

1 JOHN BRISCOE (053223)
LAWRENCE S. BAZEL (114641)
2 PETER PROWS (257819)
BRISCOE IVESTER & BAZEL LLP
3 155 Sansome Street, Seventh Floor
San Francisco, CA 94104
4 (415) 402-2700
Fax (415) 398-5630
5 jbriscoe@briscoelaw.net
lbazel@briscoelaw.net
6 pprows@briscoelaw.net

7 *Attorneys for Petitioner Point Buckler Club, LLC*

8
9 STATE OF CALIFORNIA

10 STATE WATER RESOURCES CONTROL BOARD

11 In the matter of:

12 CLEANUP AND ABATEMENT ORDER
13 NO. R2-2015-0038;
POINT BUCKLER CLUB, LLC

No.

AMENDED
PETITION FOR REVIEW
AND
REQUEST FOR STAY
(ACTION ON STAY REQUESTED BY
OCTOBER 30, 2015)

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- I. INTRODUCTION 1
- II. IDENTIFICATION OF PETITIONER 3
- III. REGIONAL BOARD ACTION TO BE REVIEWED..... 3
- IV. DATE OF REGIONAL BOARD ACTION 3
- V. STATEMENT OF REASONS WHY THE REGIONAL BOARD ACTION WAS IMPROPER..... 3
- VI. MANNER IN WHICH PETITIONER IS AGGRIEVED 3
- VII. STATE BOARD ACTION REQUESTED BY PETITIONER 4
- VIII. BACKGROUND 4
 - A. In The 1970s, The Legislature Acted To Protect Suisun Marsh..... 4
 - B. The Suisun Marsh Preservation Act Exempts Work Specified In The Point Buckler Management Plan From A BCDC Permit..... 6
 - C. The Department Of Water Resources Provided For A Duck Club At Point Buckler As Mitigation For Its Delta Diversions..... 8
 - D. Point Buckler LLC Proceeded To Implement The Individual Management Plan Without Awareness Of Any Need For Additional Authorizations..... 9
 - E. The Work Did Not Cause Tidal Marsh To Dry Out 10
- IX. POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION..... 11
 - A. The Regional Board Violated Petitioner’s Due Process Rights By Refusing To Hold A Hearing..... 11
 - B. The Regional Board Violated Petitioner’s Due Process Rights By Engaging In Ex Parte Communications And Violating The Separation-Of-Functions Rule 14
 - C. The Regional Board Violated The Void-For-Vagueness Doctrine..... 15
 - D. The Regional Board Violated The Conformity Requirement Of The Suisun Marsh Preservation Act..... 16
 - E. The Regional Board Violated The Primary Responsibility Provision Of The Suisun Marsh Preservation Act..... 17
 - F. The Regional Board Violated Water Code § 13304 And Therefore Lacked Authority To Issue The Order..... 17
 - 1. The Work Is Not A Condition Of Pollution Because It Promotes, Rather Than Harms, The Beneficial Uses..... 18
 - 2. The Work Is Not A Condition Of Pollution Because It Is Authorized By The Suisun Marsh Preservation Act..... 19

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

3. The Work Is Not A Condition Of Pollution Because It Comes Within Permits Issued By The Corps Of Engineers and Certified By The Regional Board20

4. The Work Is Not A Condition Of Pollution Because It Is A Mitigation Project Required by CEQA.....21

5. The Construction Material Is Not “Waste”.....23

G. The Factual Assertions In The Order Are Not Supported By Substantial Evidence.....25

H. The Demand For Restoration Of Tidal Circulation Is An Abuse Of The Regional Board’s Discretion.....25

X. TRANSMITTAL OF PETITION TO REGIONAL BOARD26

XI. REQUEST FOR STAY26

A. Substantial Harm To The Petitioner26

B. No Substantial Harm To Other Persons Or The Public Interest26

C. Substantial Questions Of Fact Or Law27

XII. CONCLUSION.....27

1 **I. INTRODUCTION**

2 Petitioner Point Buckler Club, LLC would like to restore a duck club on the island it owns in
3 the Suisun Marsh. This effort should be easy. The Suisun Marsh Preservation Act is extremely
4 duck-club friendly. It specifically exempts duck clubs from obtaining a marsh development permit
5 when the work is consistent with an individual management plan certified by the San Francisco Bay
6 Conservation and Development Commission (“BCDC”). Here there is a certified plan, and the work
7 is consistent with it.

8 The Suisun Marsh Protection Plan makes clear that duck clubs are especially favored. It
9 recognizes that duck clubs are a “vital component” of the wintering habitat of migrating waterfowl
10 because they encourage production of preferred waterfowl food plants that would not otherwise be
11 available. The Water Quality Control Plan for the San Francisco Bay Basin (“Basin Plan”)
12 recognizes these values by including wildlife habitat and noncontact recreation among the beneficial
13 uses for Grizzly Bay, where the island is located.

14 The work at issue—digging out interior ditches and using the material to maintain or replace
15 existing levees—is generally authorized by the U.S. Army Corps of Engineers and certified by the
16 Regional Board, which has issued section-401 certifications for two permits. These permits
17 authorize hundreds of thousands of cubic yards of material to be excavated from interior ditches and
18 used for the purposes of maintaining and replacing levees in the Suisun Marsh.

19 If for no other reason, restoration of the duck club at Pint Buckler should be encouraged
20 because it is a mitigation measure imposed by the State Water Resources Control Board
21 (“State Board”) and Regional Water Quality Control Board for the San Francisco Bay Region
22 (“Regional Board”) on the California Department of Water Resources (“DWR”) for water diversions
23 from the Delta.

24 Nevertheless, the Regional Board has been duck-club-hostile. If there were any irregularity
25 in any permitting needed for the duck club, the Regional Board could have identified that irregularity
26 and demanded that it be resolved. But it has not shown an interest in correcting permit irregularities,
27 and certainly has not given Petitioners an opportunity to make corrections. Instead, with almost no
28 preamble, the Regional Board has issued Cleanup and Abatement Order No. R2-2015-0038 (the

1 “Order”), which requires Petitioner to restore tidal circulation to the interior of the island. This
2 Order kills the duck club, which at times needs to restrict tidal circulation and raise the water level
3 within the island in order to flood the duck ponds. The island is unusual. The duck ponds are above
4 high tide, and have been flooded by maintaining the levees, closing the tide gates, and pumping
5 water into the island. As part of its mitigation, DWR provided the pump.

6 Worse still, the Regional Board killed off the duck club in violation of the Constitutional
7 due process rights of Petitioner and its owners. The Regional Board has taken Petitioner’s property
8 without an opportunity for a hearing, in which Petitioner could have reviewed whatever evidence the
9 Regional Board has obtained—the Regional Board has not presented its evidence to Petitioner—and
10 provided information that would have assisted the decision-maker.

11 The Regional Board has also engaged in impermissible ex parte communications. Staff who
12 are prosecuting this action have communicated with the advisory team, and apparently with the
13 decision-maker, outside of the Petitioner’s presence.

14 The Regional Board has violated the Suisun Marsh Preservation Act by taking action
15 inconsistent with that act.

16 The Regional Board has violated the Porter-Cologne Act by issuing a cleanup and abatement
17 order without meeting the conditions prescribed by Water Code § 13304. The Board justifies the
18 Order on the grounds that waste has been discharged into waters of the state and has created a
19 condition of pollution, but the work at issue was not and cannot be a condition of pollution.
20 It cannot be a condition of pollution because the Legislature has authorized the work through the
21 Suisun Marsh Protection Act, because the Regional Board and State Board have called for the work
22 as a mitigation measure to be implemented by DWR, and because the Regional Board has issued two
23 section-401 certifications in which it necessarily concluded that this type of work does not create a
24 condition of pollution. Also, the material used was not a waste.

