

EXHIBIT A

Alleged Violations and Factors in Determining Administrative Civil Liability

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

The State Water Resources Control Board Water Quality Enforcement Policy (Enforcement Policy) establishes a methodology for assessing administrative civil liability. Use of the methodology addresses the factors required by the California Water Code (Water Code) sections 13327 and 13385, subsection (e). Each factor in the Enforcement Policy and its corresponding category, adjustment, and amount for each of the violations is presented below.

ALLEGED VIOLATIONS

Violation 1: Unauthorized Discharge of Fill - San Francisco Bay Basin Water Quality Control Plan Discharge Prohibition No. 9 and Clean Water Act Section 301

John D. Sweeney (Mr. Sweeney) and Point Buckler Club, LLC (Club) (collectively Dischargers) violated San Francisco Bay Basin Water Quality Control Plan (Basin Plan) Discharge Prohibition No. 9 and Clean Water Act section 301 (33 U.S.C. 1311) for the unauthorized discharge of fill into waters of the State and United States, during construction of a levee at Point Buckler Island (Site). Basin Plan Discharge 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, Tables 4-1 and 2-4). Under Clean Water Act section 301, it is unlawful for any person to discharge any pollutant into waters of the United States except in compliance with the Act.

Mr. Sweeney purchased the Site on April 21, 2011 (Grant Deed, APN 0090-020-010, Solano County, April 21, 2011). Starting approximately early 2014, he constructed a levee on the Site, resulting in the unauthorized discharge of approximately 8,586 cubic yards of dried and semi-consolidated fill (1,490,186 gallons) into waters of the State and United States, namely Suisun Marsh (Declaration of John D. Sweeney in Support of Ex Parte Application, Dec. 28, 2015; Point Buckler Technical Assessment of Current Conditions and Historic Reconstruction Since 1985, April 12, 2016 (Expert Report), Appendix K, Figure K-4). An aerial photo taken March 8, 2014, shows that the levee construction and related fill activities had begun by that date and if not remedied by August 10, 2016, the date a hearing is scheduled on this matter, fill material will be in place for a total of 887 days (*Id.*, Fig. K-19).

On October 7, 2014, the Club was formed with Mr. Sweeney as its president and manager, and on October 27, 2014, the Club took ownership of the Site (Secretary of State Business Search, <http://kepler.sos.ca.gov/>, accessed May 13, 2016; Declaration, *supra*; Grant Deed, APN 0090-020-010, Solano County, Oct. 27, 2014). Starting on October 27, 2014, until the August 10, 2016, for a total of 654 days, the Club has owned the Site and will have permitted the fill to remain in place.

The unauthorized discharge filled tidal channels, thereby cutting off tidal connectivity with the Site's interior tidal marshes and unreasonably affecting beneficial uses (Expert Report, Appendices J, P & Q). As it remains in place, the fill continues to cause adverse effects to the beneficial uses of Suisun and Grizzly Bays and Suisun wetland areas (Basin Plan, § 4.2, Tables 2-1 and 2-4). Accordingly, the Dischargers are in violation of Basin Plan Discharge Prohibition No. 9 and Clean Water Act section 301, and are subject to administrative liabilities pursuant to Water Code section 13385 subsections (a)(4) and (5). The Dischargers are joint and severally liable.

Violation 2: Failure to Obtain Water Quality Certification - Clean Water Act Section 401

The Dischargers violated Clean Water Act section 401 by failing to obtain a water quality certification (401 Certification) from the San Francisco Bay Regional Water Quality Control Board (Water Board) for the unauthorized activities at the Site that are adversely impacting beneficial uses. The unauthorized activities included, at a minimum, placing fill material, dock piers, and structures into tidal waters, which resulted in the discharge of fill to waters of the State and United States (Expert Report, Appendix, Table K-1). For both discharging fill material and for building a dock in navigable waters of the United States, 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 the Clean Water Act. Title 23 of the California Code of Regulations, section 3855, requires applications for 401 Certifications to be filed with the executive officer of the regional water board.

