CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

COMPLAINT NO. R2-2016-1008
ADMINISTRATIVE CIVIL LIABILITY
IN THE MATTER OF

JOHN D. SWEENEY AND POINT BUCKLER CLUB, LLC
UNAUTHORIZED DISCHARGE OF FILL MATERIAL
POINT BUCKLER ISLAND, SUISUN MARSH,
SOLANO COUNTY

This Administrative Civil Liability Complaint (Complaint) alleges that John D. Sweeney (Mr. Sweeney) and Point Buckler Club, LLC (Club) (collectively referred to as Dischargers) caused a discharge to State and federal waters at Point Buckler Island (Site) in violation of the San Francisco Bay Basin Water Quality Control Plan (Basin Plan) and section 301 of the federal Water Pollution Control Act (Clean Water Act) (33 U.S.C. § 1251 et seq.), and failed to obtain a permit required by section 401 of the Clean Water Act (401 Certification). The California Regional Water Quality Control Board, San Francisco Bay Region (Water Board) is authorized to assess administrative civil liability under California Water Code sections 13323 and 13385 for the alleged violations. The proposed liability for the alleged violations is $4,600,000.

The Assistant Executive Officer of the Water Board hereby gives notice that:

1. This Complaint presents the factual basis for the alleged violations, legal and statutory authorities (including citations to applicable Water Code sections), and case-specific factors used to propose a $4,600,000 liability for the alleged violations.

2. Unless waived, the Water Board will hold a hearing on this matter on August 10, 2016, at Elihu M. Harris Building, First Floor Auditorium, 1515 Clay Street, Oakland, 94612. At the hearing, the Water Board will consider whether to affirm, reject, or modify the proposed administrative civil liability, or whether to refer the matter to the Attorney General for judicial civil liability. The Dischargers or their representative(s) will have an opportunity to be heard and to contest the allegations in this Complaint and the imposition of civil liability by the Water Board. The Dischargers will be mailed an agenda approximately ten days before the hearing date. A meeting agenda will also be available at: http://www.waterboards.ca.gov/sanfranciscobay/board_info/agenda.shtml. The Dischargers must submit all comments and written evidence concerning this Complaint to the Water Board not later than 5 p.m. on June 16, 2016, so that such comments may be considered. Any written evidence submitted to the Water Board after this date and time may not be accepted or responded to in writing.

3. Mr. Sweeney and the Club may waive their right to a hearing to contest the allegations contained in this Complaint by signing and submitting the enclosed waiver and paying the civil liability in full or by taking other actions as described in the waiver form. If this matter proceeds to hearing, the Water Board's Prosecution Team reserves the right to

seek an increase in the civil liability amount to recover the costs of enforcement incurred subsequent to the issuance of this Complaint through the hearing.

FACTUAL BASIS FOR THE ALLEGED VIOLATIONS

A. Dischargers

1. Mr. Sweeney and the Club are both responsible for the alleged violations as owners and operators of the Site.

2. Solano County grant deed records for Assessor's Parcel Number (APN) 90-020-010 document Mr. Sweeney's purchase of the Site on April 19, 2011, from the Cynthia V. Torres Estate. Ownership of the Site transferred from Mr. Sweeney to the Club on October 27, 2014.

3. Mr. Sweeney performed unauthorized activities, including levee construction, beginning approximately May 19, 2012. In a declaration dated December 28, 2015, Mr. Sweeney stated he was the manager of the Club, and that:

> In 2014, I personally did work (the Work) to maintain and repair the levee ringing the island…I dug out material from an artificial ditch inside the levee and placed the material on the existing levee. Some material was placed where the levee had been breached and (where part of the levee had eroded away) on solid ground inside the former levee location. I repaired one of two tide gates. The Work stopped in September 2014, when the [Club] learned that there were regulatory objections to the Work.

4. As president and manager of the Club, Mr. Sweeney continued unauthorized activities on the Site after the Club took ownership on October 27, 2014. (*Point Buckler Technical Assessment of Current Conditions and Historic Reconstruction Since 1985* (Expert Report), dated May 12, 2016, Appendix K, Figure K-4). Unauthorized placement of structures, and the removal and destruction of tidal marsh vegetation occurred during the Club's ownership. In addition, ongoing harm to beneficial uses continues to occur to the present. As the current owner of the Site, and because the Club had full knowledge of and authority over Mr. Sweeney's actions, as well as knowledge of the ongoing harm to beneficial uses, the Club is also named as a Discharger.

B. Site Description and Wetlands History

5. The Site, also known as the Annie Mason Point Club or Club 801, is located off the western tip of Simmons Island in the Suisun Marsh, Solano County. Records from the Solano County Assessor's Office identify the Site as a 51.5-acre parcel. An evaluation of the shoreline, based on comparison of aerial photographs from 1985 and 2011, determined that considerable shoreline retreat (erosion) had occurred over this time period. This evaluation determined that the Site reduced in size from 42.9 acres in 1985 to approximately 39 acres in 2011. Erosion and accretion has changed margins of the island over time, and some of the original parcel boundaries are likely now submerged (Expert Report, Appendix G). The waters to the south and east of the Site are Suisun Cutoff and Andy Mason Slough (also

known as Annie Mason Slough), respectively. Grizzly Bay is located north of the Site and Suisun Bay is to the south.

6. There was an individual management program (also referred to as an individual management plan) for the Site dated November 1984. The plan describes procedures for managing approximately 30 acres of wetlands for duck hunting using water control measures (a continuous levee, an interior ditch, and two 24-inch culverts) to flood and drain the levee interior.