25 The Order violates California Environmental Quality Act (“CEQA”) because it interferes
26 with the implementation of required mitigation.

27 The Order violates the Constitutional void-for-vagueness doctrine because it requires reports
28 that must personally satisfy an individual. This standard is too vague to pass Constitutional muster.

1 Petitioner requests a stay. Because of the short deadlines in the Order, Petitioner requests
2 that the State Board act on the stay request by October 30, 2015, which is the day before the first
3 submission in the Order is due.

4 The State Board should rescind the Order on the grounds that it violates the due-process
5 requirement for a hearing, it violates the due-process prohibition on ex parte communications and
6 requirement for separation of functions, it violates the Suisun Marsh Preservation Act and Suisun
7 Marsh Protection Plan, it violates the Porter-Cologne Act, it violates CEQA, it violates the void-for-
8 vagueness doctrine, and it is an abuse of the Regional Board's discretion.

9 **II. IDENTIFICATION OF PETITIONER**

10 Petitioner is Point Buckler Club, LLC, and should be contacted through counsel:

11 JOHN BRISCOE
12 LAWRENCE S. BAZEL
13 PETER PROWS
14 BRISCOE IVESTER & BAZEL LLP
15 155 Sansome Street, Seventh Floor
16 San Francisco, CA 94104
(415) 402-2700
Fax (415) 398-5630
jbriscoe@briscoelaw.net
lbazel@briscoelaw.net
pprows@briscoelaw.net

17 **III. REGIONAL BOARD ACTION TO BE REVIEWED**

18 Cleanup And Abatement Order No. R2-2015-0038; Point Buckler LLC, Solano County,
19 attached to the Amended Declaration of Lawrence S. Bazel ("Amended Am. Bazel Decl.") as
20 Exhibit 1.

21 **IV. DATE OF REGIONAL BOARD ACTION**

22 The Executive Officer of the Regional Board issued the Order on September 11, 2015.

23 **V. STATEMENT OF REASONS 24 WHY THE REGIONAL BOARD ACTION WAS IMPROPER**

25 The Regional Board action was improper for the reasons set out in the points and authorities
26 in section IX below.

27 **VI. MANNER IN WHICH PETITIONER IS AGGRIEVED**

28 Petitioner is aggrieved because the Constitutional rights of itself and its members have been
violated, and because it is being prohibited from maintaining and restoring the duck club that existed

1 at the property and is authorized—and even required—by various statutes and other legal
2 requirements, as specified in section IX below.

3 **VII. STATE BOARD ACTION REQUESTED BY PETITIONER**

4 Petitioner requests that the Order be stayed, and that the State Board act on the stay by
5 October 30, 2015. The Regional Board has just informed Petitioner by telephone that the November
6 1, 2015 deadline in the Order will be extended by 30 days. Petitioner is requesting action by
7 October 30, 2015 so that, if the State Board does not act, Petitioner has an opportunity to move for a
8 stay in superior court before the Order’s deadline. If the State Board cannot issue a stay by
9 October 30 Petitioner requests that the State Board act to postpone the submissions required by the
10 Order until the State Board can act on the stay request.¹

11 Petitioner also requests that the State Board should rescind the Order on the grounds that it
12 violates due process, it violates the Suisun Marsh Preservation Act and Suisun Marsh Protection
13 Plan, it violates the Porter-Cologne Act, it violates CEQA, it violates the void-for-vagueness
14 doctrine, and it is an abuse of the Regional Board’s discretion.

15 **VIII. BACKGROUND**

16 **A. In The 1970s, The Legislature Acted To Protect Suisun Marsh**

17 In 1974, the California Legislature enacted the Nejedly-Bagley-Z'berg Suisun Marsh
18 Preservation Act of 1974, which directed the San Francisco Bay Conservation and Development
19 Commission (“BCDC”) and the Department of Fish and Game to prepare the Suisun Marsh
20 Protection Plan “to preserve the integrity and assure continued wildlife use” of the Suisun Marsh.
21 (Suisun Marsh Protection Plan² at 9.)

22 The Suisun Marsh Protection Plan, which was published in 1976 and updated in 2007,
23 emphasizes the importance of duck clubs to the Suisun Marsh. Duck clubs, which “encourage
24 production of preferred waterfowl food plants”, “are a vital component of the wintering habitat for
25 waterfowl migrating south”:

26 In the Suisun Marsh, about 50,700 acres of managed wetlands are currently
27 maintained as private waterfowl hunting clubs and on publicly-owned wildlife
management areas and refuges. Because of their extent, location and the use

28 ¹

² http://www.bcdc.ca.gov/laws_plans/suisun_marsh.shtml

1 of management techniques to encourage production of preferred waterfowl
2 food plants, managed wetlands of the Suisun Marsh are a vital component of
3 the wintering habitat for waterfowl migrating south on the Pacific Flyway, and
4 also provide cover, foraging and nesting opportunities for resident waterfowl.
5 Managed wetlands also provide habitat for a diversity of other resident and
migratory species, including other waterbirds, shorebirds, raptors, amphibians,
and mammals. Managed wetlands can protect upland areas by retaining flood
waters and also provide an opportunity for needed space for adjacent wetlands
to migrate landward as sea level rises.

6 (*Id.* at 12 (Environment Finding 5).) Duck clubs “have made considerable contributions to the
7 improvement of the Marsh habitats for waterfowl”:

8 The Marsh is well known for waterfowl hunting in California.

9 The recreational values of the Marsh, particularly for duck hunting, have been
10 a significant factor in its preservation. Private duck clubs...have made
11 considerable contributions to the improvement of the Marsh habitats for
12 waterfowl as well as other wildlife.

13 (*Id.* at 28.) Duck clubs “have worked to maintain the area’s habitat value and to protect the natural
14 resources of the Marsh”:

15 Market hunting of waterfowl began in the Suisun Marsh in the late 1850s, and
16 the first private waterfowl sport hunting clubs were established in the early
17 1880s. Generations of hunting club owners and members have worked to
18 maintain the area’s habitat value and to protect the natural resources of the
19 Marsh. Today, waterfowl hunting is the major recreational activity in the
20 Suisun Marsh...

21 (*Id.* (Recreation and Access Finding 2).)

22 The Suisun Marsh Protection Plan establishes, as its first recreational policy, an
23 encouragement of duck clubs:

24 Continued recreational use of privately-owned managed wetlands should be
25 encouraged.

26 (*Id.* at 29 (Recreation and Access Policy 1).)

27 Under “Land Use and Marsh Management”, the Suisun Marsh Protection Plan once again
28 emphasizes the importance of duck clubs:

Within [the primary management] area, existing land uses should continue,
and land and water areas should be managed so as to achieve the following
objectives: ...

- Provision of habitat attractive to waterfowl
- Improvement of water distribution and levee systems ...

1 (*Id.* at 33.) The concepts are reinforced by the findings in this section, which emphasize the
2 importance of managing to “to enhance the habitat through the encouragement of preferred food
3 plant species”:

4 The managed wetlands are a unique resource for waterfowl and other Marsh
5 wildlife, and their value as such is increased substantially by the management
6 programs used by waterfowl hunting clubs and public agencies to enhance the
7 habitat through the encouragement of preferred food plant species.

8 (*Id.* at 34 (Land Use and Marsh Management Finding 2).)

9 Finally, the Suisun Marsh Protection Plan reports that in the 1980s individual management
10 plans (“IMPs”) were developed and certified for each duck club, and that managers can implement
11 these plans—including “enhancements”—without obtaining permits from BCDC:

12 Individual management plans were developed for each waterfowl hunting club
13 in the 1980s, and were reviewed by the California Department of Fish and
14 Game and certified by the San Francisco Bay Conservation and Development
15 Commission. Land managers can conduct ongoing management activities
16 described in the plans, such as maintenance, repairs, and enhancements,
17 without having to apply for separate permits from the Commission for each
18 activity.

