prepare the Site for tidal restoration through a RWQCB-approved RM/MMP.

2.2 General Description of Environmental Concerns

2.2.1 Perennial Pepperweed

Pepperweed is an invasive plant found within the Suisun Marsh area and control of its spread is a high priority among resource agencies. The May 12, 2016 Siegel Report identifies pepperweed as being present on the Site.[6] Follow-up observations relying on ground observation and interpretation of recent aerial photography to determine the geographical extent of pepperweed was conducted by HBG during mid-October 2016. This study found that the estimated total acreage where pepperweed is present is less than 2 acres. Tidal marsh areas adjacent to the bay side of the newly constructed borrow ditch and dike that were not impacted by the placement of levee fill were visually estimated to have absolute plant cover values of 1 percent or less, while areas abutting the constructed borrow ditch and dike had higher concentrations of perennial pepperweed, with estimated absolute plant cover values ranging from 1 to 95 percent. Similarly, areas within the interior portion of the island abutting or adjacent to the small tidal channel areas that were cut off hydrologically from the bay by the newly constructed dike had estimated absolute plant cover values ranging from 1 to 95 percent. Pepperweed was also observed in these tidal channel areas in aerial imagery prior to construction of the perimeter levee. In addition, perennial pepperweed was not observed to be present in all areas abutting or adjacent to the above-described disturbed areas abutting the constructed borrow ditch and dike or abutting or adjacent to all of the above-described small

[6] Siegel Report, page 18.

hydrologically cut-off tidal channel areas within the interior of the island. Attachment 1, Figure 3 shows representative locations where perennial pepperweed concentrations were observed during the mid-October 2016 site visit.

According to the San Francisco Estuary Institute, pepperweed may be controlled by:

- Planting native seed in disturbed areas
- Flooding for prolonged periods
- Applications of herbicides, such as chlorsulfuron, triclopyr (as Garlon3A® and Garlon4®), and glyphosate (as Rodeo® and Roundup®)

2.2.2 Soil Salinity

Soil salinity typically increases in the soil column when brackish marsh soils are allowed to dry. This drying can draw saline water up from the lower parts of the soil profile, which can concentrate salts in the plant root zone.[7] High concentrations of salt within the soil can kill marsh plants such as cattail (*Typha* spp.); three-square bulrush (*Schoenoplectus americanus*); and hardstem tule (*Schoenoplectus californicus*) which are the principal hydrophytic species that dominated the Site.

2.2.3 Soil Acidification

The Siegel Report states that "[d]rainage has . . . resulted in the early stages of acid sulfate soil formation . . .."[8] Highly acid soils are inimical to plant growth primarily because they inhibit the uptake of nutrients or cause direct toxicity. The Natural Resource Conservation Service Soil Survey mapping for Solano County [9]shows that Joice muck and Tamba mucky clay have been

---

[7] California Department of Fish & Game & Suisun Resource Conservation District. *Conceptual Model for Managed Wetlands in Suisun Marsh, Initial Draft.* Page 8. (no date indicated). http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/PointBuckler/references/Conceptual_Model_for_Managed.pdf

[8] Siegel Report. Appendix L, Page L-3.

[9] U.S. Department of Agriculture, Soil Conservation Service (now the Natural Resources Conservation Service [NRCS]). 1977. Soil Survey of Solano County, California.

mapped as occurring within the island.[10] According to the *Suisun Marsh Monitoring Program Reference Guide*, Tamba soils become strongly acidic if exposed to air and allowed to dry. [11]

During normal operations, duck clubs in Suisun Marsh are generally drained in the spring, and flooded in the following fall.[12] The fall flood cycle presumably has some effect on reducing any soil acidification taking place during the dry cycle. The perimeter levee at the Site was constructed in 2014, thereby eliminating any tidal flooding of the island's interior tidal channels that occurred prior to its construction.

2.2.4 Peat Decomposition and Subsidence.

Microbial decomposition of peat soils and the loss of pore water are among the causes of subsidence of diked areas.[13] This typically occurs when areas are stripped of vegetation and farmed. No records were found to indicate that the island has ever been farmed in this manner. It is unknown whether any measurable subsidence has occurred at PBC, before or after construction of the perimeter levee.

2.3 Proposed ICAP and Relationship to RP/MMP

2.3.1 Interim Water Management for Pepperweed Control and Soil Management.

The purpose of the ICAP is to prepare the Site for tidal restoration. The following discusses a water management approach for interim perennial pepperweed control and soil management to minimize the adverse effects of soil salinity, acidification, peat decomposition / subsidence.

1. Possible water management options include:
2. Use of an existing tide gate at the west end of the island to move water onto the Site; and
3. Pumping water over the perimeter levee to the interior of the island.

---

[10] The Individual Management Plan for the Point Buckler Club, and stamped as received by the Bay Conservation and Development Commission in 1984 also indicates that the soils on Point Buckler Island consist of Joice muck and Tamba mucky clay.

[11] Department of Water Resources. 2000. *Suisun Marsh Monitoring Program Reference Guide, Version 2.* Page 4.

[12] There are variations on this flood-drain cycle, but the general pattern is as described.

[13] Deverel, S.J., T. Ingrum, and D. Leighton. 2016. *Present-day oxidative subsidence of organic soils and mitigation in the Sacramento-San Joaquin Delta, California, USA.* Hydrology Journal. http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4944668/

Use of Tide Gate to Flood Site. PBC has one functional tide gate connected to an 18-inch diameter pipe at the west end of the Site (Attachment 1, Figure 3). However, given its size, it may not be able to provide sufficient water from the Bay to accomplish any of the three tasks contained in the Order.

Pumping Water to Flood the Interior of the Island. Using one or more portable pumps installed on the levee with one or more intakes placed in Andy Mason Slough to flood the diked-off interior of the island is potentially a feasible solution for interim pepperweed control and soil management. However, placement of structures or work within waters subject to Section 10 Rivers and Harbors Act jurisdiction will require authorization from the Corps. Discussion with Corps staff is on-going to determine the appropriate permitting strategy (e.g., Regional General Permit, Nationwide Permit, Letter if Permission) and associated state and federal authorizations and consultations needed. It is PBC's understanding that RWQCB staff have offered to help with this process once a permitting strategy has been identified.

2.3.2 Relationship to RP/MMP

This ICAP is intended to precede the RP/MMP with prolonged flooding of the diked interior portion of PBI. This water management approach would be used for interim perennial pepperweed control. It would also be used to minimize any adverse effects of soil salinity, acidification, peat decomposition / subsidence. At the completion of the ICAP it is anticipated that any salt concentrations within the soils, that have built up prior to inundation, will be reduced and can be moved back into the aquatic ecosystem in a way that is not harmful to aquatic organisms.

The RP/MMP currently being developed is considering three possible alternatives to restoring tidal hydrology within PBI to per-2012 site conditions. These alternatives include: (1) open levee breaches; (2) round or ovoid shaped Culverts; and (3) box culverts. Each alternative would also include water control structures to allow for vegetation management and invasive plant control. Hydrologic analysis is being conducted to determining the size and number of levee breaches or pipe/box culvert installations necessary to restore the tidal hydrology of the

interior portion of the island to pre-2012 tidal conditions. An onsite tidal study is also being initiated to collect tide data from Point Buckler Island to better predict maximum tide heights at the island when interpolating from the Port Chicago continuous recording station. A continuous recording tide gauge will be installed following the approval of the ICAP. After a 30-day interval, the data from this gauge will be compared to data from the Port Chicago Tide Station. Attachment 1, Figure 3 shows the proposed location of the tide gauge.

3.0 Implementation

3.1 Pepperweed Control

Prior to treatment, baseline conditions will be established by mapping pepperweed concentrations at the beginning of the implementation of this ICAP using a hand-held Trimble Geo XH Global Positioning System (GPS) unit with sub-meter accuracy after geo-processing. The vegetation management strategy will consist of two separate approaches both of which are designed to provide a completive advantage of wetland species other than perennial pepperweed. Separate approaches are proposed for inundated and non-inundated areas.

Inundated Areas. The first approach has the goal of reducing perennial pepperweed root / shoot biomass through continuous inundation for a long duration of time within the diked off interior marsh. After obtaining any required environmental regulatory authorizations, brackish water would be pumped from the dock area in Andy Mason Slough into the perimeter borrow ditch within the diked portion of the island and the entire interior area would be flooded to the toe of the new levee (Attachment 1, Figure 3). Attachment 2, Exhibit 2 provides detailed views of the levee slope and detailed elevation survey data developed by CLEngineering (CLE) for the Siegel Report. It is assumed, based on field experience with onsite soils, that capillary rinse in the new levee side slope soils will result in saturated soil conditions several inches above the water line. For the purpose of the ICAP a minimum of 50 continuous days of soil flooding has been selected as a means to reduce pepperweed biomass. This approach relies on the work of Chen, et. al. (2002) 14 which found that a significant reduction in perennial pepperweed biomass occurs when soils are continuously flooded for 50 days. At the end of the flooding period, flood water (impounded water) will be returned to the bay during the twice - daily, ebbing high tides. Impounded water would be moved from the island by using the existing tide gate and / or pumping (see Attachment 1, Figure 3). Prior to return of the impounded water to

[14] Chen, H., R Qualls, and G. Miller. 2002. Adaptive responses of Lepidium latifolium to soil flooding: biomass allocation, adventitious rooting, aerenchyma formation and ethylene production. Environmental and Experimental Botany 48 (2002) 119-128.

the bay, it will be freshened with bay water as necessary to reduce any significant increase of salinity.

Implementation of the ICAP will also include coordination with the Solano County Mosquito Abatement District (SCMAD) and/or Suisun Resource Conservation District (SRCD) with the goal of reducing the production of mosquito populations during the flood-up of the diked interior portions of the island.

Upland Areas. The second approach has the objective of reducing perennial pepperweed root / shoot biomass through the use of a chemical herbicide along the bay side and interior margins of the new levee, where the soil surface is not flooded or the near-surface soils (upper 6 inches) are not saturated.

Treatment will be initiated in the spring of 2017 when pepperweed flower buds appear. These upland areas will be mowed and then the exposed cut plant stems will be immediately sprayed with a 2 percent solution of Chlorsulfuron (Telar®). Chlorsulfuron would be sprayed using a backpack sprayer. In order to prevent overspray into the current flooded aquatic environment, treatment will be restricted to non-flooded / non-saturated soils a minimum of 6.0 inches above flooded / saturated soils, and when there are no winds. No cutting or spraying will occur on the bay side of the levee within a 48-hour window of the predicted Mean High Water. Grow-back areas identified at the base of treated plants will be mapped during the first monitoring period (May 2017) and treated prior to the onset of flowering, using the same 48-hour window as in the initial treatment.

During the fall (September –October, 2017), treated areas will be disked and planted with California native creeping wild rye (*Elymus triticoides*). To prevent genetic contamination with a non-native seed source, seed will be obtained from a grower within Suisun Marsh watershed or the next closest watershed. The objective of this treatment approach will be to establish a dense stand of rhizomatous, turf-forming perennial grass which can successfully compete with perennial pepperweed and minimize its regrowth and spread along the levee margins. Pepperweed control will also be included as part of both short- and long-term maintenance

activities to be conducted under the RP/MMP. The planting of creeping wild rye may also result in a secondary benefit to water quality by reducing sediment produced by erosion of the levee slopes.

The table below summarizes the flooding and herbicide invasive plant control approaches, including application time frames, and geographical boundaries where treatment will occur.

Summary of Perennial Pepperweed Treatment Approach				
Island Location	**Treatment Approach**	**Application Time Frame**	**Geographical Boundaries**	**Comments**
Diked Interior	Flooding for prolonged periods	Minimum of 50 continuous days of flooding	Flood interior island to the toe of the new levee	Authorizations required prior to pumping
Upland (new levee fill area)	1. Mow perennial pepperweed then immediately treat remaining cut stems with a 2 percent solution of Chlorsulfuron 2. Plant dense stand of rhizomatous, turf-forming perennial grass	1. When pepperweed flower buds appear 2. September, 2017	1. Only treat non-flooded / non-saturated soils 6.0 inches above flooded / saturated soils	1(a). Treatment will be restricted to when there are no winds 1(b). No cutting or spraying will occur on the bay side of the levee within a 48-hour window before and after predicted Mean High Water.

3.2 Monitoring and Evaluation

The RWQCB's Order requires that this ICAP include "triggers or criteria that will be used to evaluate whether the Site has been sufficiently rehabilitated and is ready for tidal restoration." Established criteria also aid in determining when the Adaptive Management framework discussed in Section 6.0 needs to be implemented. Among the factors stipulated by the RWQCB's Order, only pepperweed needs to reach a threshold of control before "the Site has been sufficiently rehabilitated" to be ready for tidal restoration. Flooding and subsequent tidal restoration to pre-levee construction conditions is thought to be the best solution for any soil salinity, soil acidification, and peat decomposition/subsidence issues that may have arisen as a result of construction of the perimeter levee without completion of work to install levee openings. The efficacy of that solution will not be improved upon by meeting or exceeding any criteria associated with interim corrective actions. Perennial pepperweed control performance criteria are provided in the table below. Depending on when the RP/MMP plan is implemented

by allowing tidal flow back into the interior of the island, retreatment may occur if performance criteria are not met prior to implementation of the RP/MMP.

Summary of Perennial Pepperweed Treatment Performance Criteria			
Island Location	**Treatment Approach**	**Geographical Boundaries**	**Performance Criterion**
Diked Interior	Flooding for prolonged periods	Flood interior island to toe of new levee	Absolute plant cover of perennial pepperweed in initially mapped dense stands within areas disturbed by levee construction is ≤ 5 % 45 days following the cessation of flooding treatment
Upland (new levee fill area)	Mow perennial pepperweed Immediately treat remaining cut stems with a 2 percent solution of Chlorsulfuron	Only treat non-flooded / saturated soils a minimum ground surface of 6 inches above currently flooded / saturated soils	Absolute plant cover of perennial pepperweed in initially mapped dense stands within areas disturbed by levee construction is ≤ 5 % 45 days following herbicide treatment

4.0 Implementation Schedule

The RWQCB's Order requires that this ICAP "shall include an implementation time schedule." It also requires that "[t]he Dischargers shall initiate implementation in accordance with the accepted implementation time schedule within 60 days of written acceptance of the ICAP by the Executive Officer."

Pepperweed control with herbicide will be initiated as outlined in Section 3.0. Control by inundation will begin after receipt of both State and Federal authorizations to pump water into the diked interior of PBI for the purpose of preparing the island for reintroduction of pre-2012 hydrology conditions. Pepperweed monitoring will be conducted in May, and every 4 months thereafter until the RP/MMP is implemented. Interim monitoring for pepperweed flower bud formation will occur as needed throughout the implementation of the ICAP.

ICAP implementation activities include:

1. Determine Corps permitting strategy (on-going)
2. Prepare and submit applications for authorization from Corps/USEPA,[15], RWQCB,[16] BCDC,[17] and CDFW[18] (Includes consultations with USFWS and NMFS [19] SHPO[20];, Compliance with CEQA[21] and NEPA[22] also required).
3. Pumping upon receipt of various authorization to inundate diked interior of the island
4. Implementation of herbicide treatment in upland areas
5. Pumping water off the island
6. Seeding upland areas along margin of new levee
7. Monitoring and corrective action(s)

The table below provides a proposed implementation schedule.

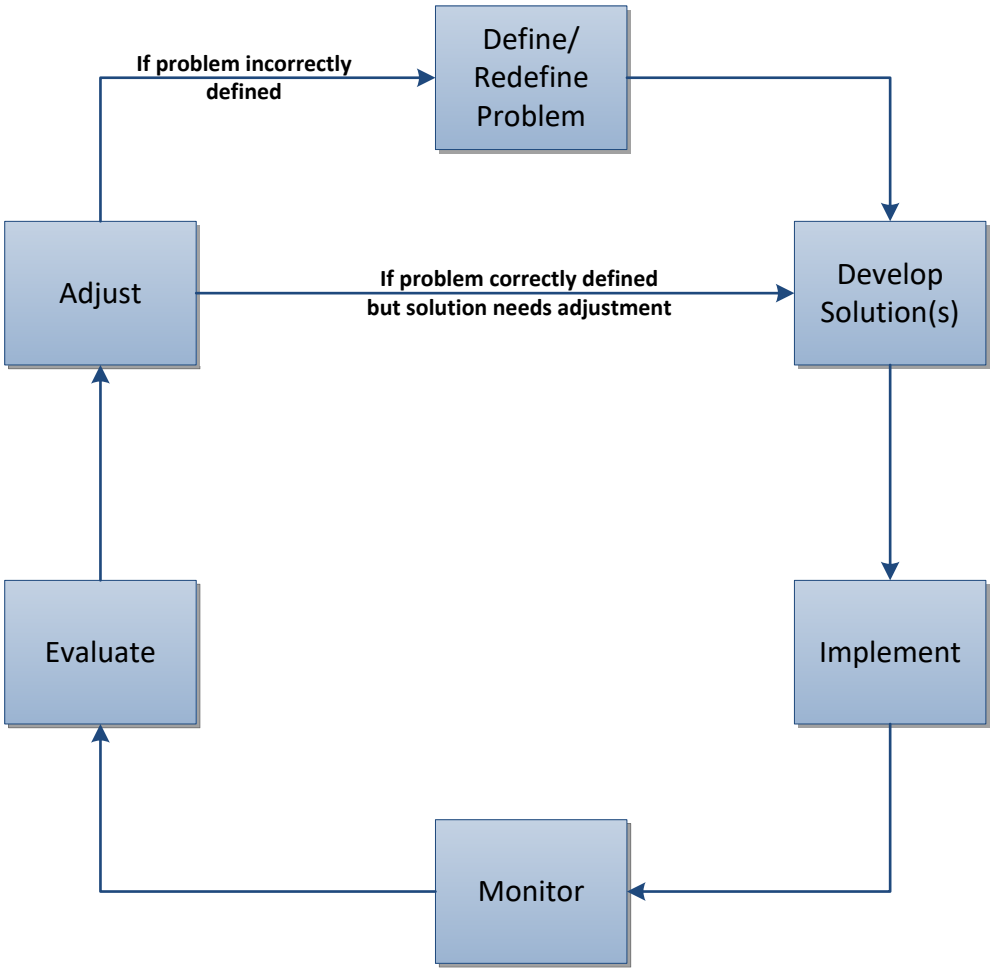
---

[15] Section 404/10 permits. Presumably, EPA would have to allow because Corps can't move forward since EPA took over process via enforcement action
[16] 401 Water Quality Certification
[17] Coastal Zone Certification and The McAteer-Petris Act
[18] California Endangered Species Act
[19] Endangered Species Act
[20] National Historic Preservation Act Section 106 clearance
[21] California Environmental Quality Act
[22] National Environmental Policy Act

ICAP Implementation Schedule		
Time Frame	**Activity**	**Comments**
December 2016	Receipt of ICAP Approval from the RWQCB	Date of ICAP submission to RWQCB for review is November 10, 2016
February 2017	Implementation of ICAP	Initiate ICAP within 60 days; Ability to flood interior of the island tentative based on obtaining authorizations
October 2017	End of ICAP	Estimated

5.0 Adaptive Management

Although the interim period described in this document should be relatively brief, and be replaced with more permanent measures that include opening the perimeter levee and re-introducing tidal action, adaptive management will be part of the framework for this ICAP. As with the new the Individual Management Plan being developed for PBC, adaptive management will follow the Plan-Do-Check-Correct framework illustrated below.



Adaptive Management Framework

Adaptive management feedback loops are incorporated into the monitoring and reporting requirements, which are intended to provide early indications of unanticipated problems in meeting and maintaining the ICAP's goals. When such problems are encountered and which may include the need for development of alternate land management strategies if landowner financial resources become a limiting factor, PBC and a qualified biologist or other expert with relevant expertise (e.g., hydrology) will consult with the RWQCB and any other agencies with relevant jurisdiction to determine the nature and extent of any corrective measures.