7. The Site appears to have been operated as managed wetlands for duck hunting during the early 1980's. The existing levee (hereafter referred to as tidal remnant levee) degraded and breached by 1993 due to the lack of repair and maintenance. By the time Mr. Sweeney purchased the Site in 2011, levee breaches provided daily tidal exchange between bay waters and the Site's interior channels, tidal remnant borrow ditch, and interior tidal marsh. In addition, the tidal remnant levee had eroded away or subsided into the underlying wetlands, resulting in direct overland tidal flooding during higher tides over the degraded tidal remnant levee across the interior marsh surface. By 2011, the Site had been a tidal marsh subject to unimpeded daily tidal action for 18 years through tidal channels at the levee breaches and by high tide flows directly over the marsh surface. This area subject to tidal action – that is, the area of the Site below the high tide line that was also exposed to the tides—was approximately 38.3 acres in 2011 (Expert Report, Appendices G, H, and J).

8. A perimeter levee at the Site deteriorated in the late 1980's and early 1990's due to lack of repair and maintenance. At least seven levee breaches (located on the south, west, and north sections of the tidal remnant levee) appear in historic aerial photographs of the Site that were not subsequently repaired (Expert Report, Appendix G-3.1). The first breach occurred by August 1988; and there were two additional breaches by June 1990, two more by August 1993, and two more in the summer of 2003. Wetlands at the Site were under tidal influence beginning with the first breach in 1998, and none of the breaches were closed or repaired by April 2011 when Mr. Sweeney purchased the Site.

9. A Cease and Desist Order (CDO) issued by the San Francisco Bay Conservation and Development Commission (BCDC) to Mr. Sweeney and the Club on April 22, 2016, provides additional findings that tidal wetlands were present at the Site, and that the individual management program plan was not applicable to the Site when it was purchased by Mr. Sweeney in April 2011 (BCDC CDO No. ECD2016.01, pp.6-7). The CDO concluded that the Dischargers violated and continue to violate the Suisun Marsh Preservation Act (SMPA) and McAteer-Petris Act (MPA) by conducting unpermitted development at the Site and required the Dischargers to apply for a permit "for the placement of fill, substantial change in use, and/or development activities" no later than June 21, 2016. The permit application "shall include a proposed plan and schedule to restore tidal action to and tidal marsh vegetation at the Site." The CDO ordered the Dischargers to cease and desist all activity in violation of the SMPA and MPA. The CDO also provided notice of a public hearing before the Commission scheduled for July 21, 2016.

10. Water Board also conducted Site inspections on October 21, 2015, and March 2, 2016, and as well as a boat survey on February 17, 2016. Results of the inspection on March 2, 2016,

confirmed that Site is a tidal marsh (see summary of inspection findings below; paragraphs 46 and 47). To document the history of the Site prior to Mr. Sweeney's purchase of the property, Water Board staff reviewed historical records including the following maps and vegetation surveys:

a. Soils at the Site were mapped by the U.S. Department of Agriculture Soil Conservation Service as Joice Muck and Tidal Marsh. Joice Muck soils are described as very poorly drained soils occurring in brackish marshes affected by the tides. Tidal Marsh soils are described as very poorly drained soils in areas flooded periodically by tidal water (Soil Conservation Service (SCS), 1977; Contra Costa County and Solano County Soil Survey, U.S. Department of Agriculture).

b. California Department of Fish and Wildlife (CDFW) and Department of Water Resources conducted vegetation surveys and mapping at 3-year intervals from 2000-2012. The 2000-2012 vegetation maps for the Site identify predominantly wetland vegetation including hardstem tule (*Schoenoplectus acutus*), California bulrush (*S. californicus*), saltgrass (*Distichlis spicata*), common reed (*Phragmites australis*), and cattails (*Typha* spp.). The only potential non-wetland vegetation is on the outer edge of the Site's east end, where California rose (*Rosa californica*) and coyote brush (*Baccharis pilularis*) are present (Expert Report, Appendix H, citing Keeler-Wolf et al., 2000).

c. The U.S. Fish and Wildlife Service's National Wetlands Inventory map identifies the Site as "estuarine intertidal emergent" or "persistent regularly flooded" (U.S. Fish & Wildlife Service, 2016. National Wetlands Inventory. Website http://www.fws.gov/wetlands/Data/mapper.html [accessed April 20, 2016]).

d. The San Francisco Estuary Institute's EcoAtlas map identifies the Site as tidal marsh with tidal drainage features (San Francisco Estuary Institute, 2016. California EcoAtlas. Website http://www.ecoatlas.org/regions/ecoregion/bay-delta [accessed April 20, 2016].

C. Beneficial Uses and Impairment Listing Applicable to Tidal Wetlands at the Site

11. The Site is located at the southern end of Grizzly Bay and the northern end of Suisun Bay in the Suisun Marsh. 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 (Table 2-1). The Basin Plan designates similar beneficial uses to Grizzly Bay (Table 2-1). The Basin Plan also designates beneficial uses to wetlands in the Suisun Marsh including estuarine habitat, fish migration, preservation of rare and endangered species, contact and noncontact water recreation, fish spawning, and wildlife habitat (Table 2-4). Suisun Bay provides critical habitat within the San Francisco Bay-Delta ecosystem that is applicable to the Site, including habitat for endangered and threatened species.

a. Suisun Bay is designated as critical habitat for threatened and endangered species under both the State and federal Endangered species acts due to the presence of Delta smelt (*Hypomesus transpacificus*), the Central California Coast population segment of steelhead (*Oncorhynchus mykiss*), and the southern population segment of green sturgeon (*Acipenser medirostris*). (CA Fish & G. Code § 2050 et seq.; 16 U.S.C. § 1531 *et seq*.).