19 (*Id.* (Land Use and Marsh Management Finding 3).)

20 In 1977, the Legislature enacted the Suisun Marsh Preservation Act, which has been codified
21 at Public Resources Code §§ 29000 et seq.³ This act directs BCDC to implement the Suisun Marsh
22 Protection Plan. (PRC §§ 29004(b), 29113, 29200, 29202.)

23 **B. The Suisun Marsh Preservation Act Exempts Work Specified In The Point
24 Buckler Management Plan From A BCDC Permit**

25 Although the Suisun Marsh Preservation Act establishes a program for marsh development
26 permits (PRC § 29500), there is an exception for development “specified in the component of the
27 local protection program prepared by the Suisun Resource Conservation District and certified by”
28 BCDC—that is, any development specified in the individual management plans:

 Notwithstanding the provisions of Section 29500, within the primary
management area no marsh development permit shall be required for any
development specified in the component of the local protection program
prepared by the Suisun Resource Conservation District and certified by the
Commission pursuant to Section 29415.

(PRC § 29501.5.) Note that this provision does not require the development to be in a managed

³ http://www.bcdc.ca.gov/laws_plans/suisun_marsh_preservation_act.shtml

1 wetland. All that is required is a certified IMP.

2 As noted above, the Suisun Marsh Protection Plan reports that IMPs were certified for each
3 duck club. (Suisun Marsh Protection Plan at 34 (Finding 3).)

4 BCDC staff provided Petitioner with a copy of the certified management plan for Point
5 Buckler, which at that time was known as the Annie Mason Point Club. (Sweeney Decl., ¶ 2.) The
6 IMP, which was received by BCDC in 1984, describes the club at that time. (*Id.*, Exhibit 1.) There
7 was a single levee with a perimeter ditch system and two gates that were used for flooding and
8 draining. (*Id.*) The IMP refers to “maintenance of levees, ditches, and water control structures.”
9 (*Id.*, Exhibit 1 at 2.) “Ditches need to be kept clear of vegetation blockages or silt build-ups to allow
10 circulation and drainage.” (*Id.*) “The dense growth of undesirable vegetation in the pond needs to
11 be reduced by burning and/or discing”. (*Id.*) “Removing the old vegetation and turning over the soil
12 provides a seed bed for the establishment of new vegetation which is more preferred by waterfowl.”
13 (*Id.*) The IMP also identifies interior and exterior levee repairs. (*Id.*, Exhibit 1, last page.)

14 An aerial photo from 1984 shows that the levees at that time had been repaired, and were
15 intact. (Am. Bazel Decl., Exhibit 2.) This photograph is consistent with the IMP which notes that
16 “the club reports that it now has the water control structures and tight levees necessary for proper
17 water management.” (Sweeney Decl., Exhibit 1 at 1.)

18 A document provided by BCDC, entitled “General Information”, which appears to have been
19 prepared no later than 1980, reports that existing vegetation at the island had “a relatively low use
20 and section value for waterfowl” and that “changing the habitat to a highly productive and selective
21 one for waterfowl should be relatively easy.” (Am. Bazel Decl., Exhibit 10, next-to-last page.) It
22 also reports that “[t]he main problem hampering proper management of the club is water control.”
23 (*Id.*) If the levee system and irrigation structures are repaired “adequate water control will be
24 achieved”. (*Id.*, last page.)

25 The levees that had been repaired by 1984 appear to have been damaged in the mid-1980s,
26 and repaired again in 1990. (*See* Am. Bazel Decl., Exhibit 11 (Wetlands Maintenance Management
27 Report dated 1990 referring to use of 4,000 cubic yards to repair levees).) Once the levees had been
28 repaired, DWR apparently installed a pump, as discussed in the next section.

1 Documents provided by BCDC include no amendment or modification of the individual
2 management plan for Point Buckler Island. (Am. Bazel Decl., ¶ 13.) The initial plan is therefore
3 still in effect.

4 Nor has BCDC issued a permit authorizing abandonment of the managed wetlands at Point
5 Buckler. (*Id.*)⁴

6 **C. The Department Of Water Resources Provided For A Duck Club At**
7 **Point Buckler As Mitigation For Its Delta Diversions**

8 The Suisun Marsh Protection Plan identifies increasing salinity as a threat to the Suisun
9 Marsh:

10 Numerous upstream storage facilities, together with diversions of water from
11 the Delta and the tributary streams of the Delta, have substantially reduced the
12 amount of fresh water flowing into the Delta with a resultant increase in
13 salinity intrusion into the Marsh....

14 (Suisun Marsh Protection Plan at 14.) Increasing salinity, the Protection Plan found,

15 will limit the distribution and abundance of important waterfowl food plants
16 and ultimately reduce the wetland diversity and the capability of the Marsh to
17 support wintering waterfowl.

18 (*Id.* (Finding 4).)

19 In 1984, the California Department of Water Resources (“DWR”), which operates the State
20 Water Project, published a Plan Of Protection For The Suisun Marsh Including Environmental
21 Impact Report. The purpose of the plan was “to mitigate the effects of the Federal Central Valley
22 Project (CVP) and the State Water Project (SWP) on the Suisun Marsh.”⁵ (Plan at 1.) The plan was
23 required by State Board Water Right Decision 1485. (*Id.* at 7.) Because the plan was issued to
24 comply with D-1485, the State Board must have approved it.

25 DWR’s mitigation facilities included the “Annie Mason Island Pump Facility”, that “would
26 operate “when water quality on the island required improvement from October through April.” (*Id.*
27

28 _____
⁴ It appears that a managed wetland cannot be abandoned without a permit from BCDC.
(PRC § 29500 (requiring permit for development); PRC § 29114 (defining “development” to include
“change in the density or intensity of use of land” and “change in the intensity of use of water”);
14 CCR § 10125 (defining “substantial change in use” to include “abandonment” of a “managed
wetland”).

http://www.bcdc.ca.gov/permits/obtain_permit.shtml (activities requiring permit approval)

⁵ Available online.

1 at 79, 103.) “The pumping equipment will be built and installed when the landowner has improved
2 the island’s levee system to provide adequate protection of the island.” (*Id.* at 103.)

3 Although the plan itself does not specify how the pump would provide mitigation, the
4 reasoning is clear. The ponds on the island are above high tide, as can be seen from aerial
5 photographs taken in 2013 and 2015. (Discussed below.) These ponds may have been dug out
6 before the pump was installed, but if so they quickly filled in. In any case, the owner of the island at
7 the time reports that DWR installed a pump, and an old pump is now visible at the island. (Sweeney
8 Decl., ¶ 3.) The purpose of the pump—to flood the ponds—counted as mitigation because it helped
9 preserve the island’s duck habitat and its growth of vegetation preferred by ducks. Without the
10 pump and the flooding of the ponds, the vegetation would revert to non-preferential species.

11 The mitigation required by the plan and its included EIR, therefore, was not just the pump,
12 but rather the maintenance of Point Buckler as property managed for ponding and growth of
13 vegetation preferred by ducks.

14 In 2005, DWR entered into the Revised Suisun Marsh Preservation Agreement with the U.S.
15 Bureau of Reclamation, the California Department of Fish and Game, and the Suisun Resource
16 Conservation District. (Am. Bazel Decl., Exhibit 3.) That agreement reiterated DWR’s obligation
17 to build the facilities it had agreed to build in the 1980s. (*Id.* at 14, ¶ VI.A (page 20 of 112).) That
18 obligation included the pump at the Annie Mason Island Unit. (*Id.* at A-4 (page 73 of 112).)

