



EDMUND G. BROWN JR.  
GOVERNOR

MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

**San Francisco Bay Regional Water Quality Control Board**

**August 10, 2016 Board Meeting  
Draft Minutes for Board Consideration**

ADOPTED September 14, 2016

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**Item 1 - Roll Call and Introductions**

Meeting called to order at 9:00 a.m. in the Elihu M. Harris Building, First Floor Auditorium.

<u>Board Members Present</u>	<u>Board Members Absent</u>	<u>Status</u>
Cecilia Ogbu	Steve Lefkovits	QUORUM
John Muller	Newsha Ajami	
Vice-Chair James McGrath	William Kissinger	
Chair Terry Young		

**Item 1 – Roll Call and Introductions**

Senior Environmental Scientist Christine Boschen introduced new volunteers Emily Sheppard and Bryce Lee. Executive Officer Bruce Wolfe announced the retirements of Division Chief Lila Tang, Senior Engineer Bill Hurley, and Staff Engineer Marcia Liao, as well as announcing the promotion of Bill Johnson to Division Chief of NPDES Wastewater Division.

**Item 2 – Public Forum**

No parties requested to speak.

**Item 3 - Minutes of the July 13, 2016 Board Meetings**

Mr. Wolfe recommended adoption of the Minutes from the July 13, 2016 Board Meeting. Board Member Muller moved for adoption of the Minutes; Vice Chair McGrath seconded the motion.

Ayes: Ogbu, Muller, McGrath, Young

Nos: none

ITEM ADOPTED

#### **Item 4 - Chairman's, Board Members', and Executive Officer's Reports**

Vice Chair McGrath noted he was working on a campaign in Berkeley to increase funding for parks and green infrastructure. Board Member Muller discussed a meeting he attended with Chair Young and staff in Napa on the evening of July 26 to discuss the proposed Vineyards General WDRs. Chair Young recognized the outstanding job Staff Engineering Geologist Mike Napolitano did in presenting the proposed WDRs to the audience at that meeting, with assistance by Board staff Jim Ponton, Alex Grant, and Dyan Whyte. She also reported on the most recent Chairs' call and their discussion about possible legislative proposals.

Mr. Wolfe gave an overview of this month's Executive Officer's Report. He noted that the budget trailer bills are still pending and need to be resolved by August 31. He highlighted the cleanup orders discussed in this month's report. He noted that Terminal One site in Richmond will be tracked closely. Vice Chair McGrath asked a question about the San Leandro Bay water quality certification listed in this month's report. Chair Young asked about the listed East Bay Regional Parks District project. Mr. Wolfe and Watershed Division Chief Keith Lichten responded.

#### **Consideration of Uncontested Item**

##### **Item 5 – Cleanup Programs – Status Report including Case Closures**

Board members asked clarifying questions. Chair Young asked about dry cleaner sites, and Vice Chair McGrath noted appreciation for development of the performance measures.

This item was for informational/discussion purposes and no action was taken.

*BREAK at 9:46 a.m.; RECONVENED at 9:57 a.m.*

#### **Other Business**

##### **Item 6 – Environmental Risk Management – Status Report**

Staff Engineering Geologist Ross Steenson gave the presentation. Mr. Steenson provided background information, described risk management measures, and concluded his presentation by illustrating ways to ensure that risk management measures remain protective over the long term.

Board members asked clarifying questions. Chair Young asked about how the failure of risk management measures could be addressed. She also asked about sites that are not fully cleaned up, the use of vapor barriers, and our experience with the lifespan of these barriers. Mr. Wolfe described various scenarios related to risk management. Vice Chair McGrath discussed potential issues related to risk management. He raised the question as to whether legislation is needed to better recognize reuse sites. Chair Young further noted the likelihood of continuing to receive proposals for development on top of contaminated sites.

This item was for informational/discussion purposes and no action was taken.

## **Cleanup and Abatement Order**

### **Item 7 – John D. Sweeney and Point Buckler Club, LLC, Point Buckler Island, Suisun Marsh, Solano County – Tentative Cleanup and Abatement Order**

Chair Young described the hearing procedures for this item. Vice Chair McGrath disclosed that he is the Board's designated representative to the San Francisco Bay Conservation and Development Commission (BCDC) and the vice president of the San Francisco Board Sailing Association. He stated that he did not believe that these positions presented a conflict on this matter and that he could fairly and impartially consider whether to adopt the tentative order.

Assistant Executive Officer Dyan Whyte introduced the item on behalf of the Prosecution Team. Staff Environmental Scientist Agnes Farres gave the presentation. She described conditions at Point Buckler Island before the Dischargers began unauthorized work, the fill that was placed in waters of the State and the United States, the impacts to 30 acres of tidal marsh, enforcement history, and the corrective actions required by the tentative Cleanup And Abatement Order. Laura Drabrandt, Prosecution Team lead attorney with the State Water Board's Office of Enforcement, discussed legal issues raised by the Dischargers and the Board's authority to issue the tentative Cleanup and Abatement Order. Dr. Stuart Siegel, expert for the Prosecution Team, presented the bases for the findings that the majority of Point Buckler Island is jurisdictional waters of the State and the United States, Point Buckler was tidal marsh for more than 20 years prior to diking and draining activities in 2014, and that diking and draining activities have significantly harmed beneficial uses.