Suisun Bay is also within the habitat range of the longfin smelt (*Spirinchus thaleichthys*) which is listed as threatened under the California Endangered Species Act (Expert Report, Appendix P).

b. Suisun Bay lies along the migratory pathway of threatened and endangered species including winter-run and spring-run Chinook salmon (*Oncorhynchus tshawytscha)*, Central Coast population of steelhead trout (*Oncorhynchus mykiss*), and green sturgeon, and is therefore critical habitat for these species (*Id*.).

c. Prior to unauthorized activities, wetland habitat at the Site would have provided feeding grounds for young salmonids as they migrate through San Pablo Bay on their way to the ocean. These wetland habitats support aquatic invertebrates and insects that are an important food source for salmonids. Shallow wetland habitats at the Site would have also provided salmonids refuge from predation from larger predatory fish. The Site is also immediately adjacent to habitats usually occupied by Delta smelt. Interior wetlands at the Site would have contributed to food web productivity and export to the Bay in support of the recovery of this threatened species. Finally, tidal channels at the Site would have provided spawning grounds for the threatened longfin smelt (*Id*.).

d. The Site is also potential habitat for special status species including Ridgway's rail (*Rallus obsoletus*), black rail (*Laterallus jamaicensis coturniculus*), salt marsh yellowthroat (*Geothlypis trichas sinuosa*), Suisun song sparrow (*Melospiza melodia samuelisis*), and salt marsh harvest mouse (*Reithrodontomys raviventris*) (U.S. Fish and Wildlife Service (USFWS), Biological Opinion on the Proposed Suisun Marsh Habitat Management, Preservation, and Restoration Plan and the Project-Level Actions in Solano County, California, 2013).

12. Suisun Marsh as a whole is identified as an impaired water body pursuant to federal Clean Water Act section 303(d) for mercury, nutrients, organic enrichment/low dissolved oxygen, and salinity/total dissolved solids/chlorides (33 U.S.C. 1313(d)).

D. Dischargers' Activities Filled Tidal Wetlands

13. Aerial photographs and satellite images bracket the timeframes for when the Dischargers conducted the unpermitted activities at the Site that impacted tidal wetlands and their beneficial uses.

a. As of May 2012, Mr. Sweeney had begun construction. Tidal marsh vegetation had been mowed on the western end and parts of the interior of the Site. Trenches had been excavated on the north and south ends of the Site with what appears to be corresponding fill placed on tidal marsh. Two fill piles were placed in Andy Mason Slough (Expert Report, Appendix K, Fig. K-5).

b. As of April 2013, there was a small boat dock (approximately 8 feet wide and 37 feet long) in Annie Mason Slough. By February 2014, this small boat dock was replaced with, or constructed into, a larger dock (Expert Report, Appendix. K, Fig. K-11).

c. As of March 24, 2014, Mr. Sweeney began levee construction activities including (1) excavating 1,770 feet of a new borrow/drainage ditch (hereafter referred to as borrow ditch) from tidal marsh, tidal remnant levee, and tidal waters; (2) constructing 1,825 feet

of the new levee on top of tidal marsh, tidal remnant levee, and tidal waters; (3) excavating two trenches on the east and southwest of the Site and discharging spoils onto tidal marsh; and (4) mowing tidal marsh vegetation on the west end of the Site. These activities resulted in closing off two breaches (Breaches 1 and 2) and blocking tidal flow into two tidal wetland areas along the south end of the Site (Expert Report, Appendix K, Figs. K-4 and K-20).

d. As of June 5, 2014, Mr. Sweeney's levee construction activities had progressed with an additional 305 feet of borrow ditch excavated from tidal marsh and the material used to construct an additional 400 feet of new levee on top of tidal marsh and tidal waters. As a result, Breach 3 was closed, removing tidal flow into the west end of the Site (Expert Report, Appendix K, Figs. K-4 and K-23).

e. As of August 6, 2014, Mr. Sweeney had excavated an additional 1,375 feet of borrow ditch from tidal marsh and tidal waters and used the material to construct an additional 1,420 feet of new levee on top of tidal marsh, tidal remnant levee, and tidal waters. Four more breaches (Breaches 4, 5, 6, and 7) were closed as a result of levee construction, thereby closing all tidal channel connections at the Site (Expert Report, Appendix K, Figs. K-4 and K-25).

f. As of October 29, 2014, two days after the Club took ownership of the Site, borrow ditch excavation and new levee construction activities appear to have been completed. An additional 980 feet of borrow ditch was excavated from tidal marsh and tidal waters and an additional 1,065 feet of new levee was constructed on top of tidal marsh, tidal remnant levee, and tidal waters. From May 2012, to October 29, 2014, a total of 4,430 feet of borrow ditch was excavated from tidal marsh and tidal waters and approximately 8,586 cubic yards of material was placed on top of tidal marsh, tidal remnant levee, and tidal waters to construct the new 4,700-foot levee. As a result, both tidal channel and overland tidal flow connectivity were fully blocked (Expert Report, Appendix K, Figs. K-4 and K-29).