19 **D. Point Buckler LLC Proceeded To Implement The Individual Management Plan**
20 **Without Awareness Of Any Need For Additional Authorizations**

21 During the dry season of 2014, Petitioner used an excavator to deepen and widen the existing
22 ditches, and placed the material removed on the levees. In some places, the existing levees had been
23 eroded away, and a new levee and ditch were created inside the old location. Places where the levee
24 had fully or partly breached—in two locations, the tide gates were in place, but the levee on top of
25 them had eroded away—were repaired. The resulting levees are approximately 2-3 feet above the
26 surrounding land. Of the two tide gates that had been in place, one is now functioning, and the other
27 needs to be repaired. (Sweeney Decl., ¶ 4.)

28 Petitioner understood, from the previous owner, that maintenance of the levees was supposed
to be done, and was not aware of any need for additional approvals. (*Id.*, ¶ 5.)

1 Some additional work was done on the island. Among other things, a dock was secured to
2 piles that were already in place. The dock was provided by BCDC, and is subject to a lease from the
3 California State Lands Commission. (*Id.*, ¶ 6.) Fourteen trees were planted and four small
4 semicircular ponds were dug to enhance duck habitat. (*Id.*) Some grasses were mowed. (*Id.*)

5 **E. The Work Did Not Cause Tidal Marsh To Dry Out**

6 The Order appears to have been motivated, at least in substantial part, by the misconception
7 that the levee work “cut off crucial tidal flow to the interior of the Site, thereby drying out the Site’s
8 former tidal marsh areas”. (Order at 2, ¶ 8.) But the levee work has not dried out the interior of the
9 island; on the contrary, the interior is now wetter than it used to be.

10 The best available evidence consists of two sets of photographs. First, there are two infrared
11 photographs taken in 2013 (before the levee work was done) by the U.S. National Oceanographic
12 and Atmospheric Administration (“NOAA”) at high water and mean lower low water. (Sweeney
13 Decl., Exhibits 2 and 3.) These show that water was present in the ditches and interior channels of
14 the island, but there was no water present in any vegetated areas.

15 In fact, there is remarkably little difference between the two photographs, no doubt
16 attributable to the fact that the ditches and channels on the island generally have vertical sides, which
17 means that their width does not increase or decrease during the tidal cycle.

18 Second, there are aerial photographs, obtained from Google Earth, from April 2013 and
19 April 2015, showing the island before and after the levee work. (Am. Bazel Decl., Exhibits 4 and 5.)
20 These photographs show no sign of vegetation in the ditches and interior channels, either before or
21 after.

22 In both photographs, the majority of the vegetation is brown, even though the photographs
23 were both taken in April. The 2013 photograph has some areas that are green, but those seem to be
24 the result of seasonal rains rather than tidal influence. There are, for example, areas of green on top
25 of the existing levees, and in places disconnected from any ditch or channel. A Google Earth
26 photograph from September 2008 shows that the interior of the island was almost completely brown.
27 (Am. Bazel Decl., Exhibit 12.)
28

1 Most of the island may be what the Suisun Marsh Protection Plan calls “lowland grasslands”
2 (“a ‘transition zone’...which supports a mixture of plants common to both the wetlands and the
3 upland grasslands”) rather than tidal marshes (“which occur on the edges of the bays and sloughs,
4 are not subjected to habitat management programs, but are exposed to the natural daily tidal
5 rhythm”). (Suisun Marsh Protection Plan at 11.) Virtually all of the island is firm enough so that
6 motor vehicles can be driven across it. (Sweeney Decl., ¶ 8.) And, other than the improved ditches
7 and water levels inside the levees, conditions at the island are generally unchanged from before the
8 work at issue. (*Id.*, ¶ 14.)

9 In any case, the Google Earth photographs leave no doubt that the interior of the island has
10 not dried up because of the levee work. The aerial photographs plainly show that in 2015, the
11 ditches were larger and therefore held more water than they did in 2013, and the inland channels
12 held as much water if not more. Because of this additional water, the Order is wrong when it says
13 that the levee work “cut off crucial tidal flow to the interior of the Site, thereby drying out the Site’s
14 former tidal marsh areas”. (Order at 2, ¶ 8.) The Order is also wrong because the aerials show that
15 virtually the entire inland area dried up before the levee work was performed, and there is no sign of
16 any additional drying up after the levee work was done.

17 **IX. POINTS AND AUTHORITIES**
18 **IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION**

19 **A. The Regional Board Violated Petitioner’s Due Process Rights By Refusing To**
20 **Hold A Hearing**

21 The Regional Board violated Petitioner’s Constitutional rights by refusing to hold a hearing.
22 “Due process principles require reasonable notice and opportunity to be heard before governmental
23 deprivation of a significant property interest.” (*Horn v. County of Ventura* (1979) 24 Cal.3d 605,
24 612.) Here there is governmental deprivation of at least two significant property interests:
25 Petitioner’s use and enjoyment of its real property, and the deprivation of substantial amounts of
26 money.⁶

27 ⁶ The hearing requirement applies to “‘adjudicatory’ matters in which the government’s action
28 affecting an individual is determined by facts peculiar to the individual case”, as opposed to
“‘legislative’ decisions which involve the adoption of a broad, generally applicable rule of conduct
on the basis of general public policy.” (*Horn* at 613.) Here the Order is indisputably individual and
adjudicatory, rather than general and legislative.

1 In *Horn*, the California Supreme Court held that property owners meet the substantial-
2 deprivation standard when land-use decisions on *adjacent* parcels substantially interfere with their
3 access to their own property. (*Id.* at 615.) Here the deprivation goes far beyond that. Petitioner is
4 being prohibited from restoring and maintaining a duck club on its property, even though there has
5 been a duck club there, and the property has been approved for use as a duck club. (*See* Sweeney
6 Decl., Exhibit 1.) The Order requires Petitioner to “restore tidal circulation to all of the tidal
7 channels...that existing prior to the...levee construction activities”. (Am. Bazel Decl., Exhibit 1 at
8 5.) This requirement for tidal circulation prevents the property from being used a duck club, which
9 requires that the tide gates be closed, and that the island be flooded, so that it can be used to provide
10 duck habitat and grow plants that provide food for ducks. (Sweeney Decl., ¶ 10.)

11 The Order also requires that the Petitioner provide “compensatory mitigation habitat”. (Ex. 1
12 at 5.) Mitigation habitat costs hundreds of thousands of dollars per acre. (Sweeney Decl., ¶ 13.)
13 Money is a property interest protected by due process. (*See Mathews v. Eldridge* (1976) 424 U.S.
14 319, 332 (due process applies to terminations of Social Security disability benefits).)

15 In July 2015, in the *West Side Irrigation District* case (copy attached as Am. Bazel Decl.,
16 Exhibit 6), the Sacramento Superior Court invalidated letters sent out by the State Board—letters
17 that commanded far less than the Order—on the grounds they were issued “without any sort of pre-
18 deprivation hearing”. (*Id.* at 5.) The court distinguished between letters that are “coercive in
19 nature” (*id.* at 2), which require a hearing, and purely informational letters, which do not. Here the
20 Order is indisputably coercive in nature. The court concluded that “[e]very day the Letter remains in
21 its current form constitutes a violation of those constitutional rights.” (*Id.*)

22 Here, as in *West Side Irrigation District*, there was no pre-deprivation hearing. (Am. Bazel
23 Decl., ¶ 15.) A pre-deprivation hearing should have been held.

24 State Board Order No. WQ 86-13, *In the Matter of the Petition of BKK Corporation*,
25 acknowledges that a hearing must be held, but concludes that the hearing can be held after an order
26 is issued:

27 The Porter-Cologne Water Quality Control Act...does not require notice and
28 an opportunity to be heard before issuance of a cleanup and abatement order.
 Due process is provided by an opportunity for a hearing after the order is
 issued.

1 (*Id.* at 4.)

2 Where a state’s interest is sufficiently compelling, the requirements of
3 procedural due process may be satisfied by a hearing provided after issuance
4 of an administrative order....

