

STATE OF CALIFORNIA
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

CLEANUP AND ABATEMENT ORDER NO. R2-2015-0038

POINT BUCKLER LLC
SOLANO COUNTY

The California Regional Water Quality Control Board, San Francisco Bay Region (hereinafter the Regional Water Board), finds that:

1. Point Buckler LLC (Discharger) owns approximately 51 acres of land at Point Buckler Island located off the western tip of Simmons Island in the Suisun Marsh, Solano County (Site). The Site was historically managed for ducks, but, over a period of decades without management, tidal circulation was naturally restored to the Site's several tidal marshes.
2. The Discharger constructed a levee at the Site without proper authorizations, certifications, and/or permits from the Regional Water Board. The Discharger'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. Based upon photographic evidence and reports from Bay Conservation Development Commission (BCDC) and California Department of Fish and Wildlife (CDFW) staff, the Discharger has adversely impacted tidal marsh vegetation.
3. The Site's adversely impacted tidal marshlands constitute waters of the State and United States.
4. The Regional Water Board's Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan) defines the existing and potential beneficial uses for waters within the Region. The beneficial uses of any specifically identified water body generally apply to all its tributaries. The Basin Plan designates the following existing and potential beneficial uses for Suisun Bay: industrial service supply, industrial process supply, commercial and sport fishing, estuarine habitat, fish migration, preservation of rare and endangered species, fish spawning, wildlife habitat, contact and noncontact water recreation, and navigation.
5. Beneficial uses present at the Site that were adversely impacted by the Discharger's unauthorized levee construction activities include estuarine habitat, fish migration, preservation of rare and endangered species, fish spawning, and wildlife habitat.
6. The Site is potential habitat for special status species including Chinook Salmon, Delta Smelt, California Clapper Rail, and Salt Marsh Harvest Mouse. The adverse impacts from levee construction activities may include impacts that resulted because some of the work was conducted outside appropriate work windows for these protected species.
7. Suisun Marsh is identified as an impaired water body pursuant to federal Clean Water Act (CWA) section 303(d) for mercury, nutrients, organic enrichment/low dissolved

oxygen, and salinity/total dissolved solids/chlorides. The circulation of waters through tidal marsh generally provides improved dissolved oxygen conditions and maintains water chemistry balance, such as the proper range of salinity. Cutting off tidal circulation to the Site's tidal marshes has disrupted the marshes' ability to provide this natural water quality benefit.

8. On November 19, 2014, BCDC and CDFW staff inspected the Site and reported that the Discharger's unauthorized levee construction activities cut off crucial tidal flow to the interior of the Site, thereby drying out the Site's former tidal marsh areas and destroying existing and potential habitat for special status species including Chinook Salmon, Delta Smelt, California Clapper Rail, and Salt Marsh Harvest Mouse.
9. The Discharger's unauthorized levee construction activities at the Site have unreasonably affected or threaten to adversely affect water quality and beneficial uses by filling the tidal drainage channels at the Site, thereby cutting off tidal circulation to the Site's interior tidal marsh habitat and destroying existing and potential habitat for special status species including Chinook Salmon, Delta Smelt, California Clapper Rail, and Salt Marsh Harvest Mouse.
10. The Discharger's unauthorized levee construction activities at the Site are in violation of California Water Code (CWC) sections 13260 and 13264, CWA sections 401 and 402, and the Basin Plan as described below:
 - a. CWC section 13260 requires that any person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the State, shall file with the appropriate Regional Water Board a Report of Waste Discharge (ROWD). CWC section 13264 further provides that no person shall initiate any new discharge of waste, or make any material changes in any discharge, prior to the filing of the ROWD required by CWC section 13260. The Discharger has not filed a ROWD with the Regional Water Board for the levee construction activities at the Site described above, which could adversely affect the quality of waters of the State. Accordingly, the Discharger is in violation of CWC sections 13260 and 13264.
 - b. CWA section 401 specifies that any applicant required to obtain a federal license or permit to conduct any activity that may result in a discharge into navigable waters must obtain a certification from the state in which the discharge originates. Title 23 of the California Code of Regulations, section 3855, requires that "an application for water quality certification shall be filed with the regional board executive officer." The Discharger has not filed an application for a CWA section 401 Water Quality Certification for the levee construction activities that resulted in a discharge of fill to waters of the State and United States. Accordingly, the Discharger is in violation of CWA section 401.
 - c. CWA section 402 established a National Pollutant Discharge Elimination System (NPDES) permit program and specifies that a NPDES permit is required for any stormwater discharges associated with construction activity, including clearing,

grading, and excavation resulting in land disturbance of one acre or more. The Discharger has not filed a Notice of Intent to enroll for coverage under the State's NPDES General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities (Order No. 2009-0009-DWQ) for the levee construction and other land disturbance activities conducted at the Site. The levee construction and other land disturbance activities conducted by the Discharger at the Site have collectively disturbed greater than one acre of land. Accordingly, the Discharger is in violation of CWA section 402.