Attachment 1

Figures

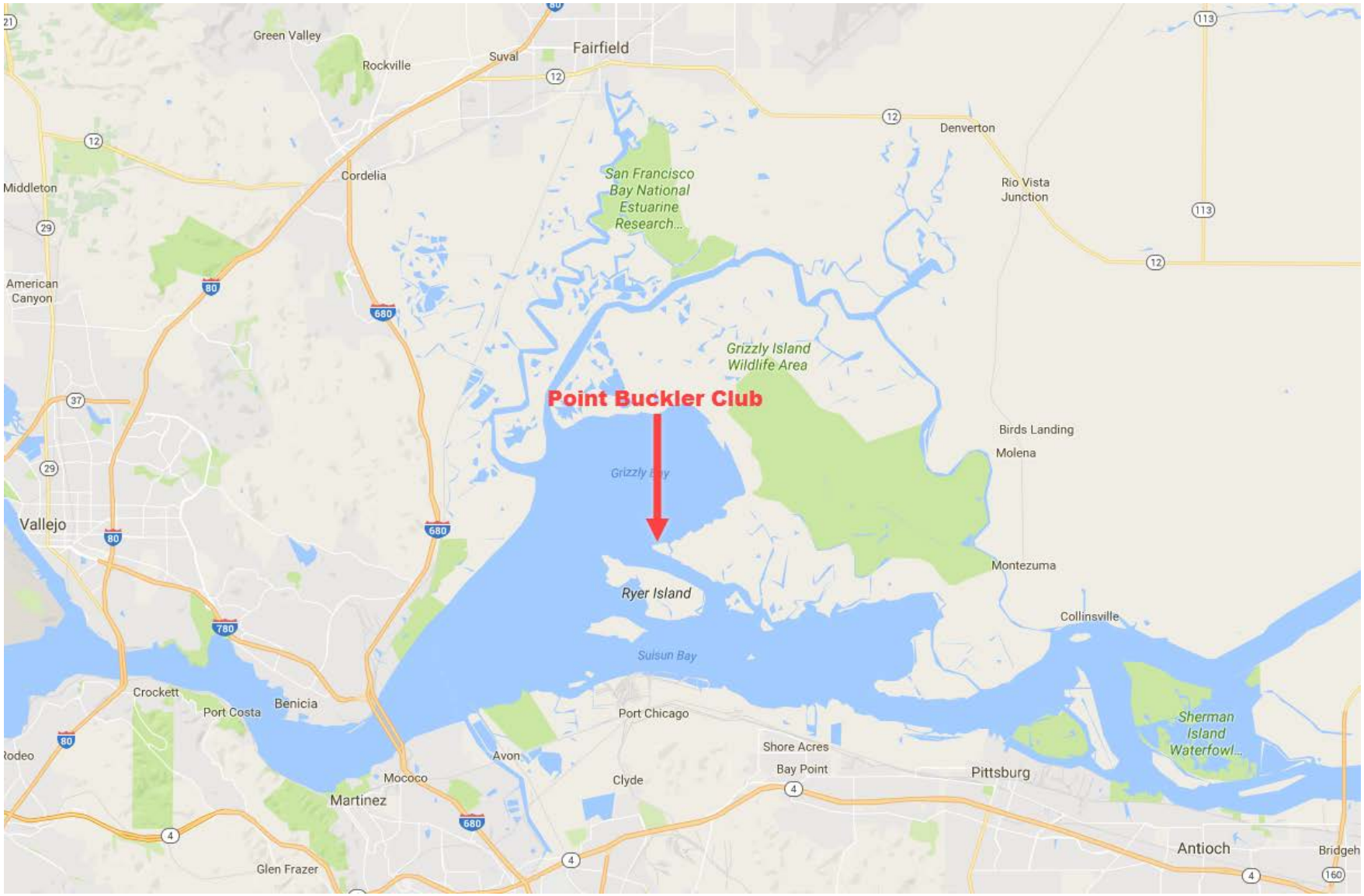


Figure 1: General Vicinity Map

Figure 2: Point Buckler Club

Figure 3. March 2016 Aerial Photograph of Point Buckler Island Which Shows Area to be Flooded

Attachment 2

Exhibits

Exhibit 1. Draft Point Buckler Club Restoration Plan and Mitigation & Monitoring Plan

Basic Elements

1. Restoration Plan

a. Protection of island from erosion by restoring levee system

b. Restoration of tidal hydrology regime to pre-2012 conditions

   i. Construct one or more breaches in perimeter levee

   ii. Evaluate control mechanisms at breach(es) to allow water to be retained within the island for pepperweed control

c. Vegetation management for tidal wetland waterfowl hunting

d. Invasive plant control using inundation and/or approved herbicide

e. Removal of creosote bulkhead piles

f. Retention of boat dock in Andy Mason Channel

g. Construction of:

   i. 5 member cabins

   ii. Kite rigging area

   iii. Kite board launch area

   iv. Helicopter landing area

2. Mitigation & Monitoring Plan

a. Wetland mitigation and associated improvement of fishery habitat

b. Mitigation Design

c. Created/Restored Habitat(s)

d. Success Criteria

e. Monitoring

f. Implementation Plan

    i. Site Preparation

    ii. Schedule

    iii. As-built Drawings

g. Best Management Practices

h. Monitoring

    i. Methods

    ii. Schedule

i. Maintenance

j. Reports

    i. Due Dates

    ii. Contents

k. Adaptive Management

    i. Agency Coordination

    ii. Determining if Action Required

    iii. Agency Coordination

    iv. Identification of Appropriate Measures

l. Final Report

Exhibit 2. CLE Surveyor's Points with Aerial Photograph Dated February 2015

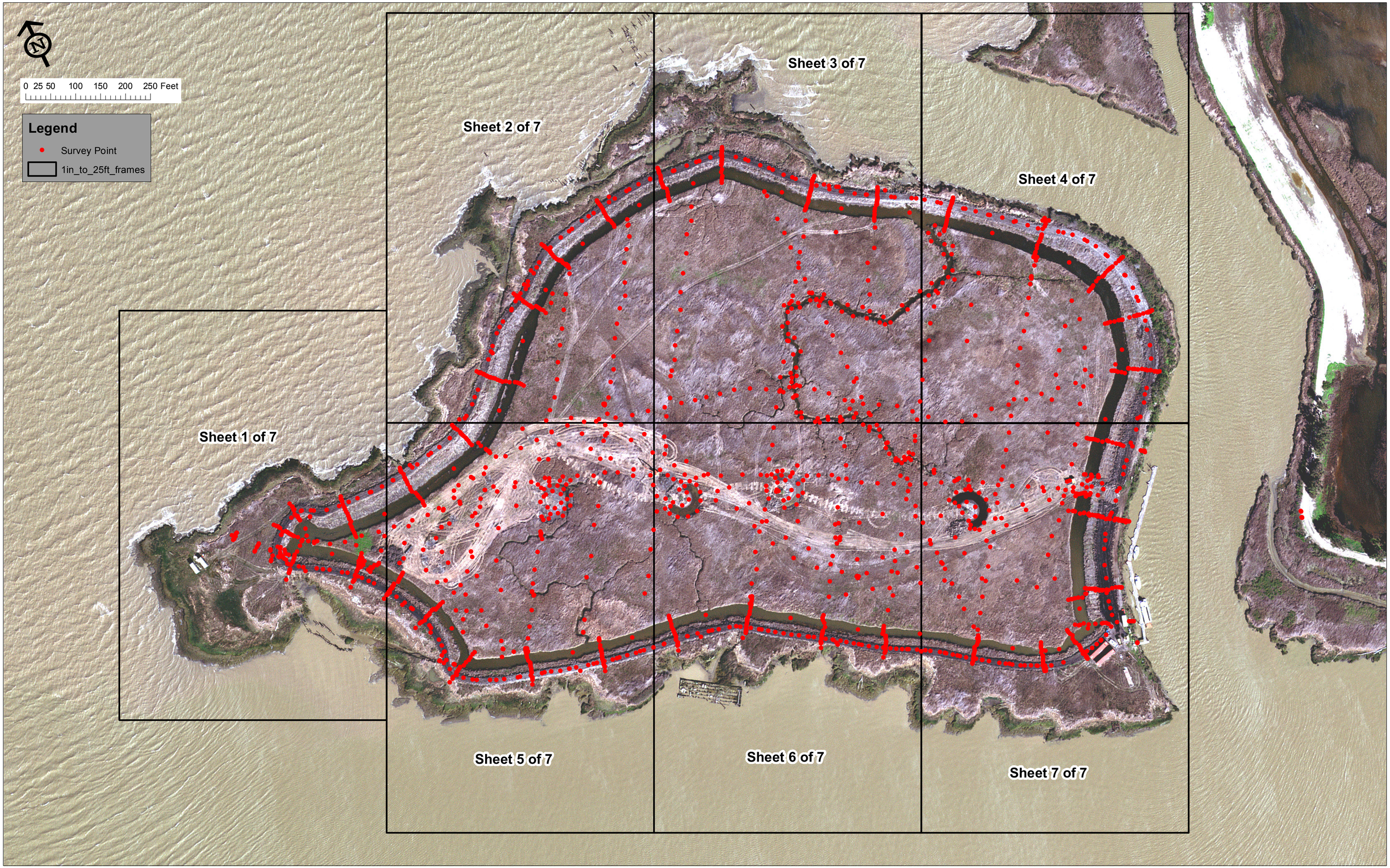


Exhibit 2. CLE Surveyor's Points with Aerial Photograph Dated February 2015

Surveyor's Points with Aerial Dated February 2015, Sheet 1 of 7

Surveyor's Points with Aerial Dated February 2015, Sheet 2 of 7

Surveyor's Points with Aerial Dated February 2015, Sheet 3 of 7

Surveyor's Points with Aerial Dated February 2015, Sheet 4 of 7

Surveyor's Points with Aerial Dated February 2015, Sheet 5 of 7

Surveyor's Points with Aerial Dated February 2015, Sheet 6 of 7

Surveyor's Points with Aerial Dated February 2015, Sheet 7 of 7

53c. Prosecution Team's Assessment of the Interim Corrective Action Plan for Point Buckler Island and Recommendations, November 18, 2016

TO: Bruce H. Wolfe
Executive Officer

November 18, 2016

FROM: Dyan Whyte
Assistant Executive Officer

Subject: Prosecution Team's Assessment of the Interim Corrective Action Plan for Point Buckler Island and Recommendations

The Prosecution Team has reviewed the Interim Corrective Action Plan (ICAP) submitted by John D. Sweeney and Point Buckler Club, LLC (Dischargers) as required by Provision 1 of Cleanup and Abatement Order No. R2-2016-0038 (CAO). As described in the CAO, the goal of the ICAP is to prepare the island for tidal restoration, and the goal for tidal restoration is to restore, at a minimum, the water quality functions and values of the tidal marsh, including the length of channel and area of marsh, existing prior to the Dischargers' unauthorized activities.

Based on our review, 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 beneficial uses. As such, the Dischargers have not timely submitted an acceptable ICAP as required by the CAO. We recommend that the Dischargers submit a revised ICAP to address the issues identified in this letter and submit it as quickly as possible. Such submittal will reduce penalties that may result from non-compliance with the CAO.

Extent of Perennial Pepperweed on the Island

The ICAP likely understates the extent of perennial pepperweed on the island because it uses observations taken at a time of year when it is difficult to observe the plant. The ICAP states that ground observations and interpretation of recent aerial photos were used to determine the geographical extent of pepperweed, and that this work found less than 2 acres of pepperweed present on the island. The methodology was not provided, so we cannot fully evaluate whether appropriate methods were used. However, one notable flaw in the observations is that they underestimate the geographical extent of pepperweed because they were conducted during the wrong time of year. The work assessed the extent of pepperweed in October 2016 when it naturally withers down to negligible cover and therefore fails to capture the prevalence and spread of this problematic invasive species.

Interim Water Management for Pepperweed Control and Soil Management

The ICAP proposes to (1) use an existing unauthorized tide gate to move water onto the island, and (2) pump water over the perimeter levee to the interior of the island, for interim pepperweed control and soil management. The island, although not its levees, would be flooded for a minimum of 50 days, and then water will be moved off the island. However, the ICAP fails to address the need for proper water management on the island. For example, water management might include alternating deep flooding with shallow flooding to drown out the pepperweed and promote the regeneration of tidal marsh vegetation including tule, bulrush, and cattail. Similarly, the ICAP does not address potential water quality issues, such as the potential for ponded water to have low dissolved oxygen that could harm fish when the water is discharged from the island. Water used to flood the island should be circulated with the Bay rather than being held in place for 50 days straight to avoid issues with low dissolved oxygen. Technical justification is needed to demonstrate that simply moving water on and off the island will achieve the goals described in the CAO.

The ICAP mistakenly concludes that water can then be moved off the island as long as the proposed performance criterion is met (less than 5% absolute cover of pepperweed 45 days following the cessation of flooding treatment). This shows a significant misunderstanding of the purpose of the interim corrective actions required by the CAO and of the underlying mechanism that led to the spread of pepperweed, elevated soil salinity, and soil acidification and peat decomposition, namely diking off and draining the island. Returning the island to diked and drained conditions after a brief period of flooding is likely to negate any improvements gained by proposed interim corrective actions and will not effectively prepare the island for tidal restoration.

Structural Fill

The ICAP does not discuss the disposition (e.g., removal, relocation, etc.) of the unauthorized structural fill placed on the island including the shipping containers, astroturf, and helipads. The ICAP should explain what will be done with structural fill during implementation of the ICAP, such as flooding, and provide a plan or schedule for removal of the unauthorized structural fill in preparing the island for tidal restoration.

Use of Tide Gate to Flood the Island

The tide gate was newly installed in 2014 during construction of the new levee without permits or consultation with U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) as required for any new point of diversion. Therefore, it remains unauthorized and cannot be operated until the Dischargers obtain the necessary approvals and/or consultation with USFWS and NMFS. However, the ICAP does not include an estimated schedule for obtaining those authorizations or a discussion of a backup plan if they are not received. The Dischargers will also need to install fish screens or comply with unscreened water diversion restrictions specified by the USFWS Biological Opinion and the NMFS Biological

Opinion. However, the ICAP does not include any discussion of potential restrictions and how they have been anticipated and addressed.

The ICAP does not include any hydraulic modeling results or other discussion evaluating whether the tide gate is of sufficient size or whether it is the right type of water control structure to allow for the proper flooding and water circulation needed to prepare the island for tidal restoration. In our meeting on July 22, 2016, we requested the Dischargers provide hydraulic analysis in support of proposed corrective actions, and they indicated this would be completed. However, the ICAP does not provide any hydraulic analysis to address issues such as demonstrating that opening the tide gate will provide tidal flow to adequately flood the island, that water will be circulated appropriately to reduce soil salinity, and that there will not be adverse water quality impacts from the proposed approach.

Finally, the ICAP does not evaluate, but should evaluate, the potential increased risk of fish predation associated with opening the tide gate. The Dischargers' experts and Water Board experts agree that such artificial structures are widely seen to increase predation risk for small fish.

Pumping Water to Flood the Interior of the Island

The ICAP proposes to use pumps to flood the island and states that discussion with Corps staff is ongoing to determine the appropriate permitting strategy. We agree that pumping water to flood the interior of the island will require authorization from agencies including the Corps or U.S. EPA. However, proposed corrective actions likely cannot be authorized under any existing Regional General Permit or Nationwide Permit. The Dischargers should inform Water Board staff which Corps staffer they have had discussions with on this issue, and the results of the discussions to date, so we can help facilitate and coordinate a permitting strategy.

Relationship to Restoration Plan

The ICAP states that proposed corrective actions are intended to precede the Restoration Plan (RP) and Mitigation and Monitoring Plan (MMP) required in the CAO. We agree that the ICAP's goal is to prepare the island for tidal restoration. Thus, it is necessarily linked to the Restoration Plan.

CAO Provision 2 requires a Restoration Plan designed to (1) restore tidal flow into channels and ditches; (2) restore tidal circulation throughout the interior of the Site; and (3) restore overland tidal connection to the Site's interior marsh during higher tides. However, the ICAP states the RP currently being developed considers the following three alternatives (1) open levee breaches; (2) round or ovoid shaped culverts; and (3) box culverts. The ICAP further states that each alternative will include water control structures to allow for vegetation management and invasive plant control. Installation of culverts is not an acceptable alternative because it will restrict tidal flow, tidal circulation throughout the island's interior, and overland tidal connection. Culverts are likely to fill in with sediment and require long-term maintenance and as discussed above, culverts can result in increased risk of fish predation. It is also unclear why

water control structures are needed for vegetation management and invasive plant control if the island will be restored to tidal marsh, and this issue is not discussed in the ICAP. Restored tidal marshes may require some adaptive management in the short-term, but should not require maintenance or water management in the long-term.

Lack of Hydraulic Analysis

Water Board staff requested the Dischargers provide hydraulic analysis as early as our July 22, 2016, meeting, to provide technical justification for proposed interim corrective actions and tidal restoration. The Dischargers agreed their consultants would complete an appropriate analysis. However, during our October 25, 2016, meeting, the Dischargers told Water Board staff that their consultants are unable to conduct any hydraulic analysis until they collect more tide data. The ICAP proposes to install a continuously recording tide gauge following approval of the ICAP to collect tide data and predict maximum tide heights on the island as compared to Port Chicago.

The Prosecution Team disagrees that additional data are needed, because the report prepared by the Water Board's technical experts includes significant analysis and conclusions regarding tidal levels at the island. The Dischagers have had ample time and sufficient tide data available to perform the needed hydraulic analysis and provide technical justification for proposed interim corrective actions. Further, the proposed approach to collect additional tide data is inadequate. To collect valid data on local tidal hydrology, a minimum of 45 days of tide data is needed; data collection must span at least three spring tide time series, and must capture solstice peak spring tides. Delaying hydraulic analysis until more data is collected with the proposed tide gauge will unnecessarily delay interim corrective actions and tidal restoration of the island.

Use of Herbicides for Pepperweed Control

During an October 25, 2016, meeting, Water Board staff informed the Dischargers that the use of herbicides to control pepperweed is inappropriate for tidal restoration sites particularly when corrective actions need to be protective of listed fish species. Further, herbicides will not be effective as they can only be used to target juvenile and adult plants and will not control the spread of seedlings. Controlling the spread of seedlings is essential to effectively controlling pepperweed.

The ICAP proposes to control pepperweed along the bay side and interior margins of the levee by mowing adult plants then spraying with chlorsulfuron. However, only glyphosate and imazapyr formulations with low-toxicity surfactants are registered for use in estuarine wetlands and in proximity to aquatic habitats in California. No other herbicides, and no chlorsulfuron formulations, are approved for use in estuarine wetlands or adjacent aquatic habitats. Further, available scientific evidence has found compelling evidence of significant persistent non-target impacts of imazapyr in Suisun marsh soils. Wick applications of glyphosate may be an acceptable method for controlling adult or juvenile plants on the levees, but will not effectively control seedlings.

In proposing herbicide control, the ICAP does not address the mechanism that led to the spread of pepperweed. Diking off and draining the island changed the hydrology and vegetation composition. Pre-existing hydrological processes and competition with the dense, tall canopies of tule, bulrush, and cattail restricted the colonization and persistence of pepperweed prior to the unauthorized levee construction. One alternative, and potentially more effective and protective means of controlling pepperweed is to promote the regeneration of tule, bulrush, and cattail, which can exclude pepperweed by forming tall, dense canopies.

Monitoring and Evaluation

The information the ICAP proposes to monitor for and evaluate is inadequate to determine the interim actions' effectiveness and whether the actions should be modified. The purpose of monitoring is to evaluate the effectiveness of corrective actions and inform decisions for the future restoration of the island. The ICAP proposes only one criterion to evaluate whether the island has been sufficiently rehabilitated and is ready for tidal restoration. The proposed performance criterion for the diked interior portion of the island and levee fill areas is that "absolute plant cover of perennial pepperweed in initially mapped dense stands within areas disturbed by levee construction is ≤5% 45 days following the cessation of flood treatment."

We discuss above that the geographical extent of pepperweed has likely been underestimated and the Dischargers' study did not adequately capture the prevalence and spread of pepperweed on the island. While population density of pepperweed may be higher in the areas disturbed by levee construction, diking off and draining the island has led to the spread of pepperweed in the island interior. Considering that the goal of the ICAP is to prepare the island for tidal restoration, more appropriate performance criteria would be to assess pepperweed cover on the entire island. Another useful performance criterion would be to assess the regeneration of native tidal marsh species including tule, bulrush, and cattail.

The ICAP also states that "pepperweed monitoring will be conducted in May and every four months thereafter until the RP/MMP is implemented." Pepperweed monitoring should be conducted during the appropriate time of year. Perennial pepperweed is green and highly visible only in spring and/or early summer. Therefore, we agree with the proposal to survey for pepperweed in May, but valid vegetation surveys to estimate pepperweed cover and distribution are only feasible in spring or early summer. Also, the RP and MMP are separate plans. CAO Provision 3 requires the MMP to provide compensatory mitigation for temporal and permanent impacts to wetlands and other waters of the State that resulted from the Dischargers' unauthorized activities in addition to tidal restoration of the island. Thus, it may be appropriate to conduct pepperweed monitoring under the ICAP until the RP is implemented, after which time monitoring would be governed by the accepted RP.

Finally, the ICAP does not anticipate potential problems (such as low dissolved oxygen), propose monitoring to identify whether those problems may be occurring, or proactively consider potential alternatives to likely problems. Instead, it presents a generic "adaptive

management framework" that is not specific to work at the island or even to tidal restoration generally. Thus, it is unlikely that potentially significantly problems will be identified or corrected under the proposed ICAP, or identified for subsequent incorporation into the longer-term RP.

Implementation Schedule

The ICAP includes an inadequate implementation schedule. It is inadequate because it does not include clearly necessary tasks, and a proposed schedule for completing those tasks, such as obtaining necessary permits and completing consultations with the resource agencies. Instead, it has three dates: Water Board approves ICAP (December 2016); Implementation of ICAP (February 2017); and End of ICAP (October 2017). The ICAP must include an appropriately detailed implementation schedule.

The ICAP states that proposed corrective actions cannot be implemented until approval is obtained from a number of regulatory agencies, including Clean Water Act Section 401 Water Quality Certification from the Water Board. However, we have not received an application for certification for the proposed corrective actions.

The ICAP proposes implementing the ICAP in February 2017, after receiving Water Board approval, and then estimates ending corrective actions in October 2017. As we discuss above, ceasing the flooding treatment and returning the island to diked and drained conditions is likely to negate any improvements gained by proposed interim corrective actions and will not effectively prepare the island for tidal restoration.

Closing

We recommend that the Dischargers submit a revised ICAP that addresses the issues identified above as soon as possible. If you have any questions, please contact Agnes Farres of my staff at (510) 622-2401 or by e-mail to agnes.farres@waterboards.ca.gov.