5 (*Id.* at 6.)⁷

6 Here, there were no interests that were “sufficiently compelling” to postpone a pre-
7 deprivation hearing. This situation is quite different from those in which a municipality or industry
8 is continually discharging infectious or toxic materials that threaten the public health. The levee
9 work was completed last year. (*Sweeney Decl.*, ¶ 4.) Petitioner is not proceeding with the work,
10 which has been put on hold. (*Id.*, ¶¶ 9, 14.) Other than the improved ditches and water levels inside
11 the levees, conditions at the island are generally unchanged from before the work at issue. (*Id.*,
12 ¶ 14.) Because there was no compelling need to act in haste, there was time for a pre-deprivation
13 hearing.

14 There is certainly time for a post-deprivation hearing. Counsel for Petitioner requested a
15 hearing twice. (*Am. Bazel Decl.*, ¶ 16 and Exhibit 13.) Nevertheless, the Regional Board has not
16 held a hearing on this matter. (*Sweeney Decl.*, ¶ 12.)

17 A hearing here would have benefited the Regional Board as well as Petitioner. It would have
18 required the Regional Board to collect and organize its evidence—the Regional Board has not
19 presented any evidence to Petitioner other than what is in the Order (*Am. Bazel Decl.*, ¶ 17)—which
20 would help protect the Regional Board from this petition. A hearing would also have given the
21 Regional Board to hear Petitioner’s side of the story, which should have prevented it from acting on
22 mistaken assumptions. (See section VIII.E above.)

23 The Regional Board’s refusal to provide a hearing is a violation of the United States
24 Constitution. On this ground alone, the Order should be rescinded and the matter remanded to the
25 Regional Board for a hearing.

26 In the *Sackett* case, a unanimous United State Supreme Court rejected a legal argument that
27 “would have put the property rights of ordinary Americans entirely at the mercy of Environmental

28 ⁷ *BKK* notes that the State Board lacks authority to declare a statute unconstitutional, but no
determination of unconstitutionality is required here. Nothing in Water Code § 13304 prohibits the
Regional Board from holding a hearing before or after it has issued a cleanup and abatement order.

1 Protection Agency (EPA) employees.” (*Sackett v. EPA* (2012) 132 S.Ct. 1367, 1375, Alito, J,
2 concurring.) “In a nation that values due process, not to mention private property, such treatment is
3 unthinkable.” (*Id.*)

4 Here the violation of due process is even more unthinkable. Due process indisputably calls
5 for a hearing. There is no principled argument to the contrary. And yet the Regional Board
6 continues to refuse.

7 **B. The Regional Board Violated Petitioner’s Due Process Rights By Engaging In**
8 **Ex Parte Communications And Violating The Separation-Of-Functions Rule**

9 “When, as here, an administrative agency conducts adjudicative proceedings, the
10 constitutional guarantee of due process of law requires a fair tribunal.” (*Morongo Band of Mission*
11 *Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 742.) Consistent with these
12 due-process requirements the California Administrative Procedure Act “generally prohibits ex parte
13 communications...and requires ‘internal separation of functions’”. (*Id.* at 742, citing *Department of*
14 *Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1, 18,) State Board staff have provided extensive answers to questions about these requirements.⁸

15 Here, Regional Board staff have informed Petitioner that a prosecution team and advisory
16 team were formed. Petitioner was never given any notice of this division, and no opportunity to
17 communicate with the advisory team or the decision maker before the Order was issued. (Am. Bazel
18 Decl., ¶ 18.) The fact that the Order was issued provides evidence that there must have been
19 communications between the prosecution team and the decision makers. These communications,
20 which took place without the knowledge or participation of Petitioner, were impermissible ex parte
21 communications. They were also a violation of the separation-of-functions requirement. Petitioner
22 has been denied a fair hearing.

23 “In general, if a party has not received a proper administrative hearing, the matter is
24 remanded back to the agency to provide ‘a full and fair hearing.’” (*Sabey v. City of Pomona* (2013)
25 215 Cal.App.4th 489, 500, quoting *English v. City of Long Beach* (1950) 35 Cal.2d 155, 160.) The
26

27
28 _____
⁸ Ex Parte Questions And Answers, www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf

1 hearing must not be held before someone whose “role as a neutral arbitrator has been compromised”.
2 (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 99.)

3 Because of the ex parte communications, the Constitutional rights of Petitioner and its
4 owners have been violated. The Order should be rescinded, and the matter remanded for a new
5 hearing by an appropriate decision maker other than the Executive Officer, who has been tainted by
6 ex parte communications.

7 **C. The Regional Board Violated The Void-For-Vagueness Doctrine**

8 The Order requires the submission of reports “acceptable to the Regional Water Board
9 Executive Officer”. Because this provision makes the required actions subject to a person’s
10 subjective approval, it violates the void-for-vagueness doctrine:

11 [T]he void-for-vagueness doctrine requires that a penal statute define the
12 criminal offense with sufficient definiteness that ordinary people can
13 understand what conduct is prohibited and in a manner that does not
encourage arbitrary and discriminatory enforcement.

14 (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.)

15 In *Kolender*, a California statute required a person stopped by policy to provide “credible and
16 reliable” identification. (*Id.* at 359.) The statute left, to the officer on the beat, the determination of
17 whether the identification was sufficiently credible and reliable. (*Id.* at 360.) The United States
18 Supreme Court concluded that the statute was “unconstitutionally vague on its face because it
19 encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect
20 must do in order to satisfy the statute.” (*Id.* at 361.)

21 Earlier this year, the Supreme Court re-stated the rule for unconstitutional vagueness:

22 The Fifth Amendment provides that “[n]o person shall . . . be deprived of life,
23 liberty, or property, without due process of law.” Our cases establish that the
24 Government violates this guarantee by taking away someone’s life, liberty, or
property under a criminal law so vague that it fails to give ordinary people fair
notice of the conduct it punishes, or so standardless that it invites arbitrary
enforcement.

25 (*Johnson v. United States* (2015) 135 S.Ct. 2551, 2556, citing *Kolender*.)

26 In *Johnson*, the statute provided, in a “residual clause”, for more serious punishment if the
27 crime “otherwise involves conduct that presents a serious potential risk of physical injury to
28 another.” (*Id.* at 2555-2556.) The Supreme Court concluded “that the indeterminacy of the wide-

1 ranging inquiry required by the residual clause both denies fair notice to defendants and invites
2 arbitrary enforcement by judges.” (*Id.* at 2556)

3 Here the Order relies on penal statutes and specifically threatens criminal liability. (Order at
4 6; Water Code §§ 13269, 13387.)

5 To the extent the statutes authorize an Order requiring reports subjectively “acceptable” to a
6 single person, they are unconstitutionally vague as applied. If the statutes themselves do not
7 authorize subjectively acceptable reports, then the Executive Officer did not have authority to issue
8 the Order.

9 **D. The Regional Board Violated The Conformity Requirement Of The**
10 **Suisun Marsh Preservation Act**

11 The Suisun Marsh Preservation Act imposes a “judicially enforceable” requirement on state
12 agencies to act in conformity with the act and the Suisun Marsh Protection Plan:

13 **Imposition of Judicially Enforcement Duty on State Agencies.**

14 (a) This division imposes a judicially enforceable duty on state agencies to
15 comply with, and to carry out their duties and responsibilities in conformity
16 with, this division and the policies of the protection plan.

17 (PRC § 29302.)

18 The Order violates this requirement because it is not “in conformity” with the act and the
19 plan. The plan concludes that duck clubs are a “unique resource” and “a vital component of the
20 wintering habitat for waterfowl migrating south”. (See section VIII.A above.) It says that duck
21 clubs should be encouraged, and that land and water areas should be managed to provide “habitat
22 attractive to waterfowl” and to improve “levee systems”. (*Id.*)

23 The act specifies that individual management plans should be prepared for each duck club,
24 and that development consistent with the plan can be implemented without a marsh development
25 permit. In short, the act and plan are very pro-duck-club.