- d. Chapter 4, Table 4-1 of the Basin Plan prohibits the discharge of silt, sand, clay, or other earthen materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity, or discoloration in surface waters or to unreasonably affect or threaten to affect beneficial uses. The Discharger's unauthorized levee construction activities have resulted in the discharge of earthen fill into the site's tidal channels and around the perimeter of the Site in quantities sufficient to cause deleterious bottom deposits, turbidity, or discoloration in surface waters or to unreasonably affect or threaten to affect beneficial uses. Additionally, cutting off tidal circulation into the Site's interior tidal marshes has unreasonably affected or threatened to affect water quality and beneficial uses. Accordingly, the Discharger's levee construction activities at the Site are in violation of the Basin Plan.
11. CWC section 13304 requires any person who has discharged or discharges waste into waters of the State in violation of any waste discharge requirement or other order or prohibition issued by a Regional Water Board or the State Water Resources Control Board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged 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, shall, upon order of the Regional Water Board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.
 12. Based on the above findings, the Regional Water Board finds that the Discharger has caused or permitted waste to be discharged or deposited where it has been discharged into waters of the State and created or threatens to create a condition of pollution. As such, pursuant to CWC sections 13267 and 13304, this Order requires the Discharger to submit technical reports to enable the Regional Water Board to understand the extent, scope, and character of the discharge and its impacts and requires the Discharger to undertake corrective action to clean up the waste discharged and abate its effects.
 13. This Order is an action to enforce the laws and regulations administered by the Regional Water Board. As such, this action is categorically exempt from the California Environmental Quality Act, pursuant to section 15321(a)(2) of Title 14 of the California Code of Regulations.

14. Pursuant to CWC section 13304, the Discharger is hereby notified that the Regional Water Board is entitled to, and may seek reimbursement for, all reasonable costs actually incurred by the Regional Water Board to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effect thereof, or other remedial action, required by this Order.

IT IS HEREBY ORDERED, pursuant to CWC sections 13267 and 13304, that the Discharger shall submit the required technical reports and clean up the waste discharged, abate its effects, and take other remedial actions as follows:

A. Prohibitions

1. The discharge of fill material that will degrade, or threaten to degrade, water quality, or adversely affect, or threaten to adversely affect existing or potential beneficial uses of waters of the State is prohibited.
2. Removal of tidal marsh vegetation in a manner that adversely impacts or threatens to adversely impact water quality or beneficial uses in any water of the State is prohibited.
3. This Order does not allow for the take, or incidental take, of any special status species. The Discharger shall use the appropriate protocols, as approved by CDFW and the U.S. Fish and Wildlife Service, to ensure that activities do not impact the Beneficial Use of the Preservation of Rare and Endangered Species or violate the California or federal Endangered Species Acts.

B. Provisions

1. **No later than October 16, 2015, the Discharger shall submit, acceptable to the Regional Water Board Executive Officer, the following:**
 - a. A technical report providing a description of all levee construction activities, boat dock construction, and any other discharges of fill material or structures into waters of the State. The technical report shall also describe all grading and vegetation removal activities the Discharger has conducted at the Site. This technical report shall describe the nature and extent of these activities by means such as, but not limited to, providing a map illustrating the extent of these activities, and calculations quantifying the amount of fill material placed into waters of the State, the acreage of all channel, marsh, or other wetland vegetation removed or otherwise adversely impacted at the Site, and the linear distance (in feet) of tidal channels impacted by the levee construction activities. The impact assessment shall be performed by a qualified professional with expertise in tidal marsh habitat and shall, at a minimum, include a description of the pre-disturbance tidal channel morphology, soil conditions, hydrology, and characterization of the tidal marsh habitat impacts and loss, as well as documentation (e.g., aerial photographs, photographs, reports, topographic maps or drawings) showing the condition of the Site prior to the recent levee construction activities. The results of this impact assessment shall serve as the basis for the Corrective Action Workplan described below.