g. As of April 2015, unauthorized activities continued on the Site, including (1) the excavation of four crescent-shaped ponds in the interior tidal marsh, and the discharge of excavated material on the adjacent tidal marsh; (2) the discharge of fill in the borrow ditch for the west borrow ditch road crossing; (3) the discharge of fill onto tidal marsh at the Site's west end to create a road to the water's edge; (4) the mowing of tidal marsh vegetation and grading of the marsh plain for a road across the interior tidal marsh; and (5) the placement of shipping containers and trailers on tidal marsh at the Site's east and west end (Expert Report, Appendix K, Fig. K-32).

h. As of February 2016, the Club continued to conduct unauthorized activities including (1) mowing of approximately 1.5 acres of tidal marsh vegetation in the northeast portion of the Site; (2) constructing a helicopter pad on tidal marsh at the east end of the Site; and (3) constructing a second helicopter pad and three wind-break platforms on tidal marsh at the west end of the Site. The helicopter pads consisted of pairs of flat-rack shipping containers that were marked with a helicopter landing symbol (a circled "H") (Expert Report, Appendix K, Fig. K-40).

14. The Dischargers continued to develop in tidal wetlands despite letters from BCDC (dated January 30, 2015) and from the Water Board (dated July 28, 2015), both which provided notice to stop work and obtain necessary permits.

15. In March 2016, Water Board staff observed during an inspection evidence of unauthorized activities inside the constructed levee that included the following: (1) approximately 1.5 acres of plowed or mowed vegetation in tidal wetlands; (2) an enclosure constructed on tidal wetlands from two shipping containers and a platform consisting of three flat-rack shipping containers; (3) two platforms placed on tidal wetlands that were marked with a helicopter landing symbol (a circled "H"); and (4) two trailers parked on tidal wetlands, one of which was marked as a toilet facility. Staff also observed fresh tracks from vehicles on levees and in the vicinity of the interior road that crosses tidal wetlands. Tracks in these areas were consistent with the use of the heavy equipment parked at the Site: an excavator, loader, crane, and a dump truck. Along the levee, a new gate had been installed across one of the ramps to the interior marsh, from the east side of the Site, and there was a trailer adjacent to this gate with a livestock pen containing goats. A number of these features were not observed at the Site during a site inspection conducted by Water Board staff and others on October 21, 2015 (Inspection Report, April 19, 2016).

16. The Club advertises the use of the Site as a "Private Sport and Social Island located in the California Delta. Ideally suited for the Bay Area / Silicon Valley Executives who want to get away and enjoy kiting in a safe and secluded environment without boarding a plane" (www.pointbucklerisland.com, accessed May 12, 2016). Mr. Sweeney is listed as the contact for people interested in being an equity member of the Club. The structures Water Board staff saw on March 2, 2016, are described on Facebook as a lounge area with various amenities (e.g., bar, seating areas with couches and chairs, fire pit, composting toilet), and the marked platforms are for helicopter access to the Site (Point Buckler Club. Facebook. Feb. 27, April 19, May 1, 2016).

F. Actions Taken in Response to Unauthorized Fill and Development

17. On November 19, 2014, staff from the San Francisco Bay Conservation and Development Commission (BCDC) and CDFW inspected the Site and reported that unauthorized levee construction activities removed crucial tidal flow to the interior of the Site, thereby drying out the Site's former tidal marsh areas. During this inspection, BCDC staff provided Mr. Sweeney a copy of the Annie Mason Point Club individual management plan; he reportedly did not have a copy before then (BCDC Cease and Desist Order, *supra*). BCDC reported findings from the inspection in a letter dated January 30, 2015, which included notice that the Site had reverted to tidal wetlands and a BCDC permit was required, and requested Mr. Sweeney to stop work.

18. On July 28, 2015, the Water Board issued a Notice of Violation (NOV) for filling waters of the State and United States. The NOV stated the Water Board's intent to issue a cleanup and abatement order requiring action to correct and mitigate for these violations and advised the Dischargers to cease and desist the unauthorized activities.

19. On September 11, 2015, the Water Board issued Cleanup and Abatement Order No. R2-2015-0038 (Order) for unauthorized levee construction activities at the Site. The Order required the submittal of (1) a technical report describing the nature and extent of unauthorized activities and impacts resulting from these activities; (2) a description of any permits and other authorizations obtained; (3) a workplan proposal for corrective actions designed to restore tidal circulation to the Site; and (4) a proposal for compensatory mitigation habitat to address temporal and permanent impacts resulting from levee construction activities.

20. In a letter to the Water Board dated September 18, 2015, Miller Starr Regalia responded to the Order on behalf of "John Sweeney, the managing member of the Point Buckler LLC" and requested a hearing before the Water Board.

21. In a September 23, 2015 email, the Water Board Prosecution Team stated that there was no action to take before the Board at this time and it would be more appropriate to schedule a meeting with Water Board staff. The email further stated that the Order could be revised in the future based on additional information received, such as the technical reports required by the Order.

22. In a letter to the Water Board dated September 25, 2015, attorney Lawrence Bazel responded to the Order on behalf of the Club. The letter (1) disputed the Water Board's authority to require cost reimbursement from the Discharger; (2) requested a hearing before the Water Board; (3) requested an explanation of how the Water Board was implementing separation of functions and the prohibition on ex-parte communications; and (4) requested that all deadlines in the Order be postponed for 60 days.

23. On October 7, 2015, Water Board staff met with Mr. Sweeney and the Club's attorneys, Lawrence Bazel and John Briscoe. The purpose of this meeting was to discuss the unauthorized activities at the Site and the regulatory approvals required for these activities. During this meeting, Mr. Bazel requested an extension for submittals required by the Order.