26 The Order is very anti-duck-club. It concludes that the improvement of levees at the property
27 is a condition of pollution—even though the Suisun Marsh Protection Plan specifically says that land
28 and water areas should be managed to improve “levee systems”, and the individual management
plan specifically calls for levee repair and maintenance at this very island. (Order at 3, ¶ 12; see
section VIII.A above.) The Order requires that tidal circulation be restored, even though the

1 individual management plan calls for seasonal flooding, which would limit tidal circulation. (Order
2 at 5, ¶ 2, see section VIII.A above.)

3 Because the Order is so strongly anti-duck-club, and because it would prohibit actions that
4 the Suisun Marsh Preservation Act and Suisun Marsh Protection Plan specifically call for, the Order
5 is not “in conformity” with the Act and Plan. It thereby violates the act.

6 **E. The Regional Board Violated The Primary Responsibility Provision Of The**
7 **Suisun Marsh Preservation Act**

8 The Order asserts that Petitioner has caused a condition of pollution on tidelands. But the
9 State Lands Commission claims state ownership of the tidelands at the island, as established by its
10 entering into a lease with Petitioner for the dock at the island. (See section VIII.D above.) The
11 Suisun Marsh Preservation Act gives State Lands primary responsibility over lands under its
12 jurisdiction:

13 **Responsibilities of State Lands Commission.**

14 (a) The State Lands Commission shall have the primary responsibility...for
15 carrying out the management recommendations in the protection plan on lands
16 owned by the state and under the jurisdiction, control, or supervision of the
17 State Lands Commission, including tidelands, submerged lands, swamp and
18 overflowed lands, and beds of navigable rivers and streams.

19 (PRC § 29307.)

20 The Order violates this provision because it takes primary responsibility for management of
21 the tidelands at issue away from State Lands.

22 The Order also violates the Suisun Marsh Preservation Act by creating duplication and
23 conflict, contrary to the act:

24 **Minimizing Duplication and Conflicts.**

25 It is the intent of the Legislature to minimize duplication and conflicts among
26 existing state agencies carrying out their regulatory duties and responsibilities
27 in connection with the subject matter of this division.

28 (PRC § 29300.)

F. The Regional Board Violated Water Code § 13304 And Therefore Lacked
Authority To Issue The Order

The Order asserts that it has authority under Water Code § 13304 because Petitioner

1 has caused or permitted waste to be discharged or deposited where it has been
2 discharged into waters of the State and created or threatens to create a
condition of pollution.

3 (Order at 3, ¶ 12.) This assertion of authority is consistent with Water Code § 13304(a), which
4 provides for the issuance of a cleanup and abatement order when a person has caused waste to be
5 discharged into waters of the state, and that waste creates a condition of pollution:

6 A person who has discharged or discharges waste into the waters of this state
7 in violation of any waste discharge requirement or other order or prohibition
8 issued by a regional board or the state board, or who has caused or permitted,
9 causes or permits, or threatens to cause or permit any waste to be discharged
10 or deposited where it is, or probably will be, discharged into the waters of the
state and creates, or threatens to create, a condition of pollution or nuisance,
11 shall, upon order of the regional board, clean up the waste or abate the effects
of the waste, or, in the case of threatened pollution or nuisance, take other
12 necessary remedial action, including, but not limited to, overseeing cleanup
and abatement efforts.

13 The Regional Board lacks authority under Water Code § 13304 to issue the Order both
14 because the work at issue is not a condition of pollution, and because the material placed is not
15 waste.⁹

16 **1. The Work Is Not A Condition Of Pollution Because It Promotes, Rather
17 Than Harms, The Beneficial Uses**

18 Water Code § 13050(1) provides, in pertinent part, that:

19 (1) "Pollution" means an alteration of the quality of the waters of the state by
waste to a degree which unreasonably affects either of the following:

20 (A) The waters for beneficial uses.

21 (B) Facilities which serve these beneficial uses.

22 Here the Order identifies the applicable beneficial uses as those for Suisun Bay. (Order at 1,
23 ¶ 4.) But the basin plan establishes beneficial uses for Grizzly Bay. (Water Quality Control Plan
24 (Basin Plan) for the San Francisco Bay Basin¹⁰, Table 2-1 (Existing and Potential Beneficial Uses of
25 Water Bodies in the San Francisco Bay Region), Suisun Basin.) Because Point Buckler borders or is
26 within Grizzly Bay, the beneficial uses for that water are apply. Those uses are: commercial and
sport fishing (COMM), estuarine habitat (EST), fish migration (MIGR), preservation of rare and

27 ⁹ The Order does not assert that it has authority under § 13304 because of a violation of waste
28 discharge requirements or other order or prohibition issued by a regional board. Nor does it assert
that Petitioner has caused a condition of nuisance.

¹⁰ http://www.waterboards.ca.gov/sanfranciscobay/basin_planning.shtml

1 endangered species (RARE), wildlife habitat (WILD), water contact recreation (REC1), and
2 noncontact water recreation (REC2). (*Id.*; see section 2.1 (defining beneficial uses).)

3 The principal effect of the work at issue is to *promote*, rather than harm, noncontact
4 recreation and wildlife habitat. Wildlife habitat will be promoted because the levee work allows the
5 island to be managed as a duck club. Now that the levees are in place, the water level can be raised
6 above high-tide, so that pond areas within the island can be disced, flooded, and managed to grow
7 vegetation and provide habitat the ducks prefer. (Sweeney Decl., ¶¶ 9-10.) Noncontact recreation
8 will be promoted because the duck club is a recreational facility.

9 Although the Order recites that the work at issue has “adversely impacted” several beneficial
10 uses, the Regional Board has provided no evidence that the work at issue “unreasonably affects” any
11 beneficial use, which is required to show a condition of pollution. The Order is based on the
12 assumption that the levees dried out vegetation on the island, but this assumption is false. (See
13 section VIII.E above.) The Order’s other assertions of adverse effect appear to be nothing more than
14 speculation.

15 Nor has the Regional Board provided any evidence that the work at issue unreasonably
16 effects “[f]acilities which serve these beneficial uses”. The Order is itself a “condition of pollution”
17 because it unreasonably interferes with the facilities—the levees—that serve the beneficial uses of
18 wildlife habitat and recreation.

19 Because the work at issue has not caused a condition of pollution, the Regional Board lacks
20 authority under Water Code § 13304 to issue the Order.

21 **2. The Work Is Not A Condition Of Pollution Because It Is Authorized By** 22 **The Suisun Marsh Preservation Act**

23 It should go without saying that an activity is not a condition of pollution when that work has
24 been authorized by the Legislature. Here the Legislature has authorized the use of Suisun Marsh for
25 duck clubs, and has established a procedure that has specifically authorized Petitioner to conduct the
26 work at issue. (See section VIII.B above.) Moreover, the Legislature has prohibited the Regional
27 Board from acting inconsistently with the policies and provisions of that act and plan. (See section
28 IX.D above.)

1 Note that the question here is not whether the Regional Board can impose permitting
2 requirements in addition to those imposed by the Suisun Marsh Preservation Act. If a project has not
3 been fully permitted, the Regional Board may require that work cease until the relevant permits are
4 obtained. But a cleanup and abatement order is not a stop-work order. For there to be a legitimate
5 cleanup requirement here, there must be a condition of pollution—not just a condition in which an
6 approvable project has not yet obtained all its permits.

7 Because the work at issue here has been authorized by the Legislature, it cannot be a
8 condition of pollution. The Regional Board lacks authority under Water Code § 13304 to issue the
9 Order.