Cc by email:

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Administrative Civil Liability Complaint
No. R2-2016-1008

John D. Sweeney and
Point Buckler Club, LLC

Description of Exhibit Provided by Hard Copy and Electronically
(Water Board and Discharger Correspondence)

Exhibit 54

Re: Request to keep information confidential, email thread, November 7, 2016

From: Whyte, Dyan@Waterboards
Sent: Monday, November 07, 2016 3:52 PM
To: Max Rollens; Drabandt, Laura@Waterboards; Ajello, Marnie@Waterboards
Cc: Lawrence S. Bazel; Lee, Shin-Roei@Waterboards; Elias, David@Waterboards; Morrison, Elizabeth@Waterboards; Wells, Elizabeth@Waterboards; Coupe, David@Waterboards; Farres, Agnes@Waterboards; Martin, Benjamin@Waterboards; Thompson, Brian@Waterboards; Lichten, Keith@Waterboards; Austin, Tamarin@Waterboards; Macedo, Julie@Waterboards
Subject: RE: Request to keep information confidential

Dear Ms. Ajello and Mr. Rollens,

This responds to Mr. Rollens' email below. We defer to the Advisory Team's decision on the request for confidentiality regarding the submissions to date, but note our disagreement with the contention that 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. Numerous parties are interested in the outcome of this penalty matter and several have advocated that the Board assess the base liability of $11.3 million. These parties are entitled to know the basis on which the Board determines whether it agrees with Mr. Sweeney's and Pt. Buckler Club LLC's affirmative defense of inability to pay, particularly here, where the information in question discloses so few specifics.

In balancing the protection of privacy against the prevention of secrecy in government, courts first evaluate whether "disclosure of the information would compromise substantial privacy interests'" and whether the information disclosed amounts to a "clearly unwarranted invasion of personal privacy." (Caldecott v. Superior Court (2015) 243 Cal.App.4th 212, 230-231, citing BRV, Inc. v. Superior Court (2006) 143 Cal.App.4th 742, 755.) The other side of the equation is considering "the extent to which disclosure of the requested item of information will shed light on the public agency's performance of its duty." (Id. at 231.) Both factors weigh in favor of disclosure here. As discussed in our prior email, the Board must make a determination on whether to impose a penalty and the appropriate amount of any penalty. In doing so, interested parties and the public generally are entitled to know the bases on which the Board made such determinations. In addition, the broad-brush "evidence" Mr. Sweeney has submitted, including home values and generic statements that Mr. Sweeney had no net taxable income and has "minority contractual interest in investment partnerships" do not compromise substantial privacy interests. Indeed, home values or sales prices are available on several well-known websites. Not having an income and at the same time purchasing an island and maintaining multiple homes, several of which were valued over a million dollars, implies substantial net worth, but does not detail the form of assets, liquidity, value or income from them – in short, very little to inform an inability to pay defense. Should Mr. Sweeney submit addition specific information concerning assets and net worth (e.g., tax returns, bank statements, a complete list of assets), we are willing to revisit our position on this issue, but the information submitted to date is not sufficiently detailed to warrant confidentiality in these proceedings.

Respectfully submitted on behalf of the Prosecution Team,

Dyan Whyte

Dyan C. Whyte
Assistant Executive Officer

California Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay St., Suite 1400
Oakland, CA 94612

510-622-2441
510-926-2870

From: Max Rollens [mailto:mrollens@briscoelaw.net]
Sent: Thursday, November 03, 2016 12:33 PM
To: Drabandt, Laura@Waterboards; Ajello, Marnie@Waterboards
Cc: Lawrence S. Bazel; Lee, Shin-Roei@Waterboards; Elias, David@Waterboards; Morrison, Elizabeth@Waterboards; Wells, Elizabeth@Waterboards; Coupe, David@Waterboards; Farres, Agnes@Waterboards; Martin, Benjamin@Waterboards; Thompson, Brian@Waterboards; Whyte, Dyan@Waterboards; Lichten, Keith@Waterboards; Austin, Tamarin@Waterboards; Macedo, Julie@Waterboards
Subject: RE: Request to keep information confidential

Dear Ms. Ajello and Ms. Drabandt:

Please see the following response with respect to the confidentiality of financial information. Thanks very much.

Max

The confidential financial information is protected from disclosure

The Public Records Act includes a privacy exemption. Government Code section 6254(c) provides that disclosure of records is not required if they are "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." The purpose of the privacy exemption is to "protect information of a highly personal nature which is on file with a public agency." (Final Rep. of Cal. Statewide Information Policy Com. (Mar., 1970), pp. 9-10, 1 Appen. to Assem. J. (1970 Reg. Sess.).) The term "similar files" has been interpreted to "have a broad, rather than a narrow, meaning." (*Department of State v. Washington Post Co.* (1982) 456 U.S. 595, 600.) The records may simply be government records containing "information which applies to a particular individual." (456 U.S. at p. 602.)

Under section 6254(c), the court balances the public interest in disclosure against the individual's interest in privacy. (*Los Angeles Unified School Dist. v. Superior Court* (2014) 228 Cal.App.4th 222, 240) While this test is similar to that under section 6255 (as you assert), it is not the same because the section 6255 test weighs the public's interest in nondisclosure, not individual's interest in privacy. (*Id.*) If disclosure "would not shed light on an agency's performance of its duties or otherwise let citizens know what their government is up to, '[t]he relevant public interest supporting disclosure … is negligible, at best.'" (*Id.* at 249, quoting *United States Dep't of Defense v. Federal Labor Relations Auth.* (1994) 510 U.S. 487, 497.) "Even where a public interest exists, if it is minimal or hypothetical, disclosure will not be compelled." (*Id.* at p. 248.)

Here, Mr. Sweeney's privacy interest is remarkably high. He has submitted confidential financial information that includes details about his assets and explains his net worth. This information is not available publically. While this type of information implicates a high interest in privacy generally, under the facts of this

case, it is even higher. Mr. Sweeney is rightly concerned that disclosing confidential information may enable others to decrease the value of his assets. Mr. Sweeney's individual interest in privacy is therefore high.

By contrast, the public interest in disclosure is minimal. Mr. Sweeney requests that only a small slice of information be withheld from public disclosure. The Regional Board could still disclose all other information related to the enforcement action, which would sufficiently justify its activities. Disclosure of this specific information would not shed light on the Regional Board's performance of its duties because the information would reveal little more about the agency or its activities.

On balance, Mr. Sweeney's interest in privacy outweighs the public interest in the disclosure of the specific financial information at issue here.

You cite the *Marken* case for the assertion that "[a] person's privacy may not be considered constitutionally violated if [] there is a strong public policy supporting transparent government." (*Marken v. Santa Monica-Malibu Unified School Dist*. (2012) 202 Cal.App.4th 1250.) But *Marken* is distinguishable because it involved a rule established for applying section 6254(c) to the disclosure of an employee's personnel file. (*Id.* at p. 1274.) Specifically, in *Marken* and the cases cited therein, the court applied a standard that involved weighing "an individual's privacy rights against the public's right to know of an alleged wrongdoing for purposes of section 6254, subdivision (c)." (*Id*. at p. 1273.) The court found that the public had a right to see the investigation report and letter of reprimand regarding a teacher accused of sexual harassment. (*Id*. at p. 1275.) Thus, *Marken* did not involve a private party's confidential financial information.

Even if *Marken* did apply, there is no question that the public would have access to the types of documents the court was concerned with there. Indeed, nearly every report and letter involving Point Buckler is available on the Regional Board's website, and the public would have no trouble learning of the alleged wrongdoing.

You further assert that "[a] government agency or its staff cannot merely promise to keep these records confidential." But, as explained in *Johnson v. Winter* (1982) 127 Cal.App.3d 435, 439, the public interest served by nondisclosure has been upheld under section 6255, where information was obtained with the understanding that it would be kept confidential. (*Id*., explaining that "[t]he public has an interest in encouraging cooperation with investigations made by public agencies" and "assurances of confidentiality may be a prerequisite to obtaining candid information about applicants and that nondisclosure of such information given in confidence serves the public interest.")

Accordingly, to protect the important privacy interests guarded by the California Constitution and the Public Records Act privacy exemption, the Regional Board should deem the financial documents confidential and prevent their disclosure

MAX ROLLENS
155 Sansome Street, Seventh Floor
San Francisco, California 94104
Office: (415) 402-2700 Direct: (415) 402-2716

From: Drabandt, Laura@Waterboards
Sent: Tuesday, October 25, 2016 4:07 PM
To: Lawrence S. Bazel; Ajello, Marnie@Waterboards
Cc: Lee, Shin-Roei@Waterboards; Elias, David@Waterboards; Morrison, Elizabeth@Waterboards; Wells, Elizabeth@Waterboards; Coupe, David@Waterboards; Farres, Agnes@Waterboards; Martin, Benjamin@Waterboards;

Thompson, Brian@Waterboards; Whyte, Dyan@Waterboards; Lichten, Keith@Waterboards; Austin, Tamarin@Waterboards; Macedo, Julie@Waterboards
Subject: RE: Request to keep information confidential

Dear Ms. Ajello and Mr. Bazel,

The Prosecution Team has concerns regarding Mr. Sweeney's and Point Buckler Club, LLC's (the Dischargers') request for confidentiality, and potential future evidence submittals. We are providing this message in an effort to assist the process leading up to the December 14, 2016 hearing on Complaint No. R2-2016-1008.

Confidentiality of Financial Information
The Prosecution Team does not contest that statements regarding financial information may raise privacy concerns under the California Constitution as indicated in the Dischargers' Request to Keep Information Confidential (October 19, 2016). However, concerns regarding privacy must be balanced against the Regional Water Board's obligation to comply with the California Public Records Act (Government Code section 6250 *et seq*.), and need to receive such information in compliance with California Civil Code section 1798.24 (Information Practices Act).

The nature of the information the Dischargers seek to keep confidential is that of statements attributed to Mr. Sweeney, his certified public accountant, and counsel. Statements by or attributed to an individual regarding financial matters may be considered "personal information" under Civil Code section 1798.3. However, none of the information is specific in nature. The declarations and brief do not contain anything substantiating any of the statements, such as tax returns which are typically required to make an affirmative defense of an inability to pay a proposed penalty claim.
Civil Code section 1798.24 instructs agencies to not disclose personal information unless the agency discloses the document consistent with the section. Subsection (g) exempts an agency from its obligation to not disclose personal information pursuant to the Public Records Act (PRA), and subsection (k) allows disclosure pursuant to a subpoena or other compulsory legal process. Under the PRA, an agency is required to disclose records if there is a request unless there is a specific exemption to the act. (*Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1275-76.) The PRA has a strong policy in favor of disclosing public records, and an agency that does not disclose records must prove that a statutory exemption applies. (*League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 987.) In arguing the California Constitution right to privacy should prevent disclosure, the Regional Water Board would have to balance whether the person's constitutional right to privacy clearly outweighs the public interest served by disclosing the record, similar to a Government Code section 6255 balancing test. (*Los Angeles Unified School District v. Superior Court* (2014) 228 Cal.App.4th 222, 239.) A person's privacy may not be considered constitutionally violated if the there is a strong public policy supporting transparent government. (*Marken v. Santa Monica-Malibu United School Dist.* (2012) 202 Cal.App.4th 1250, 1261-1262). The core purpose of the PRA is to prevent secrecy in government, and assist with understanding government activities. (*League of California Cities v. Superior Court* (App. 4 Dist. 2015) 194 Cal.Rptr.3d 444; see *also Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 909-910 [settlement records used to calculate and pay a claim could not remain secret because the public interest in overseeing government action prevailed over an individual's privacy right when he had already disclosed the information].) A government agency or its staff cannot merely promise to keep these records confidential. (*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 776 ["assurances of confidentiality are insufficient in themselves to justify withholding pertinent public information from the public"].)

In the present case, the Dischargers have the option of whether to include any financial information in their evidentiary submission. The Dischargers willingly submitted these declarations and legal brief to attempt to build an argument showing an inability to pay the proposed penalty claim. These statements were not information already contained in the Regional Water Board's files. If the Dischargers want the Board to consider the information they contain, then the information must be made public to substantiate any Board decision that may related to the information in the interest of transparent government. If any other agency or person wants to review the information, they can issue a subpoena or Public Records Act request to review the Regional Water Board's files. The Prosecution Team is concerned that even if Regional Water Board members and staff tried to keep these records confidential, the agency cannot keep their promise. The Prosecution Team encourages transparency in the decision making process, consistent with the

Enforcement Policy in seeking fair, firm, and consistent enforcement by using the methodology to fully articulate why the Board determines a penalty they impose is suitable.

Inability to Pay Claims

The information typically relied upon to put forth the affirmative defense is outlined in the Fact Sheet that accompanied the administrative Civil Liability Complaint when it was issued May 17, 2016. Another copy of the Fact Sheet is attached for easy reference. The majority of the ACL Fact Sheet is dedicated to what is needed to make an inability to pay claim, stating, "[i]f the Discharger intends to present arguments about its ability to pay, it must provide reliable documentation to establish that ability or inability." The ACL Fact Sheet lists examples of documents that should be submitted to establish ability or inability to pay, including financial records pertaining to debt, income, and assets (see pages 3 and 4). The Prosecution Team reserves the right to object to any such information the Dischargers may submit in rebuttal because the Prosecution Team will not have an opportunity to respond. Any inability to pay information the Dischargers want the Board Members to consider should have been submitted in the opposition materials due October 19, 2016. However, the Prosecution Team is open to a conversation with the Advisory Team and Dischargers should Mr. Sweeney and Point Buckler Club, LLC provide the type of documents needed to demonstrate ability or inability to pay the proposed liability in a sufficient amount of time prior to when the Prosecution Team's rebuttal is due.

Topographic Survey Evidence

A similar evidentiary concern may arise should the Dischargers seek to admit their topographic survey evidence. Prosecution Team staff observed a topographic survey conducted on behalf of the Dischargers at Point Buckler Island on October 4, 2016, but the Dischargers did not include the results of this survey with the evidence submitted on October 19, 2016. Similar to substantive financial information evidence, the Prosecution Team reserves its right to object to any such information submitted in rebuttal because the Prosecution Team will not have an opportunity to respond. Topographic survey evidence the Dischargers want the Board Members to consider should have been submitted in the opposition materials due October 19, 2016.

Thank you for your consideration.

Laura Drabandt
Attorney for the Prosecution

From: Lawrence S. Bazel [lbazel@briscoelaw.net]
Sent: Wednesday, October 19, 2016 8:20 PM
To: Ajello, Marnie@Waterboards
Cc: Lee, Shin-Roei@Waterboards; Elias, David@Waterboards; Morrison, Elizabeth@Waterboards; Wells, Elizabeth@Waterboards; Coupe, David@Waterboards; Farres, Agnes@Waterboards; Martin, Benjamin@Waterboards; Thompson, Brian@Waterboards; Whyte, Dyan@Waterboards; Lichten, Keith@Waterboards; Austin, Tamarin@Waterboards; Macedo, Julie@Waterboards; Drabandt, Laura@Waterboards; McChesney, Frances@Waterboards; Matthew.Bullock@doj.ca.gov; Max Rollens; Arlene Won
Subject: Request to keep information confidential

Attached.

LAWRENCE S. BAZEL
155 Sansome Street, Seventh Floor
San Francisco, California 94104
Office: (415) 402-2700 Direct: (415) 402-2711

Administrative Civil Liability Complaint
No. R2-2016-1008

John D. Sweeney and
Point Buckler Club, LLC

Description of Exhibit Provided by Hard Copy and Electronically
(Social Media Posts)

Exhibit 55

55a. Jeff Kafka (Point Buckler Partner) Facebook 2014 Posts

55b. Suisun Marsh Property Owners Forum Post, April 6, 2016

55c. John Sweeney Twitter Account Snapshot, October 31, 2016

55d. John Sweeney Facebook Post, November 4, 2016

55e. Point Buckler Club Facebook Description, November 11, 2016

55f. Point Buckler Club Facebook Post, June, 20, 2016

55a. Jeff Kafka (Point Buckler Partner) Facebook 2014 Posts

Jeff Kafka in Suisun City, California.
2014 · ·

Started Working at Point Buckler Club

2014 — Partner/Operator
Suisun City, California

Buckler island is a private water sport island for like minded friends to spend time together, expand their horizons, and enjoy life.http://www.pointbucklerisland.com/

Share

36

Karl Jacob Woohoo. And so it begins!
January 12, 2015 at 11:55am · 1

Jack Sweeney May the wind be with you.
January 12, 2015 at 12:47pm · 1

Jeff Kafka
Follow · August 27, 2014 · Edited ·

Looking forward to another great Buckler Island Clinic this Labor Day weekend! We have a few more spots available. Message me for details! Wind Over Water Board Shop

Like Share

16

1 share 1 Comment

Erin Loscocco I plan on foiling up to Spinner and Buckler from Sherman and stopping by. Looks like it's gonna be another great Delta weekend 🙂
August 27, 2014 at 5:07pm · Edited · Like · 1

55b. Suisun Marsh Property Owners Forum Post, April 6, 2016

Suisun Marsh Property Owners Forum at State of California: Grizzly Island Wildlife Area.
April 6 · Suisun City ·

Historic Suisun Duck Club sues State to defend its legal rights to maintain its levees. The old Seeno Club founded in the early 1920s is small but not in terms of legal power. Every Delta land owner has rights to maintain their property but the State needs the land to be restored to allow Gov Browns tunnels to get approval. So here's their first attempt at stopping a property owner from doing what every delta landowner has done since the mid 1800s. Fixing your levee is now pollution! Only a State Agency could come up with something that bizarre.

http://www.mercurynews.com/…/delta-fight-state-agencies-isl…

Delta fight: State agencies, island owner battle over wetland status

In a growing legal battle, the owner of Point Buckler Island, a small piece of land in the Suisun Marsh, says a former duck club on the island is located on an artificial…

WWW.MERCURYNEWS.COM

Like Comment Share

228 Chronological

123 shares

Rob Thomas Fuckumm lets fight. .we are with you
Like · Reply · 1 · April 6 at 11:24am

Sandy Rixey Seeno Duckhunters Club. Not fair.
Like · Reply · 1 · April 6 at 11:52am

Steven Dixon NO FREAKING TUNNELS!!! WHAT ARE THEY THINKING?
Like · Reply · 1 · April 6 at 11:58am

James Keeton The California Liberals elected the morons in Sacramento and we are all now reaping what was sowed. The Wetlands is only the beginning.....
Like · Reply · 3 · April 6 at 12:03pm

Mark Flanders Southern California has all the pull. Secession!
Like · Reply · 5 · April 6 at 12:17pm

Robert Eric Oberlies To divide the State requires both, an Act of Congress, and, a statewide vote - which would include Southern California. That's why it has never succeeded.
Like · Reply · 1 · April 6 at 11:07pm

Mark Flanders Yes you are right Robert Eric Oberlies, but it would be great if it was a real possibility
Like · Reply · April 6 at 11:09pm

Write a reply...

Melchor Molina Tandingan Just keep voting democRATS... and the UNIONS too. They suck the host state. Just look around all Dem states was bankrupt and some were about to. Only a RepubliCAN will help us guys. ...
Like · Reply · 2 · April 6 at 1:18pm

1 Reply

Jeff Miraglia ... More Orwellian double speak from an overly political government ...
Like · Reply · 3 · April 6 at 1:43pm

Abraham Drucker Wait? What? The government is political? Well, I never!
Like · Reply · April 6 at 7:51pm

Jeff Miraglia ... For the people ... By the people ...
.. Not ... For the party in power ... Whether the other side likes it or not ...
... This is how civil wars are started ...
Like · Reply · April 6 at 8:30pm

Write a reply...

Byron Buck Fixing your levee is not 'pollution' but doing so without authorization and where it adversely impacts endangered species is a felony for which jail time applies.
Like · Reply · April 6 at 2:38pm

Suisun Marsh Property Owners Forum Each club has a certified club plan to do levee work without need for permits. It's part of the Suisun Marsh Preservation Act. All clubs do the same work. Your required by law to keep your levees intact. The obligation passes to new owners automatically. So if you read the last paragraph of article BCDC admits as much.
Like · Reply · April 6 at 3:26pm

Byron Buck Absolutely right but it appears from this report, these lands are not covered in general permit administered by the RCD
Like · Reply · 1 · April 6 at 3:31pm · Edited

Suisun Marsh Property Owners Forum That's what they are trying to claim now. By not keeping club up somehow the club plan was voided. No landowner would know that and no agency told any previous owners so??? The plan has been verified by all agencies as current but water board doesn't want clubs to maintain their levees. They want tidal wetlands now not duck clubs.
Like · Reply · April 6 at 3:47pm

Byron Buck It seems that this is going to fall on the RCD and the agencies adopting the plan to interpret whether this site was covered or not. Anyone who does work in a wetland should perform due diligence before doing work, just like you don't build a home before you figure out what permits you need.
Like · Reply · April 6 at 4:04pm

Suisun Marsh Property Owners Forum Missing the point when you buy a club you get a club plan certified by all agencies. It tells you how to fix and maintain your levees. Like an HOA it's a manual with the entire deal. If you follow it no permits are required. That's the point they followed the plan they were given. If they had not army corp and bcdc would have fined them. This happened over two years ago. A year after water board decides to claim it was pollution. If you follow your plan that's certified how can it be pollution. To date no fines or penalties have been given. This was in 2014.
Like · Reply · April 6 at 4:25pm

Byron Buck I agree but there seems to be a dispute as to whether this club is covered under the permit. Fact finding should resolve this.
Like · Reply · April 6 at 4:30pm

Suisun Marsh Property Owners Forum Yes that's the dispute. They say since club didn't maintain itself under previous owners they lost the rights as new owners to follow plan. That's why they sued state. Only a judge can decide. It's their interpretation vs the clubs responsibility to keep its levees fixed. But club was handed plan by bcdc which said it was valid. So one agency's says okay then next says no. Regardless it's not pollution lol but all good points
Like · Reply · April 6 at 5:40pm

View more replies

Write a reply...