24. On October 11, 2015, the Club submitted a petition and request for stay of the Order to the State Water Resources Control Board.

25. On October 15, 2015, the Water Board granted the Dischargers' request for a 60-day extension for Provision 2 of the Order, which required submittal of a Corrective Action Workplan.

26. On October 16, 2015, the Club submitted to the Water Board documents required by Provision 1 of the Order. This submittal included: (1) an amended petition and request for stay to the State Water Board; (2) a copy of the Site's 1984 individual management plan; (3) a 1984 aerial photo; (4) a copy of the lease retroactively issued by State Lands Commission for the floating boat dock, wood pilings, gangway and walkway; (5) a letter to Bruce Wolfe; and (6) a report titled *Conditions at Point Buckler* (Conditions Report) prepared by Applied Water Resources, dated October 16, 2015. The Conditions Report, based primarily on aerial photographs, discussions with Mr. Sweeney and a site visit, states that "recent activities at the Island has resulted in the placement of fill material into waters of the State," and that the

hydrology of the Site prior to the Dischargers' activities consisted of "tidally influenced portions of some channels and some old ditches" (p. 4). The Water Board Assistant Executive Officer responded to this submittal in a letter dated December 23, 2015.

27. On October 21, 2015, Water Board staff inspected the Site, along with staff from BCDC, U.S. Environmental Protection Agency (U.S. EPA), U.S. Army Corps of Engineers (Corps), and Dr. Stuart Siegel (professional wetland scientist). The purpose of the inspection was to observe Site conditions and to better understand (1) the nature and extent of construction activities, including the volume of fill placed for construction of the levee, and (2) the extent of waters of the State and United States, including tidal marsh habitat that was adversely impacted by levee construction activities. Based on the results of the Site inspection, Water Board staff concluded that a topographical survey and wetland delineation were necessary to determine the extent of impacts to waters of the State and United States.

28. During the Site inspection on October 21, 2015, BCDC staff observed additional work performed since their November 14, 2014, Site inspection including (1) fill placed to construct a crossing over the drainage ditch on the Site's east and west end; (2) road constructed across the Site interior; (3) four crescent ponds excavated in the Site interior; (4) new water control structure installed on the Site's west end; (5) two additional storage containers; (6) goat pen installed with a number of goats brought to the Site; (7) tidal marsh vegetation removed, mowed and/or flattened throughout Site interior; and (8) approximately 14 trees planted on the Site, all dead, "apparently due to high salinity levels" (BCDC Cease and Desist Order, *supra*, p. 10).

29. On November 20, 2015, Water Board and BCDC staff again met with Mr. Sweeney and attorneys for the Club, Mr. Bazel and Mr. Briscoe. The purpose of this meeting was to (1) discuss the October 16, 2015, submittal required by Provision 1 of the Order, (2) discuss results of the Site inspection, and (3) request additional information, including a topographical survey and wetland delineation. During this meeting, Mr. Bazel agreed to provide the additional information and requested a second extension for submittal of the Corrective Action Workplan required by Provision 2 of the Order.

30. In a letter to Bruce Wolfe dated December 1, 2015, the Club requested an extension of the Order's Provision 2 deadline from January 1, 2016, to April 30, 2016, and proposed to submit additional information agreed upon during the November 20, 2015, meeting with Water Board staff. The letter recognizes the importance of providing this information to assist a decision-making process. A letter from the Water Board to the Club on December 9, 2015, refers to mutual agreement at the meeting that generating information about the Site to characterize habitat, topography, and construction activities would be beneficial to all parties concerned.

31. In a letter to the Dischargers dated December 9, 2015, the Water Board declined the second request for an extension to Order Provision 2 due to a lack of technical justification.

32. In a letter to the Dischargers also dated December 9, 2015, the Water Board Assistant Executive Officer requested the submittal of additional information that had been agreed to during the November 20, 2015, meeting and proposed by the Club in their December 1,

2015, letter, including: (1) a forensic wetland delineation characterizing the extent of wetlands and other waters of the State before and after levee construction activities, (2) a topographical survey, (3) a description of current and intended future activities at the Site, (4) the date(s) excavation of the borrow ditch and levee construction began, (5) documentation of the Site's operation as a managed wetland from 1984 until the Club purchased the Site, and (6) documentation of any use of the Site as mitigation. The letter requested the submittal of this information by February 15, 2016. The Water Board has not received this information to date.

33. In a letter to the Club dated December 23, 2015, the Water Board Assistant Executive Officer discussed the permitting requirements the Club failed to satisfy and responded to the Club's assertions regarding authorization under the Corps' Regional General Permit 3 (RGP 3) and associated Clean Water Act section 401 water quality certification (401 Certification) issued by the Water Board. The letter concluded that (1) much of the levee construction activities done at the Site were not authorized under RGP 3 and associated 401 Certification, and (2) the Site at the time it was purchased by Mr. Sweeney consisted largely of tidal marsh habitat and had been subject to tidal influence for a significant period of time.

34. On December 27, 2015, the Water Board received notice of an Ex Parte Hearing scheduled for December 29, 2015, at the Solano County Superior Court. The Club applied for a stay of the Water Board's Order, or, alternately, a temporary restraining order enjoining the Water Board from enforcing the Order. The Court issued a stay of the Water Board's Order.

35. In a memo to the Water Board Executive Officer dated January 4, 2016, the Water Board Prosecution Team recommended (1) rescinding the Order to address the Club's procedural due process claims; and (2) a hearing by the Water Board on a revised Order.