Starting at least as early as May 19, 2012, to the date of the hearing, August 10, 2016, for a total of 1545 days, Mr. Sweeney's activities resulted in fill to waters of the State and United States, and have required a 401 Certification. The Club, as owner of Site, permitted the continued fill into waters of the State and United States, and has failed to obtain a 401 Certification starting October 27, 2014, to the date of the hearing, August 10, 2016, for a total of 654 days. While the Club has owned the Site, with Mr. Sweeney as the Club's president and manager, the Dischargers excavated four crescent-shaped ponds; 2) filled the borrow ditch for a road crossing between the levee and the interior of the Site at its west end; 3) filled the tidal marsh to create a road between the levee and the water's edge at the west end of the Site; 4) mowed tidal marsh vegetation and graded the tidal marsh plain for an interior road across the Site; 5) and installed multiple structures (*Id.*, Appendix K, Table K-1, Figs. K-29 - K-40). The Dischargers have not filed an application for a 401 Certification for the unauthorized activities that resulted in a discharge of fill to waters of the State and United States. Accordingly, the Dischargers are violating Clean Water Act section 401 and are subject to administrative liabilities pursuant to Water Code section 13385, subsection (a)(5).

ADMINISTRATIVE CIVIL LIABILITY CALCULATION STEPS

STEP 1 – POTENTIAL FOR HARM FOR DISCHARGE VIOLATIONS

This step is only applicable for Violation 1 because it is a discharge violation.

The potential for harm factor considers the harm to beneficial uses that resulted or that may result from exposure to the pollutant(s) in the discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the harm or potential harm to beneficial uses; (2) the degree of toxicity of the discharge, and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: Harm or Potential Harm to Beneficial Uses

The Enforcement Policy specifies that a score between 0 and 5 be assigned based on a determination of whether direct or indirect harm, or potential for harm, from a violation is negligible (0) to major (5).

The harm and potential harm to beneficial uses is major (i.e., a score of 5). Major is assigned when there are significant impacts to aquatic life or human health, long term restrictions on beneficial uses (e.g. more than five days), or a high potential for chronic effects to human or ecological health.

The unauthorized fill to waters of the State and United States from levee construction adversely impacted beneficial uses of Suisun and Grizzly Bays and Suisun wetland areas (i.e. estuarine habitat, fish migration, preservation of rare and endangered species, fish spawning, and wildlife habitat). Additionally, construction occurred outside the work activity windows established to protect sensitive species in the Suisun Marsh (Suisun Marsh Habitat Management, Preservation, and Restoration Plan, May 2013 (Suisun Marsh Plan), Fig. 4).

Excavation of tidal marsh at the Site physically removed estuarine habitat, and the subsequent placement of 8,586 cubic yards of fill directly eliminated 2.56 acres of surface water and wetland habitat ecosystems (Expert Report, Appendices K & Q, Fig. K-4, Table Q-1). The fill has unreasonably affected and continues to threaten beneficial uses by blocking tidal action through the tidal channels and direct overland tidal flooding during higher tides to the interior tidal marsh habitat (*Id.*, Appendices F & K, Fig. K-29). As such, the limitation in immigration/emigration of aquatic organisms has caused a long-term restriction to fish spawning, fish migration, estuarine habitat, and preservation of rare and endangered species beneficial uses (*Id.*, Appendix P). The blocked tidal channels are preventing longfin smelt from being able to access spawning grounds and young salmonids (i.e., Chinook Salmon) from accessing feeding grounds. Additionally, salmonids are being exposed to a higher risk of predation due to the reduction in access to shallow water refuges as they migrate to the ocean, causing long-term restrictions on fish migration and the preservation of rare and endangered species. Lastly, blocking of the hydraulic connection between the Site and adjacent open water habitats occupied by Delta smelt has cut off the export of food material from the Site's interior wetlands, needed to support this threatened species, thereby attributing to long-term restrictions on estuarine habitat and preservation of rare and endangered species.

The Site's interior wetlands are being drained and dried out. Water quality measurements collected on March 2, 2016, by Water Board staff show elevated salinity, particularly in surface water measurements. Measurements taken inboard of the new levee and in test pits for

groundwater quality compared to those of the surrounding bay waters, demonstrate a lack of water management at the Site (Inspection Report, April 19, 2016). The resultant elevated salinity in the Site's interior surface and groundwater continue to cause detrimental and chronic harm to the Site's tidal marsh habitat, and is adversely impacting wetland productivity (vegetation growth) (Expert Report, Appendices L & Q).