Dean West Some how we need to break the back of big government
Like · Reply · 1 · April 6 at 3:17pm

Josh Reublin Jesse Painter
Like · Reply · April 6 at 3:37pm

Suisun Marsh Property Owners Forum From page of Mercury, East Bay and Democrat.

EAST BAY TIMES
Wetland wardens: Who is in charge?
Cal's abus woes wide

Like · Reply · April 6 at 3:44pm

Joel Gannotti So now do you understand what Jerry Brown and Feces are?
Like · Reply · 2 · April 6 at 4:03pm

Stephen Matthews They are both the same.
Like · Reply · April 6 at 6:35pm

Write a reply...

Tim Johnson We just keep voting these delusional idiots in
Like · Reply · 3 · April 6 at 4:10pm

Thomas Campbell Fuck the tunnels. To much traffic. Barges will keep rio vista bridge up and down all day. Hours of traffic everyday for 5 years. Fuck that.
Like · Reply · 1 · April 6 at 4:38pm

Howard Hocking Liber as KS will do anything to get what they want they will lie cheat and steal
Like · Reply · 1 · April 6 at 5:01pm

Tyler K Ermitano Matt Milligan
Like · Reply · 2 · April 6 at 5:04pm

Mark Pare Gov brown screwing things up again!!
Like · Reply · April 6 at 5:36pm

Steve McDaniel F##k gov Brown's tunnels. These people's families were promised rights...
Like · Reply · 2 · April 6 at 5:41pm

John Kuzich CALIFORNIA SUCKS
Like · Reply · April 6 at 6:06pm

Suisun Marsh Property Owners Forum They have really made a mess
Like · Reply · April 6 at 6:08pm

Stephen Matthews Governor Brown needs to go and take his tunnels and high speed train with him.
Like · Reply · 1 · April 6 at 6:34pm

Shav LaVigne Brown should build his pipe dream cho cho train in his garage. Another Democrat boondoggle!
Like · Reply · April 6 at 6:37pm

Richard Harp Uhhh.... Maybe they have a secret agenda???
Like · Reply · 1 · April 6 at 6:56pm

Bill Boyce The regime in Sacramento relie on what Jonathan Gruber refers to as the stupid American voter, especially in California. Bullet train, minimum wage, you get it. If you roll over and allow them to have their way, they will. Hoping the club gets a watch group on their side to fight the Leviathan. I'm ready to help fund the cause.

Like · Reply · 2 · April 6 at 7:46pm

Suisun Marsh Property Owners Forum Bill Boyce that's awesome the club is super well funded so they are taking it to the state. Obviously they want the land for the tunnel and felt they could devalue or impose enough legal stuff to stop them. I doubt they ever thought the club would sue them:)) it's not in their BS board it's in Solano Superior w a real judge who proudly was elected or appointed by a lot of Suisun marsh duck club owners.

Like · Reply · 5 · April 6 at 7:58pm

Bill Boyce Government tyranny by the few must stop. Unfortunately you have to lawyer up but freedom and liberty, private property, is worth the fight. Looking at seeing this political mockery and bs exposed and rectified.

Like · Reply · 2 · April 6 at 8:18pm

Suisun Marsh Property Owners Forum 12k today checked us out that means people are watching and these agencies should know it. Thanks

Like · Reply · 5 · April 6 at 8:03pm

Howard Hocking Don't trust the government

Like · Reply · 2 · April 6 at 8:14pm

Gregory Lyons Jerry isn't brown, Not that there's anything wrong with that!

Like · Reply · April 6 at 8:45pm · Edited

Robert Jadick And people wonder why I say the state of California and gov moonbeam are out of their collective minds. They are just plain nucking futs. Anything for the assholes if So Cal.

Like · Reply · 2 · April 6 at 8:57pm

Suisun Marsh Property Owners Forum http://youtu.be/I1hxBHMcIGg

Point Buckler Island owner John Sweeney describes his dispute...

YOUTUBE.COM

Like · Reply · 1 · April 6 at 9:02pm

David Moore Check the judges off sea accounts ... If only there was a way

Like · Reply · 1 · April 6 at 9:05pm

Thomas Flaxmayer Like I have said in the past so many times Southern California and Jerry Brown need to build water desalinization plants to get there water from the ocean that they need. The Southern California keeps taking the water from the north draining their wat... See More

Like · Reply · 4 · April 6 at 9:13pm

John Zink Only liberal ass hole you mean come up with this shit
Like · Reply · 1 · April 6 at 9:25pm

Bill Mortimore Another example of State Government that's out of control!
Like · Reply · 1 · April 6 at 9:29pm

Patrick Tully Same story is Oregon. Ducks instead of cows. Government asserting laws we didnt vote on to take land without due process or compensation. Sad.
Like · Reply · 3 · April 7 at 12:55am

Jon Lemeshka It's kalifornia land of fruits and nuts, what do you expect ?
Like · Reply · 2 · April 7 at 4:42am

1 Reply

Andy Giannini The way these laws are written and interpreted baffles me.

Streambed alteration is on of my peeves. ... See More
Like · Reply · 1 · April 7 at 9:12am · Edited

Rudy Sylvester Once again it's "we the gooberment" not we the people!
Like · Reply · 1 · April 7 at 10:08am

Steven L Hannah i am not a duck hunter but a sturgeon fisherman ,and i will say i fish at the edges of this island and have for many years and the club has always done an amazing job of keeping up that levee and island , our goverment has their heads so far up their ass's its scary , i truly hope the club wins this for the good of us all
Like · Reply · 3 · April 7 at 10:37am · Edited

Suisun Marsh Property Owners Forum So right. If a levee breaks now they want you to never fix it and let it revert to tidal. Accept they have no laws in place to do this so they make shit up as they go. Fixing levees is now pollution ? What happens when DWR or another state agency that owns islands can't fix their levees? Or if levee breaks for food and Sacramento goes under water what no levee repairs? So ridiculous
Like · Reply · 1 · April 7 at 12:11pm

John N. Vega I hope none of you voted for that idiot, because if you did it is now coming around to bite you in the a.. . Southern California over the years has done nothing to help its self regarding their water problem. They just let the rain water flush out into the Pacific Ocean. One reason I wish we Northern Californians, would vote to divide the state just at the base of the mountain range just south of Bakerfield.
Like · Reply · 1 · April 7 at 1:53pm

1 Reply

Richard Garcia I'd say within the last 15 years the state was out repairing levees on old hwy4 between discovery bay and stockton,and what about the road they fixed out there too,no contamination done there huh...
Like · Reply · 1 · April 7 at 5:38pm

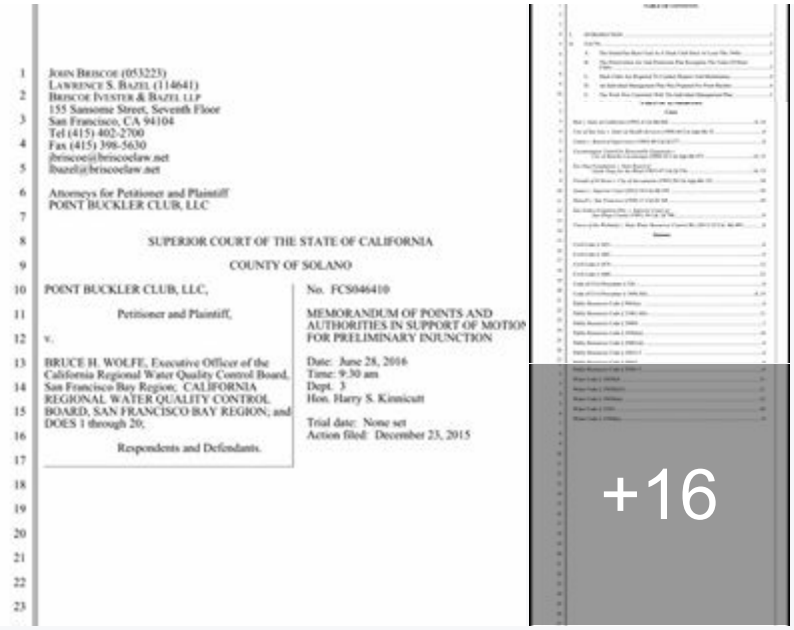
Suisun Marsh Property Owners Forum If they do it it's maintenance if a private owner does same it's pollution
Like · Reply · April 7 at 6:55pm

Del Price Commie politicians interfering once again. The peripheral canal sending water to LA for years have destroyed the whole delta. You put a major drought and and abuse in past years by pollution from industry and the whole ecosystem is devistating. The can... See More
Like · Reply · 1 · April 7 at 8:43pm

Clinton Scholting So if Old Sac levee fails they won't fix it? Come on!
Like · Reply · 1 · April 7 at 9:02pm

Suisun Marsh Property Owners Forum Of course they will but not a private island
Like · Reply · April 7 at 9:06pm

Suisun Marsh Property Owners Forumhttps://www.facebook.com/suisunmarshSRCD/posts/713526865417162



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Attorneys for Petitioner and Plaintiff
POINT BUCKLER CLUB, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SOLANO

POINT BUCKLER CLUB, LLC,

Petitioner and Plaintiff,

v.

BRUCE H. WOLFE, Executive Officer of the California Regional Water Quality Control Board, San Francisco Bay Region; CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN FRANCISCO BAY REGION; and DOES 1 through 20;

Respondents and Defendants.

No. FCS046410

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date: June 28, 2016
Time: 9:30 am
Dept. 3
Hon. Harry S. Kinnicutt

Trial date: None set
Action filed: December 23, 2015

+16

Suisun Marsh Property Owners Forum added 19 new photos — at Solano County Superior Courthouse.
April 21 · Fairfield ·

Like Page

BCDC and SRCD have worked tirelessly to stop Duck Clubs from following their certified club plans. The Regional Water Board is now trying to shut down Duck Clubs from doing work under these plans. A letter to every duck club owner went out last week highlighting the extent and tactics these agencies are using to take away landowners protected rights. Here is the actual lawsuit that effects every single duck club in the Suisun Marsh. So far we know the agencies against duck clubs and but more interestingly Duck Unlimited has failed to stand behind us. Politics run deep in the Marsh . Fixing your levee could soon be considered pollution! #Ducksunlimited

Like · Reply · April 22 at 8:24am

Melchor Molina Tandingan DemocRATS are harmful to society.
Like · Reply · April 22 at 8:48am

Bill Boyce Yep, with the mandated minimum wage signed by J.B. and pushed by the SEIU, we will see the unintended consequences soon. Another day in democratic achievements. Pitiful.
Like · Reply · April 22 at 9:32am

Rob Thomas You are right on it Bill Boyce
Like · Reply · April 22 at 1:04pm

Write a reply...

Del Price Just aside from normal population increases and a increasing burden on water supplies, this liberal quack governor and his liberal goons elected by the same liberal go on voters now has allowed and encouraged illegals to come in our state by the millions. Oh no, we have another even greater water shortage! And then major drought!! What is wrong with this picture? Idiot! You get what you vote for.
Like · Reply · April 26 at 6:04am

55c. John Sweeney Twitter Account Snapshot, October 31, 2016

Home Moments @bucklerisland Have an account? Log in

@bucklerisland

Have an account?

Phone, email or username

Password

Remember me · Forgot password?

Log in

New to Twitter?

Sign up

Top | Latest | Accounts | Photos | Videos

New to Twitter?

Sign up now to get your own personalized timeline!

Sign up

Worldwide Trends

#اوامر_ملكيه
113K Tweets

Happy Halloween

#زد_رصيدك16
125K Tweets

#içerdemisin
28.7K Tweets

#اين_تري_نفسك_بعد_الف_سنه
16.1K Tweets

#PurposeWorldTourBR
78.1K Tweets

Jamie Collins
58K Tweets

Donna Brazile
144K Tweets

طارق حامد
5,911 Tweets

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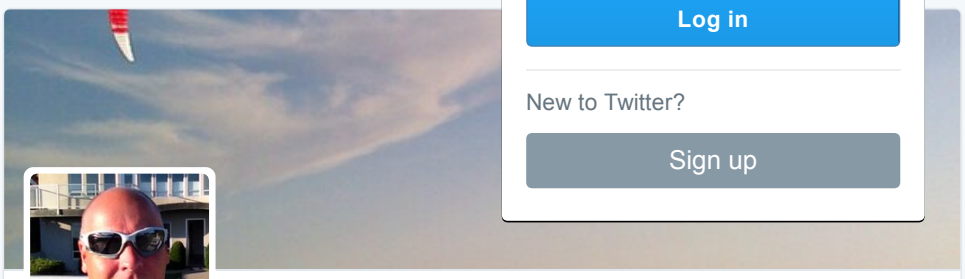


TWEETS 1 FOLLOWING 2 FOLLOWERS 10

Follow

John Sweeney
@bucklerisland

Living the Delta lifestyle to the fullest. Kite private islands and show others the secrets of adventure kiting. The ultimate retired dude lifestyle:)

Tiburon and Pittsburg • pointbucklerisland.com

55d. John Sweeney Facebook Post, November 4, 2016

John Sweeney updated his cover photo.
November 4 at 6:55pm ·

Share

20

Mark Michaelsen To quote Ferris: "For those of you with the means...I highly recommend it"
2 · November 4 at 7:12pm

Milton Koenigsberger Should have kept that car, with 271 produced I am surprised they have not brought F40 or 959 numbers yet, only a matter of time.#investmentgrade
1 · November 4 at 7:21pm

John Sweeney I had f40 89 plexi 240k sold at 400k lol now 1 million . Bread boxes approaching 100k too
2 · November 4 at 7:25pm

John Sweeney Any my xj220 was tysons before
1 · November 4 at 7:26pm

Milton Koenigsberger The plexi was rare, just saw one today at Greenwich Ferrari, the xj220 reminds me of the mc12 Maserati, so unique and largely under appreciated. The S54 breadbox has gone nuts these last few years, glad I have mine...
1 · November 4 at 7:29pm

Milton Koenigsberger storied cars like a Tyson mobile make it all more interesting
November 4 at 7:31pm

Jeremy Gordon Walker Dammit I miss my 512bb
November 4 at 11:07pm

Milton Koenigsberger Perfection

November 5 at 5:40am

John Sweeney Milton Koenigsberger sweet bb fuel injected or carb
November 5 at 7:17am

Milton Koenigsberger John Sweeney it was a 1984 fuel injected
1 · November 5 at 8:33am

John Sweeney Euro bumpers
November 5 at 9:33am

Milton Koenigsberger John Sweeney so I just ran into this 30 minutes ago. 2012 V12 Zagato. I think there are two in the US, they made ~100, concept car never titled

1 · November 5 at 9:56am

Sean Cope Nice Jaguar!
November 5 at 1:08pm

Jack Sweeney My favorite set of wheels. Ride like a luxury liner.
November 5 at 4:38pm

Tommaso Chieffi Nice car ....John
1 · Yesterday at 7:39am

55e. Point Buckler Club Facebook Description, November 11, 2016

Like Message Share More

Call Now

About

Suggest Edits

FIND US

PO Box 2490
Suisun City, California

Get Directions

@pointbucklerclubVIP

Message Now

Call (415) 686-0907

BUSINESS INFO

Business Details

Price Range $$$$

Founded in 2011

ADDITIONAL CONTACT INFO

john@spinnerisland.com

http://www.pointbucklerclub.com/

MORE INFO

About

Exclusive Private Delta Island Club for Kiteboarding Duck Hunting and Social. Silicon Valley Kite Surfing hangout via high speed yacht or helicopter

General Information

Exclusive Private Island for 10 special owners. Kiteboarding and other sports year round. 15 minutes by air from Silicon Valley, or hour by high speed yacht. Two helipads and docking for up to 300 foot yachts.

55f. Point Buckler Club Facebook Post, June, 20, 2016

Point Buckler Club at Point Buckler Club.

17 hrs · Suisun City ·

The Point Buckler Club has one summer membership left. Today's the first official day off summer so get your kite gear and join us. The season runs thru October.

Point Buckler Club

Surfing Spot · Suisun City

375 people checked in here

Save

Administrative Civil Liability Complaint
No. R2-2016-1008

John D. Sweeney and
Point Buckler Club, LLC

Description of Exhibit Provided by Reference

Exhibit 56

2015 Annual Application for the USACE Wetlands Maintenance Permit – Point Buckler Club, LLC

FOR SRCD USE ONLY
Date received:
Date sent to Corps:
Corps approval date:
Corps file number:

2015 ANNUAL APPLICATION FOR THE USACE WETLANDS MAINTENANCE PERMIT
(File Number 2012-00258N)

Return to: Suisun Resource Conservation District
2544 Grizzly Island Road
Suisun, CA 94585
(707) 425-9302 or e-mail to SRCD@SuisunRCD.org

CLUB NAME ANNIE MASON

OWNERSHIP NUMBER 801

OWNER/Phone number POINT BUCKLER CLUB LLC

MANAGER/Phone number JOHN SWEENEY 415 686-0207

ACRES OF PRIMARY MANAGEMENT AREA IN OWNERSHIP 30 MANAGED ACRES

NOTE: You must submit a map of your property showing all work locations (differentiate work locations using corresponding numbers in far left column of application, not X's or any other markings). Please fill in all applicable blanks on application grid.

Example: How to calculate acreage -

500 feet X 500 feet = 250,000 square feet / 43,560 square feet per acre = 5.74 acres
1,000 feet X 1,000 feet = 1,000,000 square feet / 43,560 square feet per acre = 22.95 acres

Example: How to calculate cubic yardage for grading -

Assume you are grading 2.5 acres to a depth of 6 inches (0.5 feet)
2.5 acres X 43,560 square feet per acre = 108,900 square feet X 0.5 feet = 54,450 square feet / 27 cubic feet per cubic yard = 2,016.6 cubic yards

Assume you are grading 2.5 acres to a depth of 12 inches (1.0 feet)
2.5 acres X 43,560 square feet per acre = 108,900 square feet X 1.0 feet = 108,900 cubic feet / 27 cubic feet per cubic yard = 4,033.3 cubic yards

Plug your numbers into the underlined portion of the formulas below and enter the result into the appropriate box in the application grid.

To calculate acreage: length of area X width of area = square feet of area / 43,560 square feet per acre = acreage

To calculate cubic yardage for grading: acreage X 43,560 square feet per acre = total square feet X depth of grade = cubic feet / 27 cubic feet per cubic yard = cubic yards

To calculate cubic yardage for ditch cleaning or levee work:
length x width x depth / 27 = cubic yards

Club name:
Ownership number:
Primary contact phone number:

2015 APPLICATION
USACE WETLANDS MAINTENANCE PERMIT (File Number 2012-00258N)

	TYPE OF WORK	# OF UNITS	SIZE OR ACREAGE	PROPOSED LINEAR FEET	PROPOSED CUBIC YARDS	PROPOSED WORK START (mm/dd/yy)	ACTUAL LINEAR FEET	ACTUAL CUBIC YARDS	Actual # of units/ size or acreage	ADDITIONAL COMMENTS
1	REPAIR EXISTING EXTERIOR WATER CONTROL STRUCTURES (gates, couplers and risers)	1	18"	X	X	5/14 DONE	X	X		indicate size, type, and location of each on enclosed map NEW FLAP
2	INSTALL, REPAIR, OR RE-INSTALL WATER CONTROL BULKHEADS		X		X			X		indicate size, type, and location of each on enclosed map
3	REPAIR EXISTING INTERIOR WATER CONTROL STRUCTURES (gates, couplers and risers)			X	X		X	X		indicate size, type, and location of each on enclosed map
4	INSTALLATION OF NEW INTERIOR WATER CONTROL STRUCTURES	1	18"		X	5/14 DONE		X		indicate size, type, and location of each on enclosed map NEW FLAP
5	PIPE REPLACEMENT FOR EXISTING INTERIOR WATER CONTROL STRUCTURE				X			X		indicate type, size and location of each on enclosed map
6	POND BOTTOM SPREADER V DITCHES	X	circle one 18X18 24X24		X			X	circle one 18X18 24X24	indicate location on enclosed map
7	CLEARING EXISTING INTERIOR DITCHES	X	X		7,000	2/13 - 8/14 DONE			X	what was done with the material removed? PLACED ON CROWN OF EXISTING LEVEE
8	CONSTRUCT NEW INTERIOR DITCHES	X	X						X	what was done with the material removed?
9	REPLACE PREVIOUSLY EXISTING RIP-RAP ON INTERIOR LEVEES/DITCHES	X	X						X	this area must have previously existing rip-rap

Club name:
Ownership number:
Primary contact phone number:

2015 APPLICATION
USACE WETLANDS MAINTENANCE PERMIT (File Number 2012-00258N)

	TYPE OF WORK	# OF UNITS	SIZE OR ACREAGE	PROPOSED LINEAR FEET	PROPOSED CUBIC YARDS	PROPOSED WORK START (mm/dd/yy)	ACTUAL LINEAR FEET	ACTUAL CUBIC YARDS	Actual # of units/ size or acreage	ADDITIONAL COMMENTS
10	REPAIR INTERIOR EXISTING LEVEES	X	X						X	material source and type?
11	REPAIR EXTERIOR EXISTING LEVEES	X	X						X	material source and type?
12	CORING OF EXISTING LEVEES	X	X						X	indicate location on enclosed map
13	GRADING POND BOTTOMS FOR WATER CIRCULATION	X	3 ACRES	X	31000	9/14 DONE	X			what was done with the graded material? MIXED TO EXISTING LEVEES INTERIOR
14	DISCING	X		X	X		X	X		state location on map
15	INSTALL NEW OR RELOCATE / REPLACE EXISTING BLINDS		X	X	X		X	X		state size, type, and location on map (can not replace more than 5 blind sites per year)
16	INSTALLATION OF DRAIN PUMP AND PLATFORMS			X	X		X	X		state size, type, and location on map
17	EXISTING ROAD MAINT., ADDING SURFACE MATERIAL, AND GRADING	X	X				X		X	material source and type?
18	EXISTING PARKING LOT MAINT., ADDING SURFACE MATERIAL, AND GRADING	X		X			X		X	material source and type?