36. In a letter dated January 5, 2016, the Water Board Executive Officer rescinded the Order. The rescission was "without prejudice to Regional [Water] Board staff's ability to propose, or the Board's ability to issue, a [Cleanup and Abatement Order] and/or other orders or permits covering the subject matter of [the Order]." The rescission specifically noted the intent to "avoid unnecessary procedural litigation and to allow Board members an opportunity to consider the factual and legal issues in this matter in a public hearing."

37. On January 14, 2016, California River Watch issued a Notice of Violation and Intent to File Suit under the Endangered Species Act Section 11(g), 16 U.S.C. § 1540 (g) to the Dischargers. The notice alleged harm to and unauthorized take of threatened and/or endangered species in the Suisun Bay Conservation Area including Delta smelt, Central California steelhead, green sturgeon, Sacramento winter-run and Central Valley spring-run Chinook salmon, salt marsh harvest, and Ridgway's rail.

38. In a series of emails beginning on January 22, 2016, Water Board Assistant Executive Officer Dyan Whyte requested permission from Mr. Bazel and Mr. Sweeney to access the Site in early February 2016 to delineate habitats, survey topography, and document the nature and extent of construction activities. In a February 10, 2016, email to Mr. Bazel, the Assistant Executive Officer noted that informal access to the Site had not been granted or denied for the fourth time, and expressed the urgency to visit the Site the last week in

February 2016 due to tides and seasonal changes in vegetation, and a need to confirm and augment existing data (Affidavit for Inspection Warrant, Misc002135. Feb. 19, 2016).

39. On February 17, 2016, Water Board staff and Dr. Stuart Siegel surveyed the Site by boat to assess whether vegetation growth would obscure visual observation of the ground surface in tidal areas. Water Board staff determined that continued vegetation growth would impede visual observations of Site conditions and that Site access before March was imperative. Water Board staff also observed recent unauthorized activities that were not observed during the October 21, 2015, site inspection, including (1) grading to repair the levee on the Site's east end, and (2) two mobile helicopter landing pads installed on top of tidal marsh (*Id.*).

40. On February 19, 2016, Water Board staff submitted an application for an inspection warrant to the Solano County Superior Court. The Court issued the inspection warrant on February 24, 2016 (Case No. Misc002135).

41. On March 2, 2016, Water Board staff executed the warrant and inspected the Site, accompanied by Dr. Stuart Siegel, Dr. Peter Baye (coastal ecologist/botanist), a topographical survey crew from CLE Engineering, Inc., Don Tanner (National Oceanic and Atmospheric Administration), and Paul Jones (U.S. EPA Life Scientist). The purpose of the inspection was to assess conditions at the Site resulting from unauthorized construction of levees and placement of fill into waters of the State and United States. The inspection objectives included (1) investigate water quality, (2) survey topography and map the extent of fill material, (3) document site activities, (4) collect wetland jurisdiction data on soils, vegetation, and hydrology, and (5) observe ecological conditions including condition of vegetation communities and occurrence of listed or special status plant, fish, or wildlife species.

42. In a letter to the Dischargers dated March 28, 2016, the Corps: (1) confirmed the unauthorized discharge of fill material into jurisdictional tidal waters of the U.S. during an October 21, 2015, site visit; (2) stated that the Dischargers may be subject to administrative and/or legal actions for unauthorized work; (3) identified the potential for penalties for violations of the Clean Water Act; (4) stated that U.S. EPA would be the lead enforcement agency to determine the appropriate enforcement response; and (5) required that the Dischargers cease any further dredge or fill activities.

43. On March 28, 2016, on behalf of the Club, Mr. Bazel provided the Water Board and the Attorney General's office with a *Notice of Motion and Motion for Determination and Preliminary Injunction* filed with the Solano County Superior Court. The motion asked the Court to make a determination that the Executive Officer and the Water Board had "acted in excess of their jurisdiction in issuing a cleanup and abatement order" and asked the Court for a "preliminary injunction prohibiting [the Water Board] from re-issuing the cleanup and abatement order, from issuing a cleanup and abatement order requiring the Club to remove or destroy any part of the levee at Point Buckler Island, or otherwise issuing another cleanup and abatement order against the Club for work done at Point Buckler Island in excess of their jurisdiction."

44. On April 8, 2016, Water Board Assistant Executive Officer Dyan Whyte sent an email to Mr. Bazel, stating that, "Our inspection of Point Buckler Island on March 2, 2016, confirmed that the Section 401 Clean Water Act violations cited in our July 28, 2015, Notice of Violation still exist. The prior observations concerning the degradation of tidal wetlands and habitat were validated, and we note that the degraded conditions may potentially be exacerbated by the presence of grazing animals, recent mowing, and lack of restored tidal flow to the island." The Assistant Executive Officer suggested meeting to discuss resolution of the violations.

45. Water Board staff documented the results of the March 2, 2016, site inspection in an inspection report dated April 19, 2016. The inspection report provided a summary of inspection activities performed, water quality sampling methodology and results, staff observations of Site conditions, and photographs taken during the inspection.

F. Summary of Significant Findings from the March 2, 2016 Inspection

46. About 96 percent of the land surface at the Site is tidal marsh and within waters of the State and United States (Expert Report, Fig. 4).

    a. Tidal waters, tidal tributaries, and waterways are definitively waters of the United States under section 404 of the Clean Water Act. A March 2, 2016, topographical survey of the Site establishes the elevation and position of the high tide line and delineates tidal waters at the Site under Clean Water Act section 404 jurisdiction. Based on the topographical survey, approximately 38.3 of the approximately 39 acres of the Site are below the high tide line, fall under Clean Water Act section 404 jurisdiction, and therefore are waters of the State and United States (Expert Report, Appendix N).

    b. Approximately 70 percent of the tidal remnant levee had subsided and degraded to high tidal marsh elevations and had been colonized by tidal marsh species (Expert Report, § 3).