- b. Description of any permits and other authorizations obtained from local, State, and federal agencies and local or regional districts for any filling, grading, vegetation removal, levee and structure construction activities, or other activities that have disturbed land or water features at the Site since the Discharger acquired it.

2. No later than November 1, 2015, the Discharger shall submit a Corrective Action Workplan, acceptable to the Regional Water Board Executive Officer, that includes the following:

- a. A workplan proposal for corrective actions designed to: (a) restore tidal circulation to all of the tidal channels and interior marsh habitat that existed prior to the Discharger's levee construction activities; and (b) provide compensatory mitigation habitat to compensate for any temporal and permanent impacts to the functions and values provided by the impacted wetlands, tidal marshlands, and drainage channels impacted by the Discharger's levee construction, vegetation removal, and other Site development activities. This Corrective Action Workplan shall include success criteria and performance standards for assessing whether the corrective actions are achieving the intended water quality and habitat restoration goals, including identification and justification for the proposed targeted native plant species, soil and hydrologic conditions, and identification and description of any reference sites utilized. Performance standards shall designate the final habitat success criteria. The Corrective Action Workplan shall include an implementation time schedule acceptable to the Executive Officer.
- b. A corrective action self-monitoring program workplan proposal, designed to monitor and evaluate the success of the implemented corrected actions. The corrective action self-monitoring program shall monitor the success of the corrective actions until the approved habitat restoration activities have been successfully achieved, but not for a period of less than five years following completion of the corrective actions and not for a period of less than three years after any irrigation of revegetation plantings has ceased.

Within sixty days of approval of the Corrective Action Workplan by the Executive Officer, the Discharger shall initiate implementation of the Corrective Action Workplan in accordance with the approved implementation time schedule.

3. No later than January 31 of each year following initiation of the corrective actions and continuing until the corrective actions are successfully achieved, the Discharger shall submit annual self-monitoring program reports, acceptable to the Executive Officer, describing the progress reached toward achieving the restoration activities' approved success criteria and performance standards.
4. The Discharger shall submit with the final self-monitoring report a Notice of Completion, acceptable to the Executive Officer, demonstrating that the Corrective Action Workplan, as approved, has been successfully completed.
5. If the Discharger is delayed, interrupted, or prevented from meeting the work completion or report submittal deadlines specified in this Order, the Discharger shall

promptly notify the Executive Officer in writing with recommended revised completion or report submittal deadlines. Any extensions of the time deadlines specified in this Order must be approved in writing by the Executive Officer. The Executive Officer may consider revisions to this Order.

6. Regional Water Board staff shall be permitted reasonable access to the Site as necessary to oversee compliance with this Order.
7. The technical reports and workplan proposals required under provisions 1, 2, 3, and 4 above shall be complete, accurate, and adequate, as determined by the Executive Officer.
8. No later than 14 days from the date of this Order, the Discharger is required to acknowledge in writing its intent to reimburse the State for cleanup oversight work as described in the Reimbursement Process for Regulatory Oversight fact sheet provided to the Discharger with this Order, by filling out and returning the Acknowledgement of Receipt of Oversight Cost Reimbursement Account Letter or its equivalent, also provided with this Order.
9. As described in finding 14 above, upon receipt of a billing statement for costs incurred pursuant to CWC section 13304, the Discharger shall reimburse the Regional Water Board.
10. None of the obligations imposed by this Order on the Discharger are intended to constitute a debt, damage claim, penalty, or other civil action that should be limited or discharged in a bankruptcy proceeding. All obligations are imposed pursuant to the police powers of the State of California intended to protect the public health, safety, welfare, and environment.

Failure to comply with the provisions of this Order may result in the imposition of civil liabilities, imposed either administratively by the Regional Water Board or judicially by the Superior Court in accordance with CWC sections 13268, 13304, 13308, 13350 and/or 13385, and/or referral to the Attorney General of the State of California for injunctive relief or civil or criminal liability. Failure to submit, late or inadequate submittal of technical reports and workplan proposals, or falsifying information therein, is a misdemeanor and may subject the Discharger to additional civil liabilities. This Order does not preclude or otherwise limit in any way the Regional Water Board's ability to take appropriate enforcement action for the Discharger's violations of applicable laws, including, but not limited to, discharging without a permit and failing to comply with applicable requirements.

Bruce H. Wolfe
Executive Officer

Date