Club name:
Ownership number:
Primary contact phone number:

2015 APPLICATION
USACE WETLANDS MAINTENANCE PERMIT (File Number 2012-00258N)

	TYPE OF WORK	# OF UNITS	SIZE OR ACREAGE	PROPOSED LINEAR FEET	PROPOSED CUBIC YARDS	PROPOSED WORK START (mm/dd/yy)	ACTUAL LINEAR FEET	ACTUAL CUBIC YARDS	Actual # of units/ size or acreage	ADDITIONAL COMMENTS
* 19	REPLACE PREVIOUSLY EXISTING RIP-RAP ON EXTERIOR LEVEE	X	X						X	this area must have previously existing rip-rap
* 20	PIPE REPLACEMENT FOR EXISTING EXTERIOR FLOOD GATE				X			X		Indicate size, type, and location of each on enclosed map Is there a bulkhead associated with the pipe(s)? YES NO
* 21	PIPE REPLACEMENT FOR EXISTING EXTERIOR DRAIN GATE				X			X		Indicate size, type, and location of each on enclosed map Is there a bulkhead associated with the pipe(s)? YES or NO
* 22	PIPE REPLACEMENT FOR EXISTING EXTERIOR DUAL PURPOSE GATE				X			X		indicate size, type, and location of each on enclosed map Is there a bulkhead associated with the pipe(s)? YES or NO
* 23	INSTALLATION OF A NEW EXTERIOR DRAIN STRUCTURE				X			X		indicate size, type, and location of each on enclosed map
** 24	CONSTRUCTION OF TEMPORARY INTERIOR COFFERDAM		X	X	X		X	X		**See conditions below for more information. Indicate location of each on enclosed map
** 25	PROPOSED INSTALLATION OF NEW INTERIOR RIP-RAP	X	X			Requires SRCD review and USACE approval			X	**See conditions below for more information
** 26	PROPOSED INSTALLATION OF NEW EXTERIOR RIP-RAP	X	X			Requires SRCD review and USACE approval			X	**See conditions below for more information
** 27	INSTALLATION OF ALTERNATIVE BANK PROTECTION		X		X	Requires SRCD review and USACE approval		X		**See conditions below for more information

*** Activities with Asterisks Have Additional Requirements (See Next Page)**

****Activities in Red are New Work Activities and have Additional Requirements (See Next Page)**

***Installation of new exterior drain structure**
See: RGP 3 Special Conditions #16 & #20

New drain placed where discharge channel already exists.
New drain is installed where exterior levees have no emergent vegetation.
No in-water work.
Pipe placed at low tide (3 hours prior to low tide to 3 hours after low tide).
Pipe is pre-assembled to minimize work time.
Pipe replacement is not done in the rain
Pipe placed at a depth below emergent vegetation.

***Pipe replacement for existing exterior drain, flood, or dual-purpose gate**
See: RGP 3 Condition #16

No in-water work.
All work done at low tide (3 hours prior to low tide to 3 hours after low tide).
New pipe pre-assembled before installation.
Pipe placed below depth of emergent vegetation.
Pipe replacement is not done in the rain.
Replacement will not change the existing use or diversion capacity.

***Replace riprap on exterior levee**
See: RGP 3 Special Condition #18

Riprap only placed where previously existing riprap was present.
Riprap is replaced in the minimum amount necessary.
Riprap not placed on emergent vegetation.
Riprap is placed during low tide.

****Construction of Temporary Interior Cofferdams**

Used in support of other permitted construction activities

Volume and size shall be limited to the amount required to stop the flow of water

Upon completion of project, the cofferdam shall be removed from the interior ditch and ditch shall be restored to original width and depth

****Proposed Installation of New Exterior Rip-Rap**
See: RGP 3 Special Condition #18

Requires special SRCD review and Corps approval

Placement new exterior rip-rap shall not exceed 66 linear feet per year for the entire marsh

Riprap will not be placed directly on emergent vegetation

Emergent vegetation will not be uprooted during the placement of riprap, nor will it be displaced by riprap

Riprap placed on the exterior side of the levee will commence and be complete within a 6-hour period, from 3 hours prior to low tide to 3 hours following low tide

Integrative vegetation shall be applied where it is biologically appropriate

****Proposed Installation of New Interior Rip-Rap**
See: RGP 3 Special Condition #19

Requires special SRCD review and Corps approval

Placement of new rip-rap on interior ditch banks shall not exceed 200 linear feet per year for the entire marsh.

Riprap will not be placed directly on emergent vegetation

Emergent vegetation will not be uprooted during the placement of riprap, nor will it be displaced by riprap

Integrative vegetation shall be applied where it is biologically appropriate

****Installation of Alternative Bank Protection**

USACE makes determination on where and when Alternative Bank protection will be used.

Bank protection material placed below mean high water mark

Brush boxes shall use natural materials associated with native plantings

Work must be completed during low tide

Work is done entirely by hand

No in-water work

Google earth feet 1000 meters 300

2014

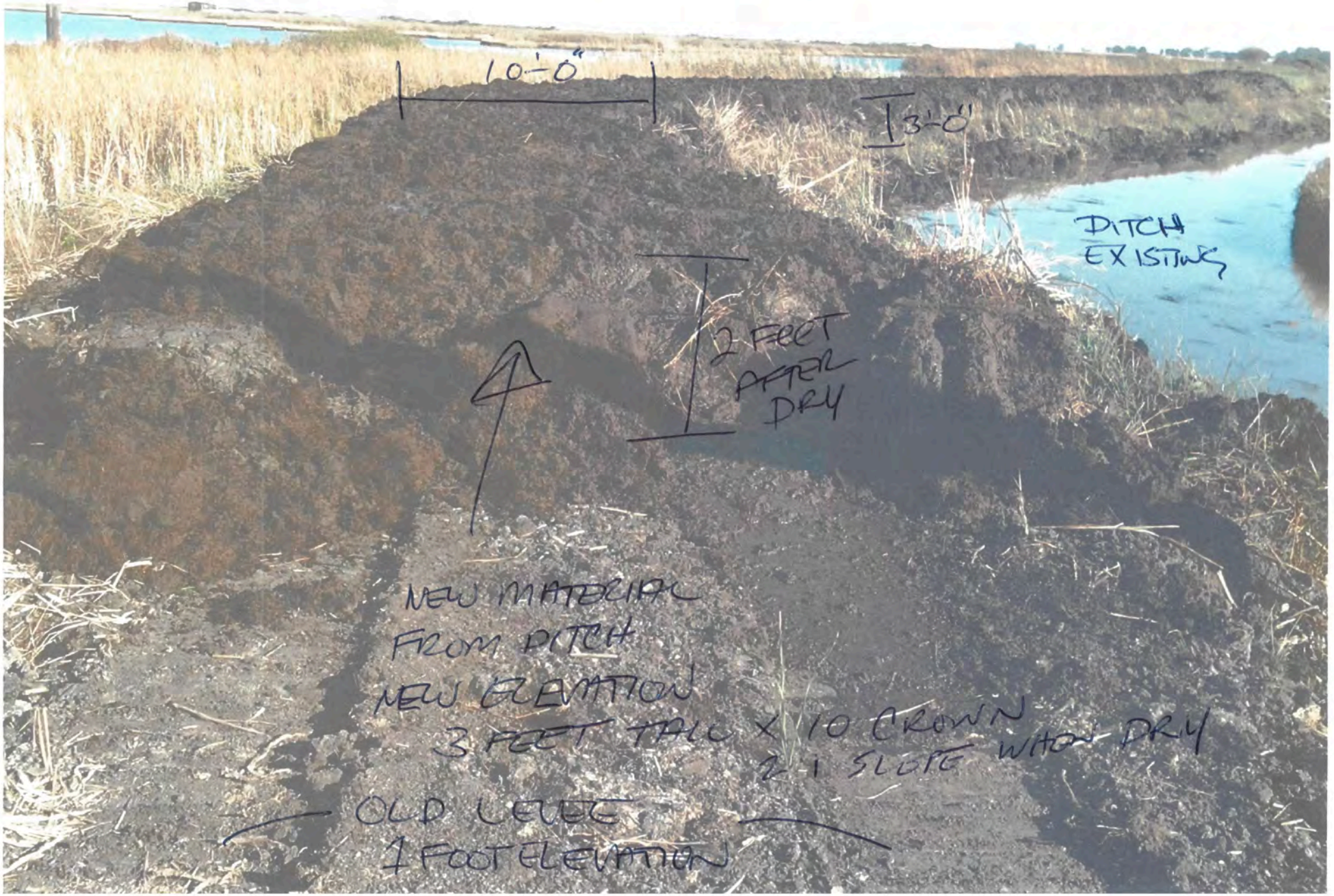
CLUB 601 ANNIE MASON / POINT BUCKLER

(1)(4) NEW FLOOD GATE FLAPS – 18" PIPE EXISTING

(7) DITCH CLEANING INTERIOR LEVEE
MATERIAL USED ON INTERIOR LEVEE CROWN

(13) PONDS GRADED

DITCH CLEANING ANNE MASON
INTERIOR LEVEE



-lornia 94585

WETLANDS MAINTENANCE MANAGEMENT REPORT
SUISUN RESOURCE CONSERVATION DISTRICT

Date: 1-29-90

Club Name: Annie Mason Pt.

Owner or Manager: Jim TAYLOR

Acres in Ownership: 51.5

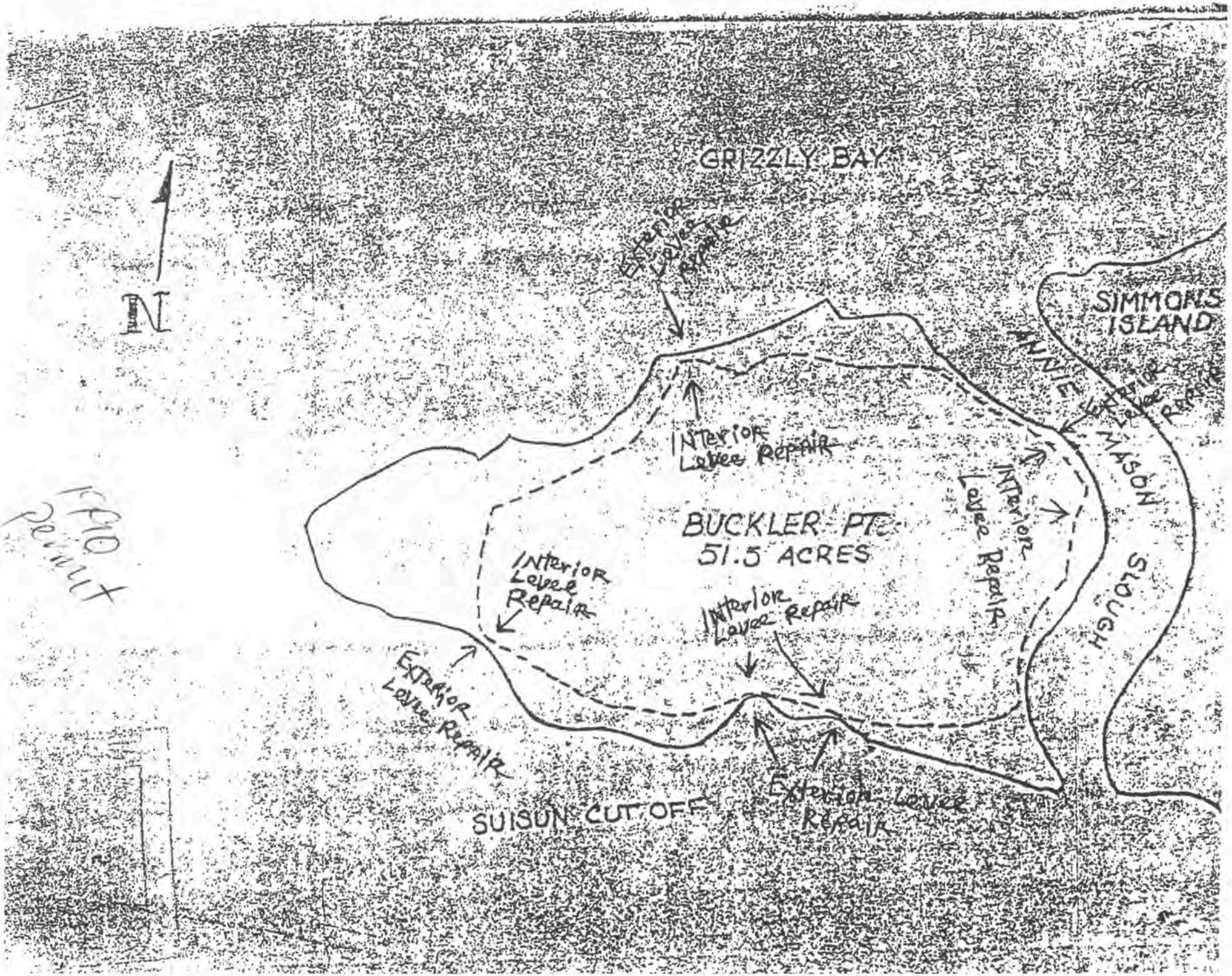
Phone: (415) 758-2

Ownership No. 801

*NOTE: YOU MUST SUBMIT A MAP OF YOUR PROPERTY SHOWING WORK LOCATIONS. SUITABLE MAPS ARE AVAILABLE FROM ASSESSOR'S OFFICE

Type of Work	# of Units	Size or Acreage	Cubic Yards	Linear Feet	Work Schedule Start	Work Schedule Complete	Comments
Clearing Ditches	XXXXX	XXXXXXX	1,000	Approx. 1,200	AS SOON AS POSSIBLE	Oct. 1	1) upon Existing L
Construct New Ditches	XXXXXX						1)
Interior Levee Repair	XXXXXX	XXXXXXXX	2000	500'	"	"	2) From Existing Di
Exterior Levee Repair	XXXXXX	XXXXXXXX	2000	≈750'	"	"	2) Suisun Cut + Annie + Suisun Bay
Road Maintenance	XXXXXX	XXXXXXXX					2)
Grading Pond Bottoms	XXXXXX						
New Culverts			XXXXXXX	XXXXXXXX			
Repair-Replace Culverts			XXXXXXX	XXXXXXXX			
Water Control Structures			XXXXXXX	XXXXXXXX			3)
Install New Blinds		XXXXXXXX	XXXXXXX	XXXXXXXX			
Relocate Blinds		XXXXXXXX	XXXXXXX	XXXXXXXX			
Other Work (Specify)							

1) State where material will be placed 2) State source of material 3) State type of structure


N
GRIZZLY BAY
Exterior Levee Repair
SIMMONS ISLAND
Exterior Levee Repair
MASON SLOUGH
Interior Levee Repair
BUCKLER PT.
51.5 ACRES
Interior Levee Repair
Interior Levee Repair
Interior Levee Repair
Exterior Levee Repair
Exterior Levee Repair
SUISUN CUT OFF
FPO Permit

John Sweeney

RECEIVED
NOV 15 1984
SAN FRANCISCO BAY CONSERVATION
& DEVELOPMENT COMMISSION

CLUB #801

ANNIE MASON POINT CLUB

LAND USE SUMMARY

Managed wetland	30 ac.
Upland area	6 ac.
Tule berm	15 ac.
TOTAL	51 ac.

PRESENT CLUB CONDITIONS

WATER MANAGEMENT

Annie Mason Point Club is a small lone club located on Buckley Island. It is contained within a single levee surrounded by Grizzly Bay to the north and Suisun Cutoff to the south. Structure A on the east side of the club functions as the main flood gate and brings water into the club via a perimeter ditch system. A system of interior ditches running from south to north further distributes water to the pond. Structure B is used to drain the club into Grizzly Bay. Two small check dams (C and D) are located in the perimeter ditch. These structures aid in circulation by putting a head on the inlet water and forcing it to circulate across the club in a south to north direction. Removing the boards in the dam enables the ditch to drain.

VEGETATION

An on-club survey in 1976 found the club to be composed predominantly of olney and hardstem bulrush in the lower areas and saltgrass in the higher areas. The 1978 CA Dept. of Fish and Game aerial survey reported tule growth intermixed with the above vegetation. None of these plants has a relatively high use and selection value for waterfowl.

Olney and hardstem bulrush are both sod forming perennials which grow along sloughs and in ditches containing water most of the year. They will invade ponds which are shallowly flooded year round and are indicative of fairly fresh water conditions. Tules are also common in permanent ponds. Their increase was probably due to the club's lack of water control at the time.

SUMMARY

Prior to 1978, Annie Mason Point Club's vegetation largely consisted of non--waterfowl food plants. This was likely due to the club's lack of water control at the time. Since then, the situation has greatly improved and the club reports that it now has the water control structures and tight levees necessary for proper water management.

FLOOD/DRAIN EVALUATION

Due to limited access, an elevation survey was not done for this club. That being the case, the club's flood and drain capability could not be determined. However, using some assumptions, it is apparent that as the ponded area is very small, gates A and B would likely have to be only 24" in diameter to service this club effectively. Although structure B, the drain gate, must be set low enough to provide subsurface drainage of the pond.

CLUB IMPROVEMENTS

WATER MANAGEMENT

regular program of water management; in this case the alkali bulrush program is recommended to promote such growth as well as fat hen and brass buttons. Considering the generally poorer quality water in Suisun Bay, effective spring leach cycles performed within 30 days are required to establish and maintain suitable habitat.

Proper water control necessitates inspection and maintenance of levees, ditches, and water control structures. Ditches need to be kept clear of vegetation blockages or silt build-ups to allow circulation and drainage. For effective drainage, ditches should be at least 2.5 ft. deeper than the average pond bottom elevation at the controlling tide gate, sloping to 1.5 ft. deep at the most remote point in the pond. Water control structures should also be kept in working order. Levees require frequent inspection and attention to prevent major breaks from occurring. See the enclosed list of standard recommendations for more information on the maintenance and repair of water control facilities.

VEGETATION MANAGEMENT

Needed Improvements: The dense growth of undesirable vegetation in the pond needs to be reduced by burning and/or discing followed by flooding according to the water management schedule. Removing the old vegetation and turning over the soil provides a seed bed for the establishment of new vegetation which is more preferred by waterfowl.

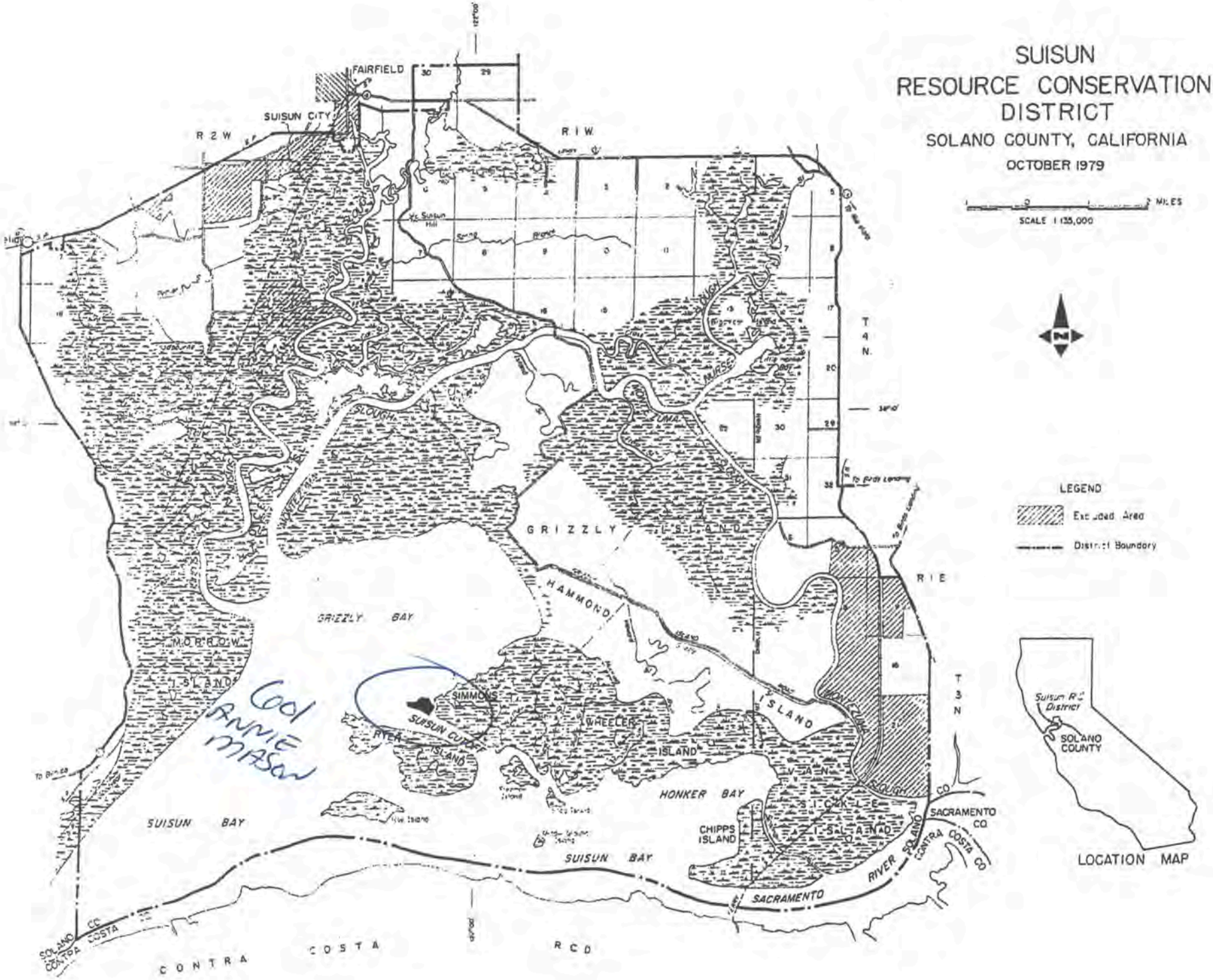
Emergent pond vegetation should be mowed to create open pond areas which are attractive to over-wintering waterfowl in the Suisun Marsh. The extent and pattern of mowing is left to the desires of the club. Close-cutting of tules and olney bulrush prior to fall flooding is an effective method of setting back their growth.