Chair Young asked clarifying questions about the survey work.

Larry Bazel, legal counsel representing the Dischargers, gave a presentation. He stated that his presentation was going to show that there was not a mass dieback of vegetation on the Island and that repairing the levy did not dry up tidal marsh because most of the Island is above the high tide. He explained that the levy was repaired for duck ponds, not kiteboarding, and that duck ponds are important. He discussed why the Prosecution Team's elevations and high tide line is wrong and presented photos. He stated that the Cleanup and Abatement Order will do more harm than good and requested that the Board postpone action until December.

Vice Chair McGrath asked Mr. Bazel a series of questions pertaining to the installation of a tidal gauge, alternative site-specific elevation and vegetation survey information, documentation of maintenance efforts, and correspondence with the Department of Water Resources (DWR) regarding plans to use Point Buckler Island as mitigation. Chair Young asked Mr. Bazel a number of questions pertaining to the Individual Management Plan. Board Member Muller asked the advisory team about the roles of the Suisun Resource Conservation District and BCDC.

Mark Zeppetello, Chief Counsel of BCDC, addressed the Board. He described BCDC's regulatory authority and noted that BCDC strongly disagrees with the Dischargers' argument that work done on the Island was exempt from BCDC permits. He noted that the Individual Management Plan was no longer in effect when the Dischargers performed work on the Island and that they

violated the Suisun Marsh Preservation Act and the McAteer-Petris Act when they conducted unauthorized work without a permit. Bret Moffet, representing U.S. EPA, clarified the definition of waters of the United States. Erica Maharg, staff attorney with the San Francisco Baykeeper, noted support for the tentative order and the modifications made in response to comments.

Steve Chappell, Executive Director of the Suisun Resource Conservation District, noted that he was available for questions. Vice Chair McGrath asked clarifying questions regarding the 1984 certification of the individual management plans. Dr. Peter Baye, Coastal ecologist, noted that he was available for questions. Vice Chair McGrath asked clarifying questions about wetland vegetation and methods of converting tidal marsh vegetation over to species that would support waterfowl. Chair Young asked about dominant wetland vegetation, and Dr. Baye clarified the definition of obligate wetland plants. Mr. Bazel stated that the Dischargers do not dispute that plants on the Island are obligate wetland plants but noted that groundwater is shallow at the site. He also noted that the Prosecution Team has not relied on a three-factor wetland delineation test.

David Coupe, Advisory Team legal counsel, clarified the definition of waters of the State and discussed the Water Board's authority under Water Code section 13304 to issue a Cleanup and Abatement Order. He highlighted that there does not need to be a demonstrated discharge to issue the tentative order but that a threat of discharge is sufficient. Dr. Bruce Herbold noted that he was available for questions.

*LUNCH BREAK at 12:46 p.m; RECONVENED at 1:24 p.m.*

Ms. Whyte presented closing remarks. She asked Steve Chappell to address the question raised regarding whether the Island was mitigation for DWR. Ms. Whyte stated that no evidence was presented that needed further response. She emphasized the Board's consistent support for recreational use of waters and that the permitting process is intended to assure that recreational uses are developed in an ecosystem-friendly manner. She noted that Provision 2 of the tentative order may need to be modified to clarify that the exact number of breaches restored is not as important as creating a tidal marsh ecosystem with functioning channels that support beneficial uses. She closed by emphasizing that the restoration plan must truly be a restoration plan and not a site development plan.

Mr. Bazel presented his closing remarks. He noted that the 1984 plan stated that the levees were repaired. He stated that the previous owners must have repaired the levees without permits and were pumping water onto the Island to make ponds. He noted that the Club planned to plant duck food and things slowed down when the agencies showed up. He reiterated that the Prosecution Team only used the high tide line to assert jurisdiction and that the photographs he provided are evidence that indicates otherwise. He concluded by stating that he thought both sides could reach agreement on restoration that is scientifically and legally sound.

The Board convened in closed session to consider evidence received and to deliberate on a

decision to be reached on that evidence.

*CLOSED SESSION at 1:37 p.m; RECONVENED at 2:14 p.m.*

Vice Chair McGrath summarized the basis for his support of the tentative order and noted that that jurisdiction is clear and that nothing was presented to support a vested rights argument. Board Member Ogbu noted support for the tentative order. Chair Young stated that it seemed clear from the evidence presented that the Island was tidal marsh. She noted that the arguments presented that the work was covered under a pre-existing permit were not persuasive. She noted that the deadlines in the tentative order seemed reasonable and that she was willing to consider alternative language for Provision 2. Board Member Muller added that the tentative order presented an opportunity for the Dischargers to move forward in a positive direction. Ms. Whyte presented alternative language, and Board members asked clarifying questions. Mr. Coupe walked the Board members through some additional changes proposed by the Advisory Team.

Vice Chair McGrath moved for adoption of Item 7 as revised both in the supplemental and as presented; Board Member Ogbu seconded the motion.

Ayes: Ogbu, Muller, McGrath, Young

Nos: none

ITEM ADOPTED

### **Item 12 - Adjournment**

Meeting adjourned at 2:38 p.m. until the next Board Meeting – September 14, 2016