47. A March 2, 2016, vegetation survey of the Site identifies predominantly wetland vegetation typical of Suisun tidal marshes including large stands of hardstem tule, threesquare bulrush (S. americanus), and cattail. These species typically occur in wetlands that are saturated or shallowly flooded for most of the growing season (Expert Report, Appendix H).The vegetation survey also identifies the presence of Mason's lilaeopsis (Lilaeopsis masonii), a wetland plant listed by the California Native Plant Society (CNPS) as a California Rare Plant Rank 1B: Plants Rare, Threatened, or Endangered in California and Elsewhere (Expert Report, Appendix H, 2016; CNPS, Rare Plant Program. 2016. Inventory of Rare and Endangered Plants (online edition, v8-02). California Native Plant Society, Sacramento, CA. Website http://www.rareplants.cnps.org [accessed April 20, 2016]).

48. The construction of a new borrow ditch and levee at the Site resulted in the excavation of about 16,000 cubic yards of material and the placement of 8,586 cubic yards of fill (after dried and semi-consolidated) within tidal marsh (Expert Report, Appendix K, Tables K-2, K3).

49. The construction of the new levee did not follow the alignment of the residual tidal levee except at selected locations; it is estimated that approximately 0.5 acres of the new levee was

placed over the residual tidal levee (*Id.*, Fig. K-1). The March 2, 2016, topographic survey included elevations along the top of the residual tidal levee (ranged from 5.45 to 6.18 feet NAVD88) which were all within the high tide line except along the eastern perimeter of the island, which was assumed to be higher elevation (*Id.*, Appendix F-2.2).

50. The new levee, which is approximately 4,710 feet in length, filled approximately 2.6 acres of tidal marsh and blocked tidal flow to approximately 27.1 acres of tidal marsh inboard of the levee from the previous breaches. Construction of the new levee negatively impacted a total of approximately 29.7 acres of tidal marsh (*Id.*, Fig. 8, Appendix K, Figs. K-2, K-4). The only conduit for tidal inflow through the levee to the tidal marsh observed on March 2, 2016, was one 24-inch culvert installed at the western end of the Site. This culvert had flap gates that were closed (Inspection Report, April 19, 2016).

51. The physical barrier created by the new levee and the closure of culvert flap gates on both sides of the levee severely restricts connectivity between bay waters and the tidal marsh inboard of the levee. There was no significant tidal inflow to the borrow ditch on March 2, 2016. Water Board staff noted that water in the borrow ditch generally stayed at the same level and was not fluctuating due to tidal changes that day (*Id.*). Survey data supports this observation. Elevations of the water surface in the borrow ditch surveyed between approximately 1:12 p.m. to 3:30 p.m. recorded a change of only 0.1 feet, while tides in the Bay changed approximately 0.7 feet over the same period of time (Expert Report, Appendix L, Fig. L-1, Port Chicago Tide Station).

52. The degraded quality of surface water and wetlands beneath and within the perimeter levee indicates that the inflow of bay waters to tidal marsh on the inboard side of the levee has been blocked for an extended period of time. Flap gates on the only culvert installed through the levee to potentially convey bay waters to the interior of the island were closed on March 2, 2016, and were reported as closed in the Applied Water Resources report on Conditions of Point Buckler, dated October 16, 2015.

    a. Surface water within the new levee appeared eutrophic on March 2, 2016, based on visual observations and measurements of dissolved oxygen. Much of the surface water was bright green in color and noticeably different than the greenish brown color of surrounding surface water in the bay. Dissolved oxygen readings, which were measured in the afternoon hours, often well exceeded 100 percent saturation levels (Inspection Report, April 19, 2016). The green coloring is due to increased phytoplankton densities from the increased residence time of surface water in the borrow ditch, which indicates a lack of episodic tidal flows that would otherwise flush salts and microalgae from the ditches. The practice for managed wetlands is to replace episodic tidal flushing with periodic cycles of flooding and draining. The quality of surface water in the borrow ditch indicates that there has been neither episodic tidal flooding or periodic flooding and draining of wetlands inboard of the new levee (Expert Report, Appendix L-3.3).

    b. Elevated salinity at the Site indicates a lack of tidal connectivity with the wetlands inboard of the new levee. Salinity concentrations measured on March 2, 2016, were elevated in the borrow ditch relative to bay waters and progressively increase towards the interior of the Site, with the highest concentrations measured in groundwater (Inspection

Report, April 19, 2016). The elevated salinity of groundwater is consistent with marsh drainage (Expert Report, Appendix L-4.0).

c. An assessment of the condition of soil and wetlands on March 2, 2016, indicates that tidal marsh inboard of the new levee is being drained and dried out. Wetland vegetation within the levee was brown, crescent ponds were relatively dry and the remaining shallow water appeared to have a high concentration of orange (iron) oxides, and the soil profile in the borrow ditch showed evidence of drying. There was a decrease in soil moisture, transition to orange and white colors (consistent with iron oxidization and evaporate mineralization), and cracking in the upper portion of the soil profile, which are all indicators of desiccation and a relatively static water level in the borrow ditch (*Id.*).

