

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

ADVISORY TEAM SUMMARY REPORT
MEETING DATE: December 14, 2016

ITEM: 6

SUBJECT: **Mr. John D. Sweeney and Point Buckler Club, LLC; Point Buckler Island, Solano County** – Hearing on Administrative Civil Liability Complaint No. R2-2016-1008

CHRONOLOGY: May 2016 Prosecution Staff issues Tentative Cleanup and Abatement Order and Administrative Civil Liability Complaint R2-2016-1008

June 2016 Hearing on Complaint R2-2016-1008 postponed until December 2016

August 2016 Adoption of Cleanup and Abatement Order No. R2-2016-0038

DISCUSSION: If adopted by the Board, the Tentative Order (Appendix A) would impose Administrative Civil Liability (ACL) in the amount of \$4.6 million against John D. Sweeney and Point Buckler Club, LLC for two violations: (1) discharging fill into waters of the United States in violation of the Basin Plan and the Clean Water Act; and (2) failing to obtain a water quality certification for this discharge.

Background and Rationale for Complaint

Mr. Sweeney purchased Point Buckler Island (Island), located in Suisun Marsh, in 2011. The approximately 39-acre island had formerly been ringed with levees to create managed wetlands for duck hunting. However, the Prosecution Team alleges that at the time of the property transfer, the Island had not been a managed wetland or a duck club for more than two decades, the levees had breached and deteriorated, and 38.3 acres of the Island were tidal marsh and waters of the state and United States.

Mr. Sweeney transferred title of the Island to Point Buckler Club, LLC in October 2014. (Mr. Sweeney and Point Buckler Club, LLC are hereinafter referred to jointly as the Dischargers.) According to the Prosecution Team, Mr. Sweeney began unauthorized construction at the island in 2012, completed a new, 4,710-foot long levee in October 2014, and the Dischargers have continued to excavate and fill in the interior of the Island ever since. Combined, these activities have, in the Prosecution Team's estimation, directly filled three acres of tidal marsh,

drained or cut off tidal circulation to an additional 27.18 acres, destroyed or degraded marsh habitat, lowered water quality, and damaged or killed wetland vegetation. More specifically, the Prosecution Team asserts that the Dischargers' activities have destroyed or degraded critical habitat for salmonids and longfin smelt, decreased nutrient cycling important to Delta smelt, and degraded habitat and feeding opportunities for several listed bird species. The Prosecution Team asserts that Mr. Sweeney knew or should have known about requirements for permits and water quality certifications based on his involvement in developing other duck clubs and his interactions with staff of multiple regulatory agencies. Furthermore, the Prosecution Team alleges that, despite being notified that his activities were illegal and directed to stop work by several agencies, Mr. Sweeney has continued unauthorized construction and fill through the present date.

Violation 1 – Discharge of Fill

The Prosecution Team notes that it has based the duration and volume estimates underlying the ACL amount on levee construction alone, because levee construction is the primary fill activity.. The Prosecution Team calculated the fill violation to have begun on March 8, 2014, the first day that aerial photographs showed evidence of levee construction. Counting the days that the levee was actively under construction and the days that fill has remained in place, the Prosecution Team has calculated the violation will have continued for a total of 1,013 days as of December 14, 2016. The Prosecution Team alleges that the volume of fill discharged in levee construction is 1,490,186 gallons, or 8,586 cubic yards.

Violation 2 – Failure to Obtain a Water Quality Certification

To date, the Prosecution Team alleges that the Dischargers have never obtained a water quality certification, as required under Clean Water Act section 401, for their dredge and fill activities at the Island. Using May 19, 2012, the day an aerial photograph showed construction activities had begun at the Island, as the first day of the violation, the Prosecution Team has calculated that this violation will have continued for 1,671 days as of December 14, 2016.

Dischargers' Opposition

The Dischargers dispute the assertions that the Island was predominantly tidal marsh in 2011 or that levee construction took place in waters of the United States. Although Dischargers concede that the levee closed off channels and ditches in the interior of the island to tidal circulation, they dispute that this harmed fish habitat or killed vegetation. According to Dischargers, the levees will restore the managed wetlands that once existed on the Island, and will therefore enhance duck habitat and freshwater vegetation. Dischargers claim that Mr. Sweeney did not have knowledge of permitting or water quality certification requirements, despite inquiring about permitting at various agencies.

The Dischargers ask the Regional Water Board to decline to impose a penalty or to impose a reduced penalty based on a reevaluation of the penalty factors. They argue that the harm to the wetland habitat of the Island is not as severe as the Prosecution Team claims, that the duration of the fill violation should only include days of actual construction, and that the failure to obtain a water quality certification is a one-time, one-day violation. Asserting that Mr. Sweeney was unaware of permitting requirements, is now actively engaged in the permitting process, and is complying with the deadlines in Cleanup and Abatement Order No. R2-2016-0038, the Dischargers argue that increasing liability for culpability is inappropriate. Dischargers assert they are unable to pay the ACL amount and claim that if the Regional Board adopts the \$4.6 million penalty, they will not be able to pay for restoration, mitigation, and permitting at the island. Dischargers argue that the ACL amount far exceeds other penalties imposed by this Regional Board, reflects vindictiveness and retaliatory intent on the part of the Prosecution Team, and is unconstitutional. Dischargers also claim that the penalty is not permissible under the Porter-Cologne Water Quality Control Act (Porter-Cologne) or under the Suisun Marsh Preservation Act (SMPA).

Prosecution Team's Rebuttal

In its rebuttal, the Prosecution Team disputes the Dischargers' claims that the island was not tidal, that the discharge of fill did not harm habitat and vegetation, and that Mr. Sweeney was unaware of permitting requirements. The Prosecution Team provides additional legal argument and evidence to support the factors it selected in calculating the ACL amount. The Prosecution Team also denies that it issued the ACL Complaint in retaliation for the Dischargers' legal challenge of a previously-issued and later rescinded CAO, clarifying that efforts to develop the Complaint predated the issuance of the CAO. The Prosecution Team disputes the Dischargers' claims that the penalty is unconstitutional, or violates Porter-Cologne or the SMPA.

Dischargers' Rebuttal

The Dischargers' rebuttal introduces three additional pieces of evidence: (1) a letter from the State Lands Commission, copying staff at BCDC, notifying Mr. Sweeney that docks at the island are a hazard to navigation and must be removed; (2) the minutes from a September 24, 2016, conference, at which State Water Board Chair Felicia Marcus discussed draft State Board Procedures for Discharges of Dredged or Fill Material to Waters of the State; and (3) a comment letter from the Army Corps of Engineers on these proposed Procedures. The Dischargers assert that the first piece of evidence supports the argument that the ACL is retaliatory in nature because BCDC is copied on it, that the second piece of evidence undermines the Prosecution Team's interpretation of which conduct constituted illegal fill, and that the third piece of evidence indicates that only the Army Corps of Engineers can enforce alleged unauthorized fill activities.

Prior to the hearing, evidentiary objections raised by the Dischargers and the Prosecution Team will be ruled on by the Board Chair in consultation with the Advisory Team.

At the hearing, the Regional Water Board will have the opportunity to affirm, reject, or modify the ACL set forth in the Tentative Order. The Advisory Team will be available to provide legal or technical advice to the Board members.

APPENDICES: A. Tentative Order Imposing Administrative Civil Liability