Factor 2: The Physical, Chemical, Biological or Thermal Characteristics of the Discharge

The Enforcement Policy specifies that a score between 0 and 4 be assigned based on a determination of the risk or threat of the discharged material to potential receptors. It defines potential receptors as those identified considering human, environmental and ecosystem health exposure pathways.

The risk or threat of the discharge is moderate (i.e., a score of 2). Moderate is assigned when chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection.

The unauthorized discharge of fill into waters of the State and United States poses a moderate effect on environmental receptors. During the levee construction there was a high potential for sediment discharges to bury and smother organisms and aquatic and wildlife habitats (Expert Report, Appen. Q). The fill material that was discharged released a substantial amount of sediments (Joice Muck and Tidal Marsh soils) that would have suspended in the water column and over time settled out and smothered benthic organisms (Annie Mason Point Club Individual Management Plan, p. 9). Additionally, fine-grained sediments can clog the gill structures of fish, make water-column feeding difficult or impossible, and eliminate light penetration that is needed for primary production (EPA, The Biological Effects of Suspended and Bedded Sediment (SABS) in Aquatic Systems: A Review, 2003).

Factor 3: Susceptibility to Cleanup or Abatement

The Enforcement Policy specifies that if 50 percent or more of the discharge is susceptible to cleanup or abatement, then a score of 0 is assigned. A score of 1 is assigned if less than 50 percent of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated.

A score of 0 is assigned. The discharge of fill was to build up and construct a levee and it is determined that 50% or more of the fill is susceptible to cleanup or abatement.

STEP 2 – ASSESSMENTS FOR DISCHARGE VIOLATIONS

This step is only applicable for Violation 1 because it is a discharge violation.

The Enforcement Policy specifies that when there is a discharge, an initial liability amount based on a per-gallon and/or a per-day basis is determined using the sum of the potential for harm scores from Step 1 and a determination of deviation from requirement. The deviation from

requirement reflects the extent to which a violation deviates from the specific requirement that was violated.

The sum of the three factors from Step 1 is 7. The deviation from requirement is major. A major deviation from requirement is one where the requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).

Basin Plan Prohibition No. 9 and Clean Water Act section 301 prohibit discharging fill of earthen material into waters of the State and United States that is sufficient to unreasonably affect or threaten to affect water quality and beneficial uses. By placing and leaving the fill, the Dischargers have rendered these requirements ineffective in their essential function.

The resulting per-gallon and per-day multiplier factor is 0.31, based the potential for harm score and extent of deviation from requirement described above.

Initial Liability Amount

There was no adjustment of the maximum \$10/gallon because the discharge has resulted in daily detrimental impacts to the environment. The initial liability amount calculated on a per-day basis is as follows:

Per Gallon Liability: $(1,490,186 \text{ gallons} - 1000 \text{ gallons} = 1,489,186 \text{ gallons}) \times (0.31) \times (\$10/\text{gallons}) = \$4,616,477$

Per Day Liability: $\$10,000/\text{day} \times (0.31) \times (887 \text{ days}) = \$2,749,700$

Initial Liability = \$7,366,177

STEP 3 – PER DAY ASSESSMENT FOR NON-DISCHARGE VIOLATIONS

This step is only applicable to Violation 2 because it is a non-discharge violation.

The Enforcement Policy specifies that for non-discharge violations, an initial liability is determined from the maximum per day liability multiplied by the number of days in violation and a per day factor using a matrix that ranges from 0.1 to 1 corresponding to an appropriate potential for harm and deviation from requirements. The potential for harm reflects the characteristics and/or the circumstances of the violation and its threat to beneficial uses. Deviation from requirement reflects the extent to which a violation deviates from the specific requirement that was violated.

Potential for Harm

The potential for harm is major. A major potential for harm applies to violations that indicate a very high potential for harm and that involve particularly sensitive habitats.

The Suisun Marsh includes approximately 52,000 acres of managed wetlands and 6,300