53. A low water level in the borrow ditch relative to the interior marsh and level of groundwater appears to maintain a gradient for marsh drainage, and the draining of tidal wetlands at the Site is decreasing soil moisture in plant root zones and increasing soil salinity (Expert Report, § 5, p. 18). Continued drainage at the Site will increase soil salinity and result in a decline of native plant diversity, and cause long-term, adverse impacts to wetland productivity (*Id.*, Appendix Q-3.2).

54. The drainage of tidal marsh inboard of the new levee has reduced vegetation growth, caused a mass dieback of the Site's tidal marsh, and allowed for the growth of invasive species, including the perennial pepperweed (*Id.*, § 5, p. 18, Appendix Q-3.0).

55. Marsh soils inboard of the new levee are decomposing, which will lead to subsidence that is potentially irreversible, and the elimination of tidal action has excluded tidal sedimentation that would otherwise help protect the Site from sea level rise (*Id.*, Appendix Q-3.2.2).

ALLEGED VIOLATIONS

56. Violation 1: From on or about March 8, 2014, to the date of the hearing or the date of its removal, Mr. Sweeney discharged and the Club permitted continued placement of approximately 8,586 cubic yards of fill into waters of the State and United States, violating Basin Plan Prohibition No. 9 and Clean Water Act section 301. The fill remains in waters of the State and United States, and is contributing to the ongoing degradation of approximately 27.1 acres of surface water and wetlands at the Site, including at least seven tidal channels.

57. Violation 2: From on or about May 19, 2012, to the date of the hearing or the date a permit is obtained, Mr. Sweeney failed to obtain a 401 Certification for the discharge of dredged or fill material into navigable waters of the United States, as required by Clean Water Act section 401. From October 27, 2014 to the date of the hearing or the date a permit is obtained, the Club has failed to obtain a 401 Certification.

APPLICABLE REQUIREMENTS

58. Basin Plan Prohibition No. 9 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 (Section 4.2, Table 4-1).

59. Clean Water Act section 301 states that the discharge of any pollutant by any person into waters of the United States shall be unlawful except in compliance with the Clean Water Act.

60. Clean Water Act section 404 requires a permit before dredged or fill material may be discharged into waters of the United States, unless the activity is exempt from section 404 regulations. Section 10 of the Rivers and Harbors Act prohibits building any dock without authorization from the Corps. For both of these activities, Clean Water Act section 401 requires the applicant to obtain a related certification from the state in which the discharge originates or construction occurs, certifying (with or without additional conditions) that the activity is consistent with a number of specifically identified Clean Water Act provisions. 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." Neither Discharger has filed an application for a Clean Water Act section 401 Water Quality Certification for the unauthorized activities that resulted in a discharge of fill to waters of the State and United States.

LEGAL AUTHORITY

61. Water Code section 13323 authorizes the Water Board to issue a complaint to any person on whom administrative civil liability may be imposed under the Water Code. Administrative civil liability for violating Clean Water Act sections 301 or 401, or a Basin Plan prohibition may be imposed under Water Code section 13385, subsections (a)(4), (a)(5), and (c).

62. This enforcement action is exempt from the provisions of the California Environmental Quality Act, Public Resources Code section 21000 et seq., in accordance with California Code of Regulations, title 14, section 15321.

STATUTORY LIABILITY

63. The Dischargers are liable civilly under Water Code section 13385(a)(4) for violating Basin Plan Discharge Prohibition No. 9, under Water Code section 13385(a)(5) for violating Clean Water Act section 402, and under Water Code section 13385 (a)(5) for violating Water Code Clean Water Act section 401. Water Code section 13385(c) authorizes the Water Board to impose administrative civil liability in an amount not to exceed the sum of both of the following: (1) $10,000 for each day in which the violation occurs; and (2) where there is a discharge, $10 per gallon for any portion of the discharge that is not cleaned up exceeding 1,000 gallons. Alternatively, the Water Board may refer such matters to the Office of the Attorney General for prosecution and seek up to $25,000 per day of violation and $25 per gallon discharged in excess of 1,000 gallons pursuant to Water Code section 13385(b).

PROPOSED CIVIL LIABILITY

64. **Maximum Liability:** The maximum administrative civil liability is $39,211,860. This is based on the maximum allowed by Water Code section 13385: (1) $10,000 for each day in which each violation occurred; and (2) $10 for each gallon exceeding 1,000 gallons that is discharged and not recovered.

65. **Minimum Liability:** Pursuant to Water Code section 13385(e), at a minimum, liability shall be assessed at a level that recovers the economic benefit or savings, if any, derived from the

unauthorized discharge violation. The State Water Resources Control Board Water Quality Enforcement Policy (Enforcement Policy) requires that the minimum liability amount imposed not to be below the economic benefit plus ten percent. The Dischargers realized cost savings of approximately $1,409,864. Applying the methodology as set forth in Exhibit A, the minimum liability in this matter is $1,550,850.

66. **Proposed Liability:** The Assistant Executive Officer proposes that administrative civil liability be imposed in the amount of $4,600,000, of which $41,641 is recovery of staff costs incurred thus far. The Exhibit A attachment (incorporated herein by this reference) presents a discussion of the factors considered and the values assessed to calculate the proposed liability in accordance with the Enforcement Policy and Water Code section 13327. The proposed liability is more than the minimum liability and less than the maximum liability allowed for the alleged violation.

Dyan C. Whyte
Assistant Executive Officer

May 17, 2016
Date

Attachment: Exhibit A: Factors Considered in Determining Administrative Civil Liability