Levee vegetation should be mowed, as necessary, to facilitate access for maintenance reasons. This should be done after June 1st to lessen disruption of pheasant and waterfowl nesting.

SUISUN RESOURCE CONSERVATION DISTRICT

SOLANO COUNTY, CALIFORNIA

OCTOBER 1979

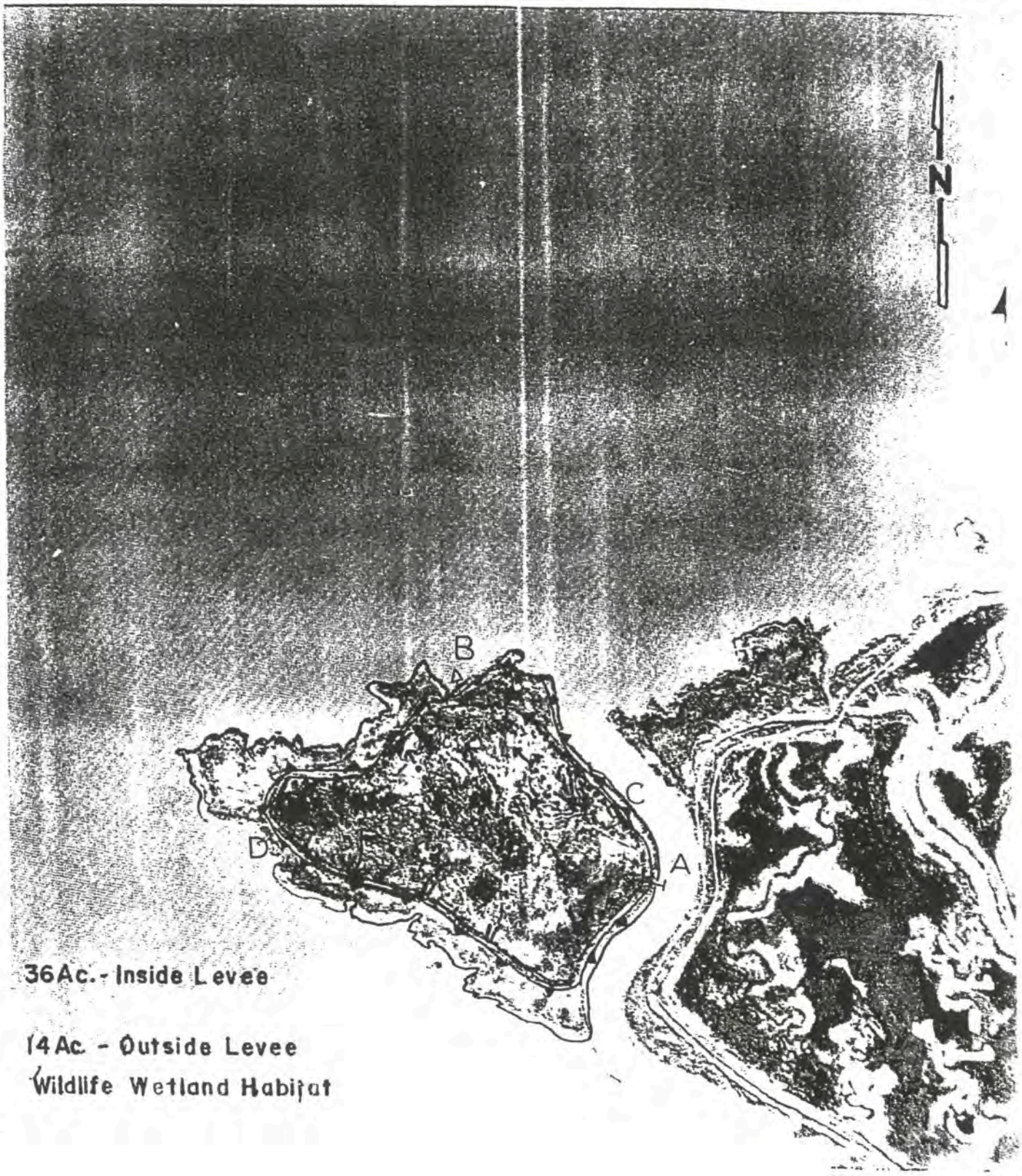


Prepared by SOIL CONSERVATION SERVICE ★ UNITED STATES DEPARTMENT of AGRICULTURE
cooperating with

OWNER
OPERATOR

FARM NO.
SCALE
PHOTO NO

DATE
ACRES



36Ac. - Inside Levee

14Ac. - Outside Levee
Wildlife Wetland Habitat

SCS-CONS-15
OCTOBER 1974

SOIL MAP

U.S. DEPARTMENT OF AGRICULTURE
SOIL CONSERVATION SERVICE

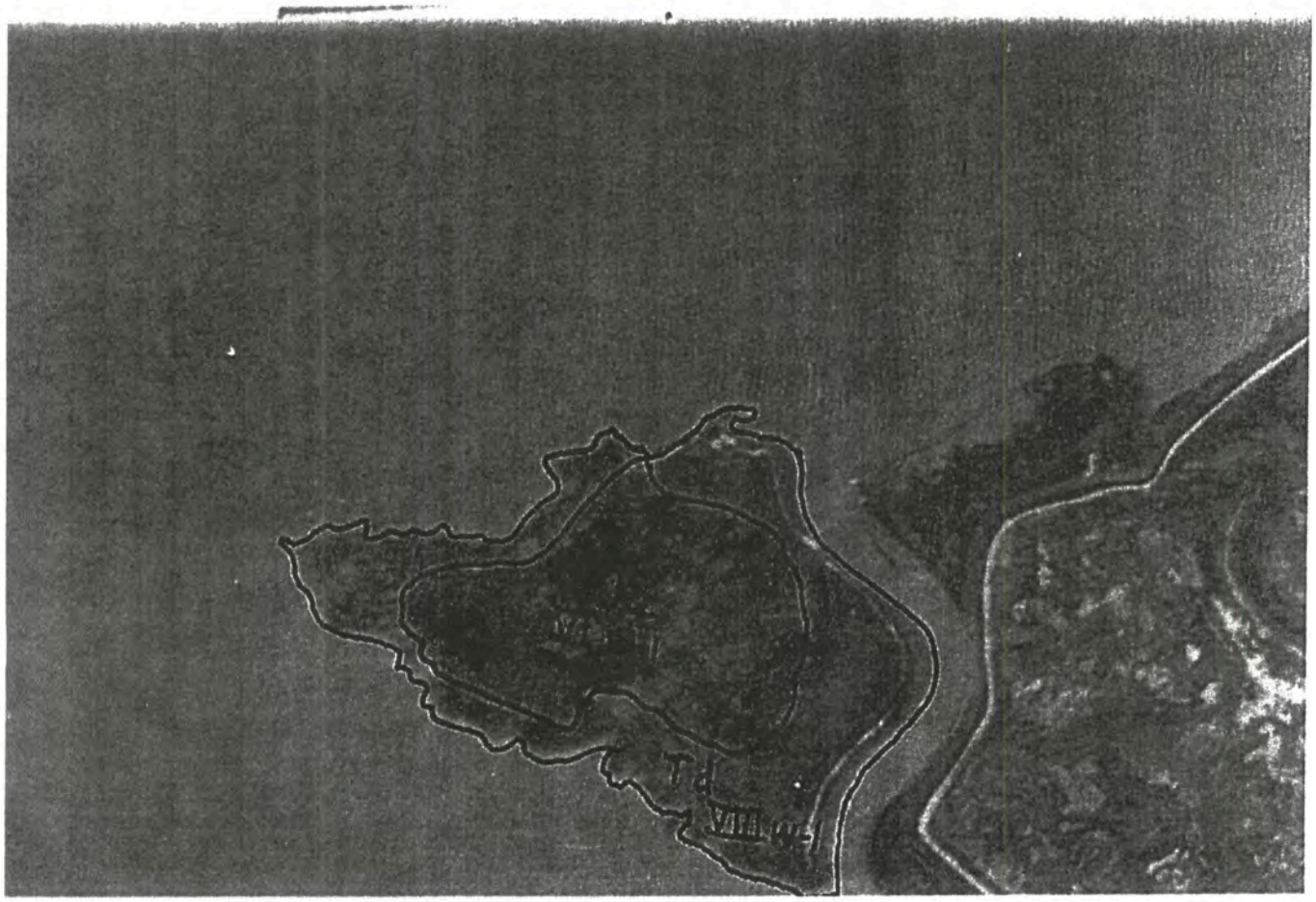
Owner Taylor, James F. Operator

County Solano State CA

Soil survey sheet(s) or code nos. Approximate scale 1"=660'

N

Prepared by U.S. Department of Agriculture, Soil Conservation Service cooperating with Suisun Resource Conservation District



U.S. Department of Agriculture
Soil Conservation Service

SOIL and CAPABILITY MAP SUMMARY

Date:

Effective Depth	Soil Profile			Average Slope in %	Erosion Status	Suitable Land Uses or Crops	Limiting Factors or Remarks
	Texture		A.W.C.* Inches				
	Surface	Subsoil					
+60"	clayey muck	clayey muck	14-15"	0-1%	slight	1) Wildlife, wetland habitat. 2) Recreation.	1) Rooting depth restricted by high water table. 2) Requires drainage and leaching of soil salts for proper management. 3) Levees and tidegates are necessary for water control. 4) Only salt tolerant vegetation should be managed for.
----------variable------			1-2"	0-1%	NONE	1) Wildlife wetland habitat.	1) Strongly saline land type. 2) Mud flats, subject to tidal inundation.

Available Water Holding Capacity [illegible]

SCS-CONS-16
OCTOBER 1974

CONSERVATION PLAN MAP

U.S. DEPARTMENT OF AGRICULTURE
SOIL CONSERVATION SERVICE

Owner Taylor, James F. Operator

County Solano State CA Date

Approximate acres 51.51 Approximate scale 1"=660'

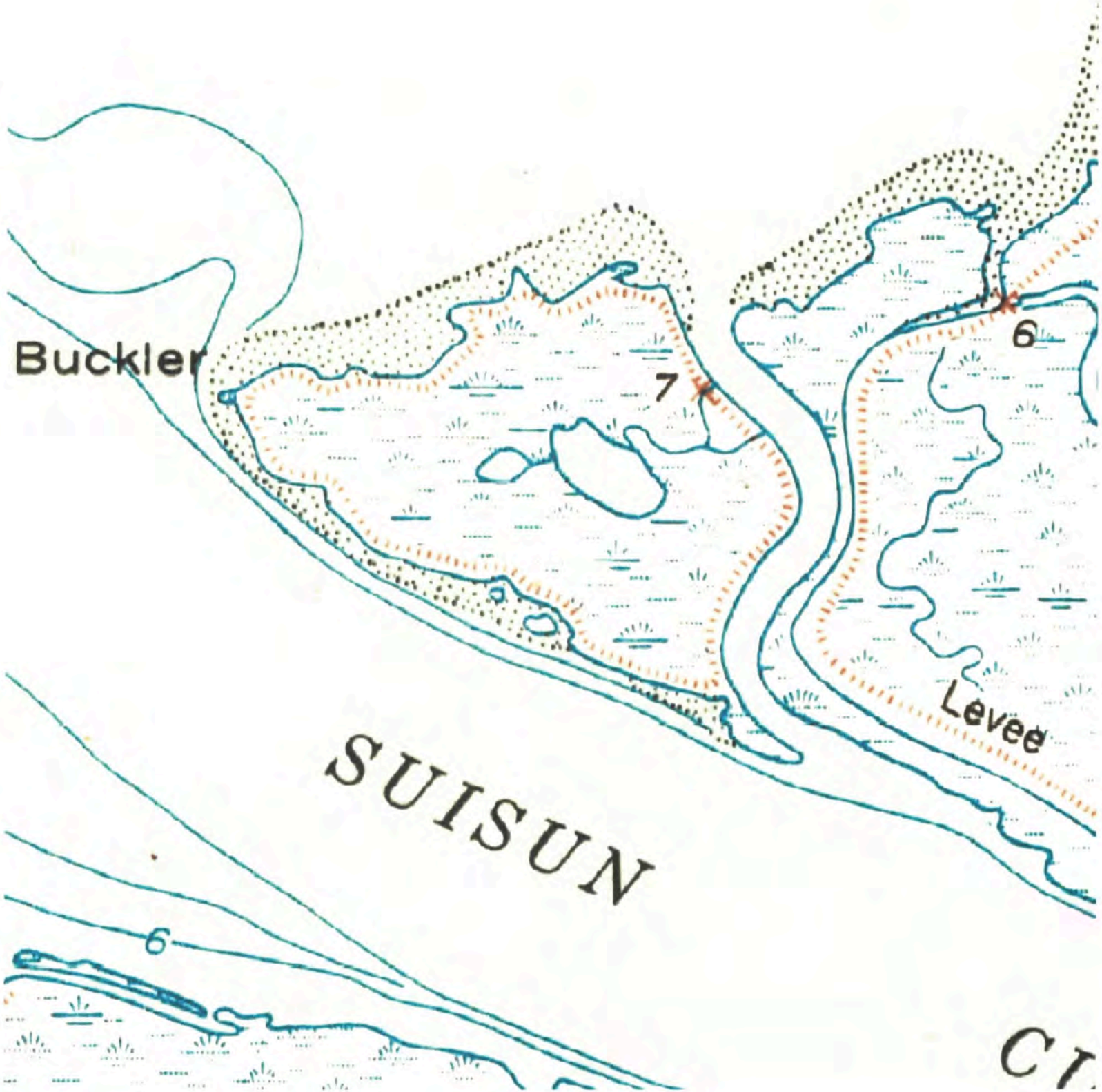
Cooperating with Suisun Resource Conservation District

N Plan identification 801 Photo number

Assisted by USDA Soil Conservation Service

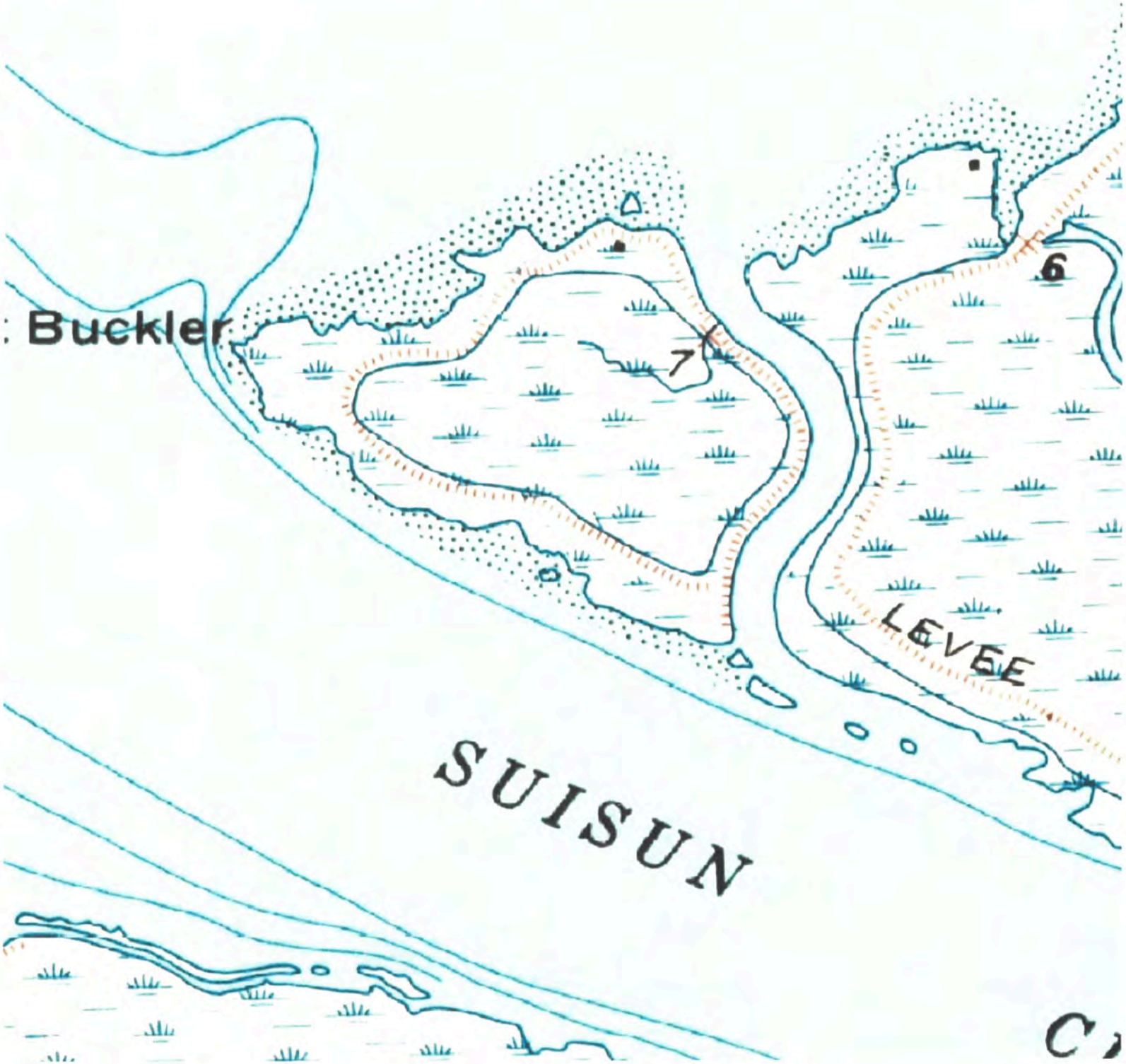
USGS 1948 AERIAL
sand
EXTENSIVE CREEK BANK