10 **3. The Work Is Not A Condition Of Pollution Because It Comes Within**
11 **Permits Issued By The Corps Of Engineers and Certified By The**
12 **Regional Board**

13 The San Francisco District of the U.S. Army Corps of Engineers has issued Regional General
14 Permit 3 (“RGP3”), which in accordance with the federal Clean Water Act authorizes, among other
15 things, maintenance and creation of interior ditches, maintenance and repair of levees, creating
16 drainage swales and raising the interior of managed wetlands, discing, pump installation,
17 constructing cofferdams, maintaining and replacing water control structures, installing new water
18 control structures, and maintenance and repair of salinity control gates. (Am. Bazel Decl.,
19 Exhibit 14.)

20 In accordance with Clean Water Act § 401, the Regional Board has certified the permit as
21 being in compliance with California law. (Am. Bazel Decl., Exhibit 15.) This certification explains
22 that it covers “158 privately owned duck clubs represented by SRCD”. (*Id.* at 2.) Point Buckler is
23 one of the duck clubs represented by the Suisun Resource Conservation District.¹¹ The certification
24 specifies that the “total amount of annual excavation and temporary fill for the project would vary
25

26 ¹¹ See PRC § 9962(a) (SRCDC has “primary local responsibility for regulating and improving water
27 management practices on privately owned lands within the primary management area of the Suisun
28 Marsh in conformity with [the Suisun Marsh Preservation Act] and the Suisun Marsh Protection
Plan”); Sweeney Decl., Exhibit 1 (individual management plan submitted to BCDC by SRCDC for
club 801, Annie Mason Point Club); Am. Bazel Decl., Exhibit 9 (current list of SRCDC club names
and numbers includes club 801, identified as Buckler Point, Inc).

1 from year to year, but would be limited to a maximum of 443,000 cubic yards of earthen material.”
2 (*Id.* at 3.)

3 Because the Corps and the Regional Board have provided a general authorization for the
4 work at issue here, the work cannot be a “condition of pollution”. If the whopping “443,000 cubic
5 yards of earthen material” approved by the Regional Board created a condition of pollution, the
6 Regional Board would not have been authorized to issue the certification. (*See* Water Code
7 § 13263(a) (requiring regional boards to implement basin plans).)

8 Since those 443,000 cubic yards of earthen material do not create a condition of pollution,
9 why does the work at Point Buckler? The Regional Board does not say, and therefore does not
10 establish a condition of pollution. The Regional Board should, at the very least, have explained why
11 the work at Point Buckler is so different from the work elsewhere that it cannot be tolerated.

12 The Regional Board has also issued a 401 certification for levee maintenance dredging.
13 (Am. Bazel Decl., Exhibit 16.) This certification applies to 133 miles of levees, and allows a
14 maximum of one million cubic yards of dredged material. (*Id.* at 2.) These quantities are obviously
15 orders of magnitude greater than the work at issue. The Regional Board has not explained why, if
16 these activities do not create a condition of pollution, the work at issue does.

17 It does not matter whether the work at issue has fully complied with the requirements of
18 RGP3 and the board’s certification. If the work at Buckler Island is not fully permitted, then the
19 Regional Board may have authority to stop work pending that permitting. But because the work has
20 not created a condition of pollution, the Regional Board does not have authority to issue a cleanup
21 and abatement order.

22 **4. The Work Is Not A Condition Of Pollution Because It Is A**
23 **Mitigation Project Required by CEQA**

24 CEQA mitigation measures must be “fully enforceable”:

25 [N]o public agency shall approve or carry out a project for which an
26 environmental impact report has been certified which identifies one or more
27 significant effects on the environment that would occur if the project is
28 approved or carried out unless both of the following occur:

(a) The public agency makes one or more of the following findings with respect to each significant effect:

1 (1) Changes or alterations have been required in, or incorporated into, the
2 project which mitigate or avoid the significant effects on the environment.

3 (PRC § 21081.)

4 (a) When making the findings required by paragraph (1) of subdivision (a) of
5 Section 21081..., the following requirements shall apply:

6 (1) The public agency shall adopt a reporting or monitoring program for the
7 changes made to the project or conditions of project approval, adopted in
8 order to mitigate or avoid significant effects on the environment.

9 (b) A public agency shall provide that measures to mitigate or avoid
10 significant effects on the environment are fully enforceable through permit
11 conditions, agreements, or other measures. Conditions of project approval
12 may be set forth in referenced documents which address required mitigation
13 measures....

14 (PRC § 21081.6.)

15 Here, the work at Point Buckler is a mitigation measure required by CEQA. In 1984, it was
16 identified by DWR as mitigation for Delta diversions. (See section VIII.C above.) In 2005, it was
17 incorporated into the Suisun Marsh Mitigation Agreement of 2005. (*Id.*) In 2013, the Regional
18 Board relied on that agreement—and on its mitigation provisions—when it certified RGP3. The
19 Regional Board specifically found that the “[p]ermanent and temporary impacts related to the
20 current operation and maintenance of managed wetlands in the proposed Project area have been
21 offset by the Suisun Marsh Mitigation Agreement of 2005.” As a result, Point Buckler has been
22 identified as required mitigation for two projects: DWR’s water diversions from the Delta, and the
23 long list of maintenance, repair, and construction activities covered by RCP3 and the Regional
24 Board’s certification.

25 Mitigation is, by definition, a measure that must be undertaken to benefit the environment
26 and thereby counter or make up for the adverse environmental effects of the project being approved.
27 Because mitigation *benefits* the environment, it cannot be a condition of pollution. Because CEQA
28 requires mitigation measures to be implemented, the Regional Board lacks the authority to issue a
cleanup and abatement order that prevents mitigation from being implemented.

For these reasons—the work at issue benefits and implements the beneficial uses of wildlife
habitat and noncontact recreation, the work has been authorized by the Legislature in the Suisun
Marsh Preservation Act and Suisun Marsh Protection Plan, and the work is a mitigation measure that

1 must be implemented under CEQA—the work at issue cannot be a “condition of pollution”. The
2 Regional Board therefore lacks authority to issue the Order.

3 **5. The Construction Material Is Not “Waste”**

4 The Porter-Cologne Act, which was enacted in 1969, follows from the federal Water Quality
5 Act of 1965. (Am. Bazel Decl., Exhibit 8.) The latter provided for the establishment of “water
6 quality criteria” and for a “plan for the implementation and enforcement of the water quality
7 criteria”, which jointly would be a state’s “water quality standards”. (*Id.* at 907-908.) The Porter-
8 Cologne provided for the development of “water quality control plans” that include “water quality
9 objectives”. (Water Code §§ 13050(j), 13164, 13170.) The Water Quality Act of 1965 provided for
10 the regulation of the “discharge of matter... which reduces the quality of such waters below the
11 water quality standards”. (Am. Bazel Decl., Exhibit 8 at 909.) The California Legislature, however,
12 chose not to use a term as broad as “matter”. Instead, it limited authority under the Porter-Cologne
13 Act to the discharge of *waste*. As noted above, Water Code § 13304 applies only to discharges of
14 *waste*.

15 Waste means waste. The Porter-Cologne Act defines “waste” as follows:

16 “Waste” includes sewage and any and all other waste substances, liquid, solid,
17 gaseous, or radioactive, associated with human habitation, or of human or
18 animal origin, or from any producing, manufacturing, or processing operation,
including waste placed within containers of whatever nature prior to, and for
purposes of, disposal.

19 (Water Code § 13050(d).) This definition makes clear that the statutory term “waste” includes
20 “all...waste substances”, including “waste placed within containers”, but it does not include
21 anything that is not waste.

22 The scope of the Porter-Cologne Act is therefore quite different from the federal Clean Water
23 Act, which regulates the discharge of a “pollutant”, and defines that word to include much more than
24 wastes. (33 USC §§ 1311(a), 1362(6).) Cases interpreting the discharge of a pollutant under the
25 Clean Water Act are not relevant here.