1951
US95
552109

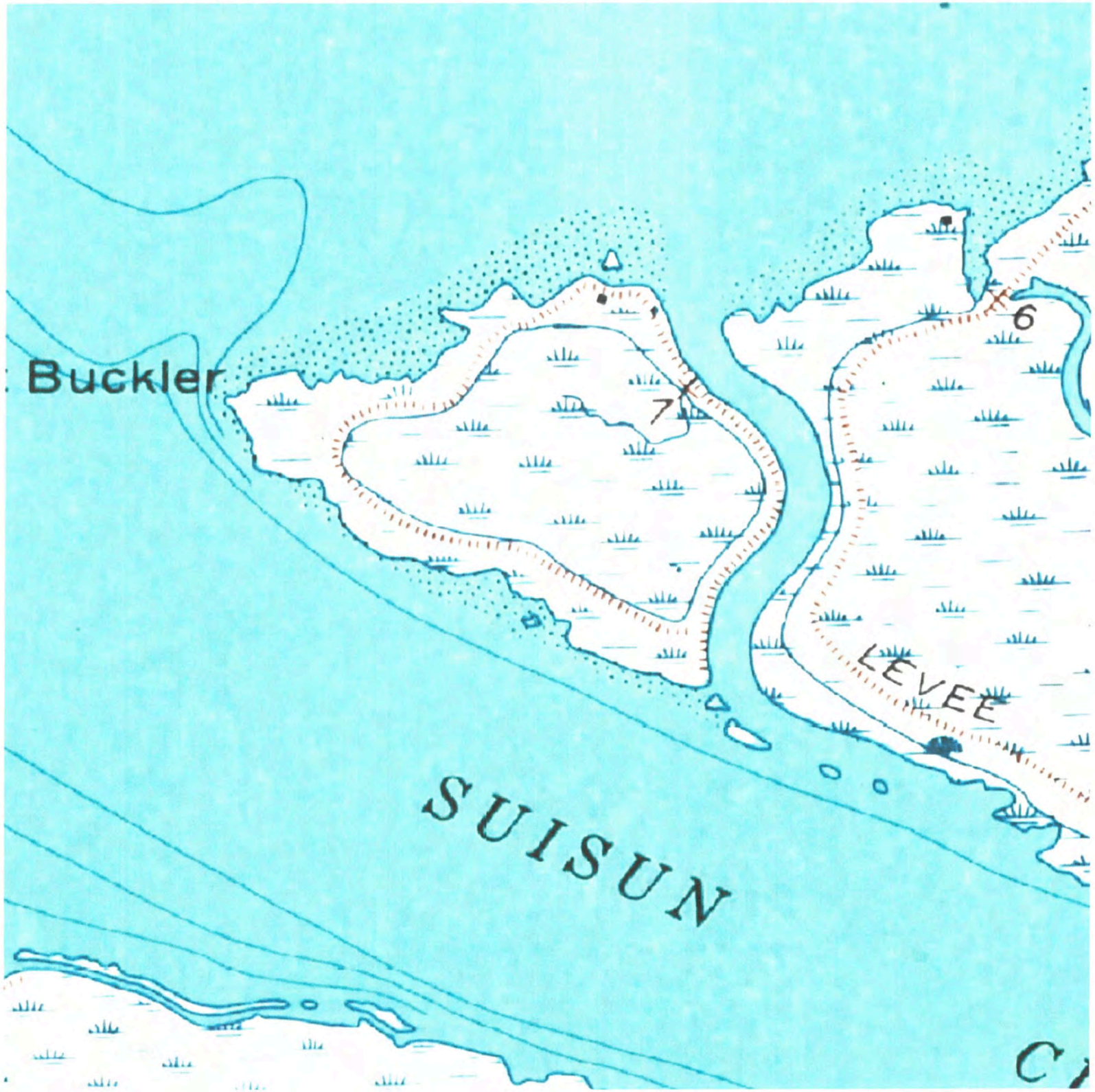


1958
345

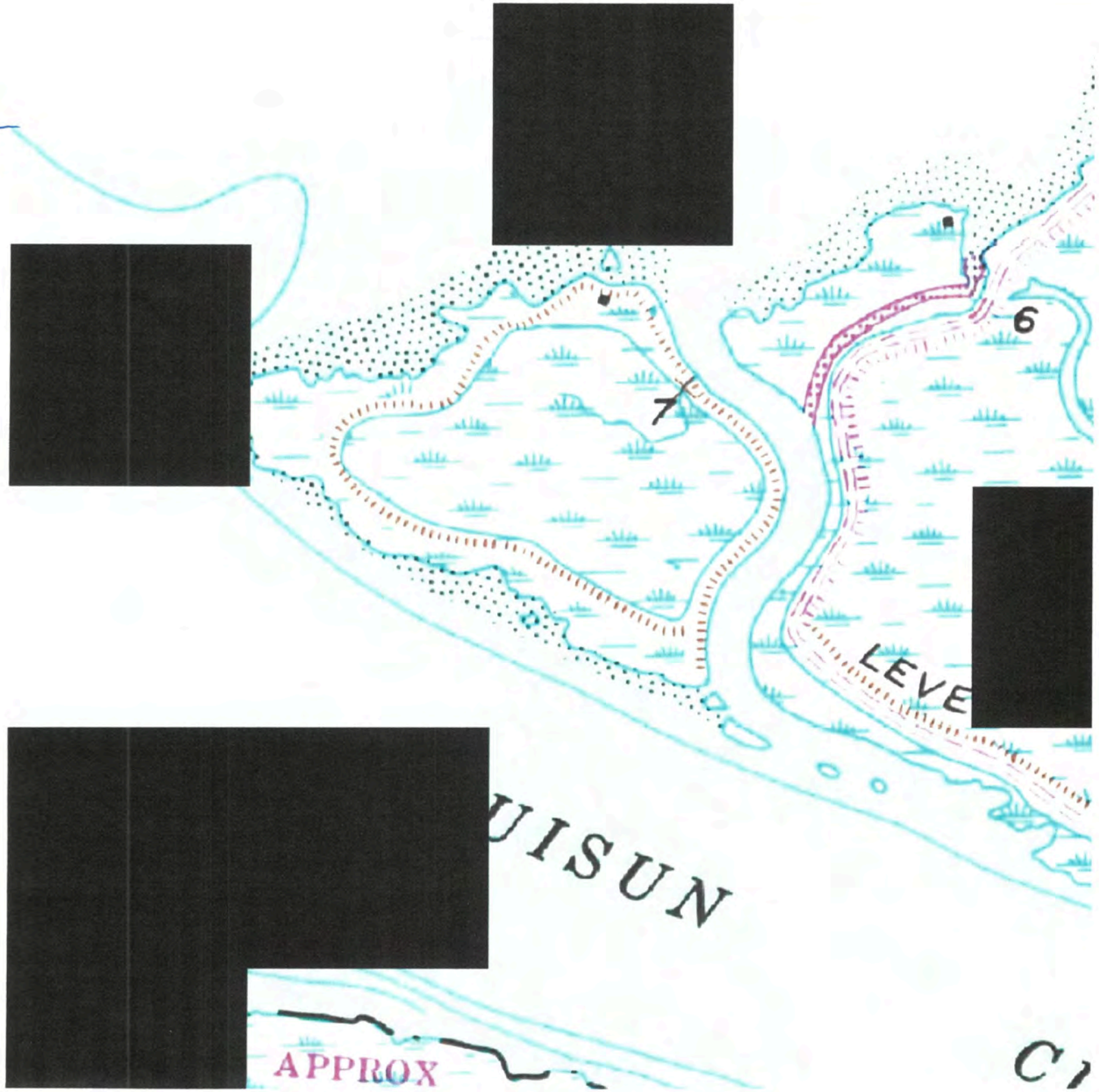
1960
USGS
5521095



USGS
1967
5521097



USGS
1988
5525485



Administrative Civil Liability Complaint
No. R2-2016-1008

John D. Sweeney and
Point Buckler Club, LLC

Description of Exhibit Provided by Hard Copy and Electronically
(California Online Business Entity Search)

Exhibit 57

57a. Lost Islands, Inc., Secretary of State Details

57b. Lost Islands, Inc., Secretary of State Snapshot, November 11, 2016

57a. Lost Islands, Inc., Secretary of State Details

Business Entity Detail

Data is updated to the California Business Search on Wednesday and Saturday mornings. Results reflect work processed through Friday, March 25, 2016. Please refer to **Processing Times** for the received dates of filings currently being processed. The data provided is not a complete or certified record of an entity.

Entity Name:	LOST ISLANDS, INC.
Entity Number:	C3759167
Date Filed:	02/17/2015
Status:	ACTIVE
Jurisdiction:	CALIFORNIA
Entity Address:	171 SANDPIPER DRIVE
Entity City, State, Zip:	PITTSBURG CA 94565
Agent for Service of Process:	JOHN D SWEENEY
Agent Address:	171 SANDPIPER DRIVE
Agent City, State, Zip:	PITTSBURG CA 94565

* Indicates the information is not contained in the California Secretary of State's database.

- If the status of the corporation is "Surrender," the agent for service of process is automatically revoked. Please refer to California Corporations Code **section 2114** for information relating to service upon corporations that have surrendered.
- For information on checking or reserving a name, refer to **Name Availability**.
- For information on ordering certificates, copies of documents and/or status reports or to request a more extensive search, refer to **Information Requests**.
- For help with searching an entity name, refer to **Search Tips**.
- For descriptions of the various fields and status types, refer to **Field Descriptions and Status Definitions**.

Modify Search **New Search** **Printer Friendly** **Back to Search Results**

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State of California
Secretary of State

S

Statement of Information
(Domestic Stock and Agricultural Cooperative Corporations)
FEES (Filing and Disclosure): $25.00.
If this is an amendment, see instructions.
IMPORTANT – READ INSTRUCTIONS BEFORE COMPLETING THIS FORM

F893236

FILED

In the office of the Secretary of State of the State of California

OCT-27 2015

This Space for Filing Use Only

1. **CORPORATE NAME**
LOST ISLANDS, INC.

2. **CALIFORNIA CORPORATE NUMBER**
C3759167

No Change Statement (Not applicable if agent address of record is a P.O. Box address. See instructions.)

3. **If there have been any changes to the information contained in the last Statement of Information filed with the California Secretary of State, or no statement of information has been previously filed, this form must be completed in its entirety.**
☐ If there has been no change in any of the information contained in the last Statement of Information filed with the California Secretary of State, check the box and proceed **to Item 17**.

Complete Addresses for the Following (Do not abbreviate the name of the city. Items 4 and 5 cannot be P.O. Boxes.)

	CITY	STATE	ZIP CODE
4. STREET ADDRESS OF PRINCIPAL EXECUTIVE OFFICE 171 SANDPIPER DRIVE, PITTSBURG, CA 94565			
5. STREET ADDRESS OF PRINCIPAL BUSINESS OFFICE IN CALIFORNIA, IF ANY 171 SANDPIPER DRIVE, PITTSBURG, CA 94565			
6. MAILING ADDRESS OF CORPORATION, IF DIFFERENT THAN ITEM 4			

Names and Complete Addresses of the Following Officers (The corporation must list these three officers. A comparable title for the specific officer may be added; however, the preprinted titles on this form must not be altered.)

	ADDRESS	CITY	STATE	ZIP CODE
7. CHIEF EXECUTIVE OFFICER/ JOHN D SWEENEY	171 SANDPIPER DRIVE, PITTSBURG, CA 94565			
8. SECRETARY JOHN D SWEENEY	171 SANDPIPER DRIVE, PITTSBURG, CA 94565			
9. CHIEF FINANCIAL OFFICER/ JOHN D SWEENEY	171 SANDPIPER DRIVE, PITTSBURG, CA 94565			

Names and Complete Addresses of All Directors, Including Directors Who are Also Officers (The corporation must have at least one director. Attach additional pages, if necessary.)

	ADDRESS	CITY	STATE	ZIP CODE
10. NAME JOHN D SWEENEY	171 SANDPIPER DRIVE, PITTSBURG, CA 94565			
11. NAME				
12. NAME				

13. NUMBER OF VACANCIES ON THE BOARD OF DIRECTORS, IF ANY: 0

Agent for Service of Process If the agent is an individual, the agent must reside in California and Item 15 must be completed with a California street address, a P.O. Box address is not acceptable. If the agent is another corporation, the agent must have on file with the California Secretary of State a certificate pursuant to California Corporations Code section 1505 and Item 15 must be left blank.

14. NAME OF AGENT FOR SERVICE OF PROCESS
JOHN D SWEENEY

15. STREET ADDRESS OF AGENT FOR SERVICE OF PROCESS IN CALIFORNIA, **IF AN INDIVIDUAL** CITY STATE ZIP CODE
171 SANDPIPER DRIVE, PITTSBURG, CA 94565

Type of Business

16. DESCRIBE THE TYPE OF BUSINESS OF THE CORPORATION
FARM DUCK CLUB

17. BY SUBMITTING THIS STATEMENT OF INFORMATION TO THE CALIFORNIA SECRETARY OF STATE, THE CORPORATION CERTIFIES THE INFORMATION CONTAINED HEREIN, INCLUDING ANY ATTACHMENTS, IS TRUE AND CORRECT.

10/27/2015	JOHN D. SWEENEY	PRESIDENT	
DATE	TYPE/PRINT NAME OF PERSON COMPLETING FORM	TITLE	SIGNATURE

3759167

FILED
Secretary of State
State of California
FEB 17 2015

ARTICLES OF INCORPORATION
OF
LOST ISLANDS, INC.

I

The name of this corporation is Lost Islands, Inc.

II

The purpose of this corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of California other than the banking business, the trust company business, or the practice of a profession permitted to be incorporated by the California Corporations Code.

III

The name and address in the State of California of this corporation's initial agent for service of process are:

John D. Sweeney
171 Sandpiper Drive,
Pittsburg, CA 94565

IV

The corporation's initial street address, and its initial mailing address, are both: 171 Sandpiper Drive, Pittsburg, CA 94565.

V

This corporation is authorized to issue one class of stock, which shall be designated "Common Stock." The total number of shares of Common Stock which this corporation is authorized to issue is 120,000 shares.

VI

A. Limitation of Directors' Liability. The liability of the directors of this corporation for monetary damages shall be eliminated to the fullest extent permissible under California law.

B. Indemnification of Corporate Agents. This corporation is authorized to provide indemnification of agents (as defined in Section 317 of the California Corporations Code) for breach of duty to the corporation and its stockholders through Bylaw provisions or through agreements with its agents, or both, in excess of the indemnification otherwise permitted by Section 317 of the California Corporations Code, subject to the limits on such excess indemnification set forth in Section 204 of the California Corporations Code.

Date: February 17, 2015

Philip S. Boone, Jr.
Sole Incorporator

State of California
Secretary of State

CERTIFICATE OF STATUS

ENTITY NAME:

LOST ISLANDS, INC.

FILE NUMBER:	C3759167
FORMATION DATE:	02/17/2015
TYPE:	DOMESTIC CORPORATION
JURISDICTION:	CALIFORNIA
STATUS:	ACTIVE (GOOD STANDING)

I, ALEX PADILLA, Secretary of State of the State of California, hereby certify:

The records of this office indicate the entity is authorized to exercise all of its powers, rights and privileges in the State of California.

No information is available from this office regarding the financial condition, business activities or practices of the entity.

IN WITNESS WHEREOF, I execute this certificate and affix the Great Seal of the State of California this day of April 08, 2016.

ALEX PADILLA
Secretary of State

NP-25 (REV 01/2015)

ABW

Secretary of State
Business Programs Division
Business Entities - Records, P.O. Box 944260, Sacramento, CA 94244-2600

Corporation Status Inquiry

As requested, enclosed is a screen print of the entity's database record. The following is an explanation of the information contained on the enclosed screen print. See the reverse side for a sample screen print.

1. **NAME** – The name under which the domestic (California) or foreign (not California) entity was registered in California.
2. **CORP NO** – The entity identification number assigned by the California Secretary of State at the time of registration.
3. **INC. DATE** – The date the domestic or foreign entity was registered in California. If blank, see #15 below.
4. **STATUS** – The status code for the entity is described as follows:
   - **ACTIVE** – The entity is not suspended or terminated in California.
   - **FTB SUSP** or **FTB FRFT** – The entity was suspended/forfeited by the California Franchise Tax Board for failure to meet tax requirements (e.g., failure to file a return, pay taxes, penalties, interest).
   - **SOS SUSP** or **SOS FRFT** – The entity was suspended/forfeited by the California Secretary of State for failure to file the required Statement of Information and/or for failure to reimburse the Victims of Corporate Fraud Compensation Fund for a paid claim (see #8 below).
   - **SOS/FTB SP** or **SOS/FTB FT** – The entity has been suspended/forfeited by both the California Secretary of State and the California Franchise Tax Board as stated above (also may show **FTB/SOS SP** or **FTB/SOS FT** depending upon which agency suspended the entity first).
   - **DISSOLVED** – The entity is dissolved (terminated).
   - **MERGED OUT** – The entity merged into another entity.
   - **CONV OUT** – The entity converted to another type of *domestic* entity.
   - **INACTIVE** – In most cases, the entity converted to a federal entity or consolidated with another entity to form a single entity.
   - **TERM EXP** – The entity's stated term of existence expired.
   - **SURRENDER** – The entity surrendered (terminated) it's authority to transact intrastate business in California.
   - **CANCELLED** – The entity's registration filing was cancelled by the California Secretary of State because the payment for the filing fee was not honored by the financial institution.

   Note: If the status of the entity is not "ACTIVE" the entity loses the right to use the name in California.
5. The type of entity (domestic stock corporation, domestic nonprofit corporation, foreign stock corporation, foreign nonprofit corporation or foreign association).
6. **CLASS** (*domestic* nonprofit corporation only) – The statutory classification assigned to the entity based on the filings of record. PB = Public Benefit, MU = Mutual Benefit, RE = Religious, SL = Corporation Sole, OC = Cooperative, AG = Agricultural Cooperative and CR = Credit Union. If the classification code is UN, the corporation has not been classified by the California Secretary of State.
7. **CID** will display if the *domestic* entity is formed to manage a common interest development.
8. **VCFCF SUSP** will display when the entity was suspended/forfeited by the California Secretary of State for failure to reimburse the Victims of Corporate Fraud Compensation Fund for a paid claim.
9. **1505 ACTIVE** will display if the entity is a California corporate registered agent authorized to be designated as agent for service of process by other business entities. See #20 below.
10. **NO OF PAGES** – The number of pages of the *entity's registration* document filed with the California Secretary of State. If "00" is displayed, or blank, the information is not contained in the database.
11. **ST/CTRY** – The state or place the entity was organized.
12. **RECENT SI** – The type, file date and document number for the most recently filed Statement of Information. "C" is a *complete* Statement of Information and "N" is a *no change* Statement of Information. A Statement of Information is a document filed with the California Secretary of State containing information such as entity addresses, names and addresses of officers and/or directors, and the name and address of the agent for service of process.
13. **PRIOR COMPLETE SI** – The type, file date and document number for the complete Statement of Information that was filed before the **RECENT SI**.
14. **CID STATEMENT** – The file date and document number for the most recently filed Statement by Common Interest Development Association.
15. **CONVERSION DATE** – The date the entity converted to this type of *domestic* entity.

SSCPUD7 STATUS INQUIRY PAGE 1 04/08/16
CPOISTA3 11:32:37.6

NAME LOST ISLANDS, INC.

CORP NO C3759167 INC. DATE 02/17/2015 STATUS ACTIVE
DOMESTIC STOCK CLASS
NO OF PAGES 01 ST/CTRY

STMT OF INFO (SI) RECENT SI C DATE 10/27/15 NO F893236
PRIOR COMPLETE SI DATE NO

PRINCIPAL EXECUTIVE ADDR 171 SANDPIPER DRIVE

CITY/ST/CNTRY PITTSBURG CALIFORNIA
ZIP 94565

CALIFORNIA ADDRESS 171 SANDPIPER DRIVE

CITY PITTSBURG CA 94565

MAILING ADDRESS
171 SANDPIPER DRIVE

CITY/ST/CNTRY PITTSBURG CALIFORNIA
ZIP 94565

CEO NAME JOHN D SWEENEY
ADDRESS 171 SANDPIPER DRIVE

CITY/ST/CNTRY PITTSBURG CALIFORNIA
ZIP 94565

AGENT NAME JOHN D SWEENEY
ADDRESS 171 SANDPIPER DRIVE

CITY PITTSBURG CA 94565

TYPE OF BUSINESS FARM DUCK CLUB

ENTR=CONTINUE PF2=HISTORY PF3=BACK TO WORKSCREEN PF10=MAIN MENU

57b. Lost Islands, Inc., Secretary of State Snapshot, November 11, 2016

Business Entity Detail

Data is updated to the California Business Search on Wednesday and Saturday mornings. Results reflect work processed through Tuesday, November 08, 2016. Please refer to **Processing Times** for the received dates of filings currently being processed. The data provided is not a complete or certified record of an entity.

Entity Name:	LOST ISLANDS, INC.
Entity Number:	C3759167
Date Filed:	02/17/2015
Status:	ACTIVE
Jurisdiction:	CALIFORNIA
Entity Address:	4093 DENVERTON ROAD
Entity City, State, Zip:	SUISUN CITY CA 94585
Agent for Service of Process:	JOHN D SWEENEY
Agent Address:	4093 DENVERTON ROAD
Agent City, State, Zip:	SUISUN CITY CA 94585

* Indicates the information is not contained in the California Secretary of State's database.

- If the status of the corporation is "Surrender," the agent for service of process is automatically revoked. Please refer to California Corporations Code **section 2114** for information relating to service upon corporations that have surrendered.
- For information on checking or reserving a name, refer to **Name Availability**.
- For information on ordering certificates, copies of documents and/or status reports or to request a more extensive search, refer to **Information Requests**.
- For help with searching an entity name, refer to **Search Tips**.
- For descriptions of the various fields and status types, refer to **Field Descriptions and Status Definitions**.

Modify Search **New Search** **Printer Friendly** **Back to Search Results**

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Administrative Civil Liability Complaint
No. R2-2016-1008

John D. Sweeney and
Point Buckler Club, LLC

Description of Exhibit Provided by Hard Copy and Electronically

Exhibit 58

Declaration of Dyan Whyte, November 18, 2016

JULIE MACEDO, Senior Staff Counsel (SBN 211375)
LAURA DRABANDT, Senior Staff Counsel (SBN 235119)
State Water Resources Control Board
801 K Street, 23rd Floor
Sacramento, California 95814
Telephone: 916-323-6847
Fax: 916-341-5896
E-mail: julie.macedo@waterboards.ca.gov

Attorney for Regional Water Quality Control Board,
San Francisco Bay Region

STATE OF CALIFORNIA

REGIONAL WATER QUALITY CONTROL BOARD, SAN FRANCISCO BAY REGION

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

I, Dyan Whyte, declare as follows:

1. I am an Assistant Executive Officer ("AEO") at the San Francisco Bay Region Regional Water Quality Control Board, ("Water Board") I have been with the Water Board for over 28 years and am a licensed professional geologist in the State of California. I am the lead member of the Prosecution Team for the Pt. Buckler matter.

2. As an AEO, I participate in enforcement case prioritization meetings and determine what formal or informal enforcement measures are necessary to achieve compliance with the California Water Code and Water Board permits, plans, and policies. The consideration of matters for enforcement can be generated in a variety of ways, such as referrals from other agencies, complaints from members of the public, or inspections by Water Board staff.

3. In July 2015, I met with Water Board permit staff to discuss unauthorized activities at Point Buckler Island and next steps. During this meeting I directed staff to do the following: 1) draft a notice of violation (NOV) informing the property owner to cease all

unauthorized activities and to submit technical documents pursuant to Water Code section 13267; 2) draft a cleanup and abatement order (CAO) requiring the property owner to restore impacted water quality beneficial uses; and 3) refer the matter to our Enforcement Unit for preparation of an administrative civil liability complaint (ACL Complaint). The NOV was drafted and sent on July 28, 2015, and prepared by Agnes Farres. The CAO was drafted and finalized on September 11, 2015. The matter was referred to the Enforcement Unit, and Water Board Enforcement staff Benjamin Martin and Brian Thompson have been working on the matter since at least November 2015. Therefore, Dischargers' statements that a penalty was considered by the Prosecution Team only after the Dischargers challenged the initial 2015 CAO in Solano Superior Court are completely false and unsubstantiated. Furthermore, in developing the ACL Complaint I worked closely with Enforcement staff and we never consulted with other agency staff about the potential amount of our proposed administrative civil liability. Nor did Bay Conservation and Development Commission staff consult with me regarding the amount of their proposed penalty.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

_____
Dyan Whyte,
Assistant Executive Officer
San Francisco Bay Regional Water Quality Control Board

November 18, 2016

Administrative Civil Liability Complaint
No. R2-2016-1008

John D. Sweeney and
Point Buckler Club, LLC

Description of Exhibit Provided by Hard Copy and Electronically

Exhibit 59

59a. Sacramento Bee Article – Sacramento-San Joaquin Delta Faces Deadline for Restoring Fish Habitat, April 22, 2016

59b. ACB News 10, Delta Island Owner Seeks Feds' OK for Quick Levee Fix, January 3, 2012

59c. Business Wire - SuperCarDirect Articles, 2007-2009

59d. America's Cup Yacht Listing, November 3, 2006

59e. John Sweeney LinkedIn Page

59a. Sacramento Bee Article – Sacramento-San Joaquin Delta Faces Deadline for Restoring Fish Habitat, April 22, 2016

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http://www.sacbee.com/2012/04/22/4432946/sacramento-san-joaquin-delta-faces.h Go
4 captures
8 Jun 12 - 30 Oct 15
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THE SACRAMENTO BEE sacbee.com

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MANNY CRISOSTOMO / mcrisostomo@sacbee.com

Flowers bloom along Chipps Island in the Delta. California's major water providers face a federal deadline in 2019 to restore thousands of acres of fish habitat.

- Slideshow: Chipps Island Put Up For Sale

Click to view the Large Graphic

More Information

- Additional Multimedia and Map

  Click to view the Large Graphic

Sacramento-San Joaquin Delta faces deadline for restoring fish habitat

By Matt Weiser
mweiser@sacbee.com
Published: Sunday, Apr. 22, 2012 - 12:00 am | Page 1A
Last Modified: Sunday, Apr. 22, 2012 - 12:59 pm

Chipps Island is packed with stories. The 1,000-acre tract in the Sacramento-San Joaquin Delta has been the stage for a variety of human scheming and struggling.

Legend has it the island once was owned by the Italian Mafia, and a spat there between mobsters resulted in one being run over by a bulldozer.

The island was also, until 1956, the terminus of a railroad that carried produce and people from Sacramento. A

ferry then floated whole train cars across the Sacramento River to Pittsburg in an era before big bridges.

If John Sweeney has his way, the next story will look more like the first one, when Chipps was among hundreds of natural islands in the Delta and a vital nursery for fish.

Sweeney, managing partner of a duck-hunting club that owns most of the island, hopes to sell it in what may be the Delta's biggest modern land rush: a stampede to buy land for fish habitat.

State and federal water agencies face a number of hard deadlines over the next seven years to restore at least 17,300 acres of fish habitat.

That would seem a modest task, given that the Delta as a whole is 740,000 acres. In fact, though, few parcels are suitable for the kind of habitat required, given the unique needs of the Delta's native fish.

As a result, land with the right characteristics may soon be in very high demand.

"It's going to create a massive gold rush in the marsh," said Sweeney. "No one out here who owns duck clubs knows what they are sitting on."

Only time will tell if that proves true. But one thing is sure: The scale of the restoration required, and the urgency to get it done, is unprecedented in the Delta. Those involved will be attempting to take entire agricultural parcels – whether farms or duck clubs – and re-engineer them to let the tide back in.

In the process, they will be reversing 150 years of labor and engineering that transformed the Delta into a farming mecca.

Such restoration work has been talked about for decades, and a few small projects have been completed. Now, federal fishery agencies have set firm targets, and the Endangered Species Act is their weapon.

The orders, known as biological opinions, require the state Department of Water Resources and U.S. Bureau of Reclamation to restore habitat to atone for killing fish and altering habitat, an unavoidable side effect of pumping millions of acre-feet of water from the Delta every year.

If the deadlines are not met, the water agencies will find themselves in violation of the state and federal endangered species acts, and subject to water cutbacks. This would be costly and disruptive to the 25 million Californians who depend on Delta water.

The deadlines require 8,800 acres of tidal habitat to be restored by 2019 for Delta smelt and longfin smelt. Another 8,500 acres of floodplain habitat must be restored for salmon by 2016. An equal amount must be restored after that, totaling at least 17,300 acres of floodplain. In some cases, the agencies will be able to count the acres in one project toward all three species.

"I don't think there's been anything on this scale before," said Dennis McEwan, a biologist employed by the state for 25 years and now chief of the mitigation and restoration branch at the California Department of Water Resources, one of the agencies bound by the restoration deadlines.

"It's going to be huge what we do here," McEwan said. "It is very, very significant in trying to restore the ecological health of the Delta."

A return to tidelands

The agencies have vowed to work only with willing sellers to find all the land they need. The real challenge, however, will be finding willing sellers who have the right kind of land.

The Delta in which smelt and salmon evolved was originally a mostly tidal place. There were natural islands and even "levees" caused by natural sediment deposits, but they were small and routinely overflowed during storms and high tides.

This constant washing of the land was a kind of natural farming that produced huge blooms of phytoplankton and zooplankton – small plants and animals in the water column that are the basics of fish food. Tidelands were "the

breadbaskets of the Delta," McEwan said.

Because the Delta was converted to farms, it is now a very different place. Levees restricted water to narrow, fast-moving channels. Many of today's islands have subsided 20 feet or more below sea level, a result of native peat soil decomposing over time.

As a result, many of these islands, even if flooded, would not make very good fish habitat. The water would be too deep to allow tidal action.

So as water officials search for land to restore, the No. 1 criteria is elevation: Is the property at the right elevation to be swept by the tides – both now and in the future as sea level changes?

It turns out there aren't very many of those places left. DWR has projects in the pipeline that meet about half the 8,000-acre smelt requirement. It is actively searching for another 4,000 acres.

Local water agencies that depend on Delta water sense the urgency of the situation. In 2009, they formed a group called the State and Federal Contractors Water Agency specifically to "pitch in" to help get the habitat projects done, said Byron Buck, the agency's executive director.

"We knew it was going to be tough for the state and federal governments to do it alone," Buck said. "These are complicated projects, and they have a lot of local issues to overcome. We are looking all over the Delta where there are willing sellers and where the land is in the right location."

Buck's group includes the state's largest and most politically powerful water agencies that depend on Delta water, including the Metropolitan Water District of Southern California, and Westlands Water District in the San Joaquin Valley, the nation's largest farm irrigation agency.

The agency plans to partner with DWR on the restoration projects. An agreement to guide that relationship is close to being signed.

The actual restoration work ranges from easy to wickedly complicated. If conditions are perfect, the habitat will create itself once water flow is restored by breaching levees.

Perfection is rare. Most properties will require costly excavation to create meandering habitat channels – at carefully engineered depth and elevation – to restore the right water flows.

Potential for speculators

Every restoration project will be planned in a public process, including environmental impact reports. The first in the pipeline is called Yolo Ranch, a parcel in the Yolo Bypass purchased by Westlands Water District in 2007.

Yolo Ranch is expected to yield 1,205 acres of tidal wetland habitat, Buck said. A draft environmental impact report is expected this summer, at which point the "local issues" Buck mentioned will come to the fore.

The land is in Yolo County, where the Board of Supervisors in 2010 passed a moratorium on habitat projects. Supervisor Mike McGowan said the county was feeling "muscled" by the water agencies and the moratorium was intended to force them to the table. It expires in November, and McGowan said the county is prepared to cooperate as long as its interests are accommodated. These include flood protection and the preservation of agriculture.

"We are not religiously opposed to habitat restoration in Yolo County," he said. "But you're going to do it the Yolo way, or we will resist you."

Besides environmental studies and local government permits, each habitat restoration project also requires permits from an alphabet soup of other agencies. These include the U.S. Army Corps of Engineers, the Central Valley Flood Protection Board and the State Water Resources Control Board.

"You need every single permit, and every one of them is a nightmare," said Tom Cannon, who formerly built such projects for Wildlands Inc. The company's business is to restore habitat and then sell so-called "mitigation credits" to developers at whatever the market will bear – sometimes more than $100,000 per acre.

The water agencies have vowed to do their own restoration work rather than buy credits. They believe they can save money by doing the work themselves, and estimate acquisition and development costs at $20,000 per acre. Total project costs for 8,000 acres of habitat are estimated at $205 million, to be funded largely through water rates.

McEwan acknowledged the uncertainty in that number.

"A lot of these properties are going to be really valuable," he said, "so there is a potential for land speculators to come in and buy the property in front of us, then sell it back to us at a really increased cost."

Many Delta properties are richly encumbered by historic multifamily partnerships, natural gas drilling rights, utility and transportation easements and levee maintenance obligations. Clearing all that up to complete a sale is costly and time consuming.

Which is why John Sweeney considers Chipps Island so attractive. The partners own three-fourths of the 1,000-acre island, which they spent several years consolidating out of 18 disparate parcels. They also evicted squatters and removed derelict buildings.

Sweeney recently advertised the island online and has discussed a sale with some of the water agencies. He is frank about wanting to profit from such a deal, but said that isn't the only motivation for him and his partners.

"They're much more willing to look at a project, even if it's less return, because we're doing something good for the environment," Sweeney said. "It will be bought. The returns, when they start to happen, could be quite good."

Recommend 35 people recommend this. Be the first of your friends.

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Call The Bee's Matt Weiser, (916) 321-1264.

• Read more articles by Matt Weiser

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Be the first to comment.

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For My one… smiles • Sir's Choice

1 comment • 2 years ago

destiny — *smiles up to my Master, the tug within warming me as i read Your post. The words which i hunger for before me, as i …

mmm how lovely • Sir's Choice

1 comment • 2 years ago

destinyleashed — *smiles softy* red and white my One???

subjoolz: sirrobertpayne: The Desire for Payne... • Sir's Choice

1 comment • a year ago

Joolz44 — Ha ha, very funny :)

A family torn asunder

1 comment • 2 years ago

Jennifer McKee Roussin — I'm praying for these children. This is sad.

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59b. ACB News 10, Delta Island Owner Seeks Feds' OK for Quick Levee Fix, January 3, 2012

NEWS10 abc
SACRAMENTO - STOCKTON - MODESTO

Delta island owner seeks feds' OK for quick levee fix

7:24 PM, Jan 3, 2012 | comments

Written by
George Warren

FILED UNDER

News
Local News

PITTSBURG, CA - The owner of a private island in the Delta who found a quick and inexpensive way to repair a broken levee is trying to convince the federal government the technique could save lives and property elsewhere.

John Sweeney said a levee breach last summer threatened to inundate his 1,000 acre Chipps Island, which lies across the Sacramento River from Pittsburg.

"We first tried to fix it the old fashioned way by horseshoeing around it with dirt," Sweeney explained. "But every time we put the dirt on it, it would just wash back out at high tide."

Sweeney eventually floated a 40-foot steel shipping container out to the island and carefully sank it in the breach by filling it with mud.

He plans to replace the container with a permanent dirt or rock berm later this year.

Sweeney got the idea from news reports of shipping containers filled with gravel being used during the Hurricane Katrina crisis in New Orleans.

Sweeney was later surprised to get a letter from the US Army Corps of Engineers telling him placement of the shipping container in the levee may have violated the terms of a repair permit because it was not a recognized levee repair material.

Sweeney, 41, made his fortune by selling an outdoor advertising business in 2001 and owns a total of three Delta islands that are all at risk for future levee breaks.

He contacted News10 to publicize his levee fix in an attempt to gain official acceptance.

"If the Army Corps did a little research and saw this, I think this could be a widely-appreciated way to fix any levee break," Sweeney said.

Advertisement

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NEWS10 abc
SACRAMENTO - STOCKTON - MODESTO

The Corps of Engineers' San Francisco division did not immediately respond to email and phone messages seeking comment.

by George Warren,

News10/KXTV

Advertisement

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59c. Business Wire - SuperCarDirect Articles, 2007-2009

SuperCarDirect.com Offers Free Automotive Classifieds to Individuals, Dealers

July 31, 2007 05:01 PM Eastern Daylight Time

SAN FRANCISCO--(BUSINESS WIRE)--What could be better than nationwide exposure when you want to sell a new or used car or truck? How about free nationwide exposure?

“Starting Aug. 1, anyone wanting to sell a vehicle, including dealers, can post a 60-day free classified ad, with unlimited photos and video, on the cleanest and easiest-to-use site on the internet – www.SuperCarDirect.com,” explains John Sweeney, spokesman for the new San Francisco-based enterprise.

“There are no fees or membership charges, no hidden costs, just an open marketplace that brings buyers and sellers together,” he said. “We’ve taken the best features of the most popular pay classifieds/auction sites out there and made them available to everyone – free. You simply sign on, create an account and list as many vehicles as you want. SuperCarDirect.com has a powerful internal search engine that directs buyers quickly and efficiently to the car they’re looking for. Buyers and sellers include their contact information and handle the transaction directly.”

SuperCarDirect.com, which is also free to dealers, has won support from a number of prominent auto dealership groups.

“Mercedes Benz of Oakland, California Motors, Ferrari/Maserati of San Francisco, Lotus/Lamborghini/Bentley of San Francisco, and Marin Aston Martin, Jaguar, Land Rover, Volvo, Toyota and Infiniti, just to name a few, are all supporting SuperCarDirect,” Sweeney said. “Existing sites charge dealers and manufacturers by the ad or click-through, which can be very costly, and they focus on driving traffic through multiple pop-ups and banner ads. SuperCarDirect does none of that. We are the first site which offers completely free car classifieds to private parties, manufacturers and dealers. We are a free forum for buyers and sellers to meet.”

SuperCarDirect.com is backed by a group of entrepreneurs with a long history of success in the automotive, sports marketing and advertising fields, Sweeney said.

“The business model for SuperCarDirect.com is traffic, traffic, traffic,” he explained. “Our investors believe that offering a free site that is not compromised by multiple ads and pop-ups will quickly make SuperCarDirect the fastest growing automotive site on the internet.”

Contacts

SuperCarDirect.com
John Sweeney, 415-686-0907
John@SuperCarDirect.com

SuperCarDirect.com Brings Free Car Classifieds to Apple's iPhone users

June 02, 2008 01:21 PM Eastern Daylight Time

SAN FRANCISCO--(BUSINESS WIRE)--SuperCarDirect.com, the nation's leading free car classified site, is now available to Apple's iPhone users. Shoppers can view hundreds of thousands of dealer and private party ads for used cars and trucks on their iPhones. Sellers can list their vehicles free via their iPhone, along with 20 photos for 60 days.

"SuperCarDirect.com continues to live on the cutting edge of car classifieds," says company founder John Sweeney. "Our goal is simple: Give everyone in America a free place to buy and sell their cars and trucks. We also offer niche car groups a free marketplace for everything from NOPI to NASCAR. We are the fastest growing marketplace for Ferraris and the leading choice for specialty car enthusiast of all kinds. You can find everything from your daily driver to your weekend racecar on SuperCarDirect.com."

SuperCarDirect.com has also just unveiled its vintage 2003 NASCAR, which will tour the United States later this summer. The car has been highly modified to be street legal and will be featured in car shows and track events.

"We are crazy about all cars," says Sweeney. "I want Bugatti owners to have the same forum as hybrids owners. We are a one-stop shop for any car or truck at any price, and SuperCarDirect.com is free. Why wouldn't you use us!"

Contacts

SuperCarDirect.com
John Sweeney, 415-686-0907
Email: John@SuperCarDirect.com

Business Wire
A Berkshire Hathaway Company

SuperCarDirect CEO Ditches Corporate Jet, Drives NASCAR to Work

SuperCarDirect.com CEO John Sweeney uses the company's NASCAR as his everyday vehicle, drawing a lot of second looks from pedestrians and police. (Photo: Business Wire)

January 06, 2009 06:33 PM Eastern Standard Time

SAN FRANCISCO--(BUSINESS WIRE)--SuperCarDirect.com CEO John Sweeney, who runs the nation's largest free car classified website, has taken a novel approach to eliminating executive perks. He sold the company's jet and now drives a NASCAR race car to work.

"We took a NASCAR we had been running on the race circuit, fitted it with lights, seat belts, windshield wipers etc. to be street legal, and that's my everyday vehicle," says Sweeney, an avid car collector. "There are no windows, so my suit gets a bit damp in the rain, but expression of people's faces and the reaction of the cops is priceless."

Sweeney started SuperCarDirect.com to bring free car classifieds to the Internet. The site enables sellers to list as many vehicles as they want, complete with contact information, maps, vehicle description and up to 20 photos for each listing. Listings are completely free and can be renewed every 60 days.

"AutoTrader.com, Cars.com, eBayMotors – they're all basically ripping off their customers," Sweeney contends.

"Craigslist showed that free classifieds are the future, and SuperCarDirect.com has done the same thing for vehicles. We've grown to more than 600,000 listings in less than two years, so we know it can be done. I am building a brand because of my own passion for cars and the experience of paying tons of cash for useless ads. I'm not making a dime, but as the public learns about our site I believe we will attract a sponsor to help with marketing and refining the site's technology."

Contacts

SuperCarDirect.com
John Sweeney, 415-686-0907
John@SuperCarDirect.com

59d. America’s Cup Yacht Listing, November 3, 2006

CATEGORIZED | VARIOUS

ITA-1, first IACC ever built, for sale

Posted on 03 November 2006 by Valencia S

0

Tweet Pin it

1992 America's Cup Yacht "IL Moro Di Venezia" ITA 1

This is the first boat built under the new IACC Rule for the 1992 Cup in San Diego. Built at Tencarna Italy in 1989 she is the strongest of any AC yacht built to date. Bullet proof rig and hull designed by German Frers to IMS maxi/volvo standards. Volvo 72hp Saildrive with feathering prop. Two 40′ containers with tools, spares and dozens of brand new sails. She has been sailing this summer in San Francisco for casual day sails. Fully restored and in racing order. New 3DL Main and 3DL Blade make her easy to sail with a small crew. The most famous AC yacht built and the last of four that the owners had owned and restored. She is ready for a new owner and in turn key condition. Offered at a fraction of her restoration cost. Asking $375,000 USD.

Contact John Sweeney at john@supercardirect.com

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2 COMMENTS FOR THIS POST

sad64 Says:

May 7th, 2008 at 10:02 am

ITA 1 is the second, the first is F1. You can have more informations on the french web site:

http://www.class-america-f1.com

This Association want to restor the first IACC.

This project is really interesting. You become a member and sailing on the only small ACC, LAB1&LAB2

sad64 Says:

May 7th, 2008 at 10:06 am

IACC F1 sail for the first time at March 4- 1990 to Sète. He is and he stay the real one in the America's Cup story

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Posted on 03 November 2006 by Valencia S 0

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4 COMMENTS FOR THIS POST

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sad64 Says:

May 7th, 2008 at 9:02 am

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59e. John Sweeney LinkedIn Page

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John Sweeney

Kiteboarding Islands Worldwide

San Francisco Bay Area | Sports

177 connections

Current	Point Buckler Club
Previous	SuperCarDirect Free Car Classified for the Luxury Market, Sausalito Challenge for America's Cup 2007 Valencia, IACCSF International America's Cup Class San Francisco
Education	Orange Coast College
Websites	Personal Website Personal Website Personal Website

View John's full profile. It's free!

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View John's Full Profile

Summary

Providing Silicon Valleys Executives with the best and most private kiteboarding and duck hunting experience in California.

Experience

Founding Partner

Point Buckler Club

May 2011 – Present (5 years 7 months)

Providing Silicon Valley Executives a safe place to Kiteboard in the Delta for friends, family and business associates.

CEO

SuperCarDirect Free Car Classified for the Luxury Market

2007 – 2009 (2 years)

Founded and funded a free car classified model to provide high end car dealers and buyers a free way to hook up. Achieved the largest Ferrari marketplace new and used on the web in 2009.

Founding Partner

Sausalito Challenge for America's Cup 2007 Valencia

2005 – 2006 (1 year)

Funded a small America's Cup team to challenge for 2007 trophy in Valencia. Failed to secure a title sponsor so merged with South African Team Shosholoza.

Co Founder

View this profile in another language

Find a different John Sweeney

First Name Last Name

Example: John Sweeney

Patrick John Sweeney
COO / VP Retail / VP E commerce / VP Sales / VP Merchandising / VP Operations - Luxury Brands
United States

John Sweeney
General sales manager at Nutley Auto Kia Goodyear CARQUEST
United States

John Sweeney
EVP, Retirement & Investing Strategies
United States

John Sweeney
President, LOGICFORCE
United States

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Lesley Belcher
BS, MBA, JD

Constantine Kadel
Certified Bikram Yoga Teacher at Bikram Yoga Boston

Soriba Bangoura

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Financial backer for fleet of America's Cup Yachts. Based at Treasure Island. Owned and operated four IACC yachts. Other participants Larry Ellison, Peter Stoneberg, David Thomson and Herb Myers of Wells Fargo title sponsor. Company was run by Nick Thomson.

Co Founder and CEO

Sailing Billboards LLC

January 1992 – December 2001 (10 years)

Largest privately held Outdoor Advertising Company acquired by Next Media in 2001

Owner

Surf Report

1991 – 1993 (2 years) | San Francisco Bay Area

First 976 Pay surfline in Northern California.

Skills

Entrepreneurship | Marketing Strategy | Social Media | Agriculture | Start-ups | Coaching | Marketing | Ranch | Agribusiness | Dog Training | Yachting

Education

Orange Coast College

Architecture, Architecture

1989 – 1991

Groups

Kite Surfing

Business Kitesurfer…

Ferrari Owners & Ent…

Windsurf and kitesurf

Kite Surfers

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- Contact **John** directly

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Relocation & Move Specialist at Ultimate Moves

John Paul Sweeny IV
CEO

Benjamin Schoenleber
Student at Duke University

Simon Daubney
Yachtsman

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