26 What is relevant, however, is the California Supreme Court’s discussion of the word “waste”
27 in a case involving the collection of discarded recyclables:

1 The commonly understood meaning of “waste” is something discarded
2 “as worthless or useless.” (Amer. Heritage Dict. (1985) p. 1365,
col. 1; 19 Oxford English Dict. (2d ed. 1989), p. 958, col. 1.)

3 (*Waste Management of the Desert v. Palm Springs Recycling Center, Inc.* (1994) 7 Cal.4th 478,
4 485.)

5 “Discard” means “to throw away.” (Amer. Heritage Dict. (2d college
6 ed. 1982) p. 402, col. 1.) That “discard” connotes throwing away
7 or abandoning has been well recognized in cases dealing with waste
and related issues. (*American Min. Congress v. U.S. E.P.A.* (D.C. Cir.
1987) 824 F.2d 1177, 1184 [U.S. App.D.C. 197]....)

8 (*Id.* at 486.) The *American Mining Case* cited by the California Supreme Court is also quite
9 relevant, because it involves an attempt by EPA to regulate “secondary materials reused within an
10 industry's ongoing production process”. (*American Mining Congress*, 824 F.2d at 1178.) In its
11 interpretation of the federal Resource Conservation and Recovery Act (“RCRA”), the DC Circuit
12 concluded that that “‘solid waste’ (and therefore EPA's regulatory authority) [is] limited to materials
13 that are ‘discarded’ by virtue of being disposed of, abandoned, or thrown away.” (*Id.* at 1193.)

14 Here, Petitioner has not thrown anything away. Instead, it has used onsite material to
15 maintain and restore valuable improvements to the property, i.e. its levees and ditches. Just as no
16 one would seriously contend that shingles nailed on the roof of a house are a waste, or that a
17 cinderblock wall built to prevent flooding is a waste, no one should contend that the placement of
18 material on Point Buckler was a waste.

19 Because the material was kept onsite as part of valuable improvements, it was not a waste.
20 The *Lake Madrone* case, in which sediment was found to be a waste, is readily distinguishable.
21 (*See Lake Madrone Water Dist. v. State Water Resources Control Bd.* (1989) 209 Cal.App.3d 163.)
22 In that case, silt was flushed from behind a dam into the creek below. (*Id.* at 165-166.) The District
23 argued that the silt was not a waste because it was “not discharged from any producing,
24 manufacturing, or processing operation, or from land owned by the District.” (*Id.* at 168.) The court
25 rejected this argument. It concluded that the Porter-Cologne Act “was intended to include all
26 interpretations of ‘sewage,’ ‘industrial waste’ and ‘other waste’”. (*Id.* at 169.) But it did not suggest
27 that the act was intended to cover anything other than waste.

1 Ultimately, the court reasoned that the “dam receives a natural substance—silt—which, in its
2 unconcentrated form in a creek is innocuous and, by furnishing a man-made artificial location for its
3 concentration, changes the innocuous substance into one that is deadly to aquatic life.” (*Id.* at 169-
4 170.) This concept—that silt can be a waste in some situations but not in others—is consistent with
5 *Waste Management*, in which the California Supreme Court made clear that an item (in that case a
6 recyclable) is a waste if it is thrown away, and is not a waste if it is sold. (*Waste Management*,
7 7 Cal.4th at 486.)

8 Because the work at issue here was not the discharge of a “waste”, the Regional Board does
9 not have authority to issue the Order.

10 **G. The Factual Assertions In The Order Are Not Supported By Substantial**
11 **Evidence**

12 The Order should also be overturned because the factual assertions are not supported by
13 substantial evidence. The only harm specified is the alleged drying out of the interior of the island.
14 (See section VIII.E above.) But the Regional Board did not consider the evidence readily available
15 in Google Earth photos—evidence that directly contradicts the assertion that the island is tidal marsh
16 that has been dried up. (*Id.*)

17 Although the Order includes other conclusory assertions of harm to beneficial uses, no
18 evidence is cited. These assertions are, therefore, not supported by substantial evidence.

19 **H. The Demand For Restoration Of Tidal Circulation Is An Abuse Of The Regional**
20 **Board’s Discretion**

21 The Regional Board abused its discretion by demanding that tidal circulation be restored to
22 the interior of the island. To flood the duck ponds, Petitioner needs to close the tide gates and pump
23 water into the island. By requiring tidal circulation, the Regional Board is prohibiting the duck club.

24 But the duck club is either permitted or eminently permissible. The Regional Board has not
25 considered the statutes and other legal requirements favoring the duck club, and therefore has not
26 considered an important aspect of the problem. This is an abuse of discretion.

27 The Regional Board also abused its discretion by relying on a false assumption, and by not
28 carefully evaluating the available scientific information. The Order appears to have been motivated
by the false assumption that the work at issue has dried out interior tidal marshes on the island. (See

1 section VIII.E above.) A review of available Google Earth aerials, however, shows no evidence to
2 support this assumption.

3 **X. TRANSMITTAL OF PETITION TO REGIONAL BOARD**

4 A copy of this petition will be transmitted to the Regional Board by e-mail concurrently with
5 its filing with the State Board.

6 **XI. REQUEST FOR STAY**

7 Petitioner requests a stay as described in section VII above.

8 **A. Substantial Harm To The Petitioner**

9 If Petitioner is required to proceed comply with the Order while it is being reviewed by the
10 State Board, Petitioner will be substantially harmed. It would have to pay substantial amounts of
11 money to obtain the mitigation demanded. Mitigation banks charge approximately \$100,000-
12 200,000 per acre. The levee work cost hundreds of thousands of dollars. If it or any portion of it
13 had to be removed, that would harm Petitioner by depriving it of valuable property improvements.
14 Additional costs in the hundreds of thousands of dollars would be incurred if substantial removal
15 were required. (Sweeney Decl., ¶ 13.)

16 Petitioner would be harmed because the Constitutional rights of itself and its members are
17 being violated by the requirements of the Order, which was issued without a hearing. Petitioner is
18 also being harmed by being prohibited from using the island for a duck club, which is what is has
19 historically been used for and which benefits the public and the environment. (*Id.*)

20 Requiring tidal flows at the island would harm the vegetation and habitat that has been
21 created by the elevated water levels that have existed for more than a year now. (*Id.*)

22 **B. No Substantial Harm To Other Persons Or The Public Interest**

23 There would be no substantial harm to other persons or the public interest if a stay is granted.
24 The duck club restoration activities have been placed on hold. The public interest would be
25 promoted by a stay because the Order threatens all duck clubs in the Suisun Marsh, which must
26 maintain their levees and internal ditches. Other than the improved ditches and water levels inside
27 the levees, conditions at the island are generally unchanged from before the work at issue. Petitioner
28 is not aware of any harm to any sensitive species resulting from work at issue. (*Id.*, ¶ 14.)

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C. Substantial Questions Of Fact Or Law

Substantial questions of fact or law exist as described in section IX above.

XII. CONCLUSION

Petitioner requests that the Order be stayed, and that the State Board act on the stay by October 30, 2015. If the State Board cannot issue a stay by that time, Petitioner requests that the State Board act to postpone the submissions required by the Order until the State Board can act on the stay request.

Petitioner also requests that the State Board should rescind the Order on the grounds that it violates due process, it violates the Suisun Marsh Preservation Act and Suisun Marsh Protection Plan, it violates the Porter-Cologne Act, it violates CEQA, it violates the void-for-vagueness doctrine, and it is an abuse of the Regional Board's discretion.

DATED: October 12, 2015

BRISCOE IVESTER & BAZEL LLP



By: _____
Lawrence Bazel
Attorneys for Point Buckler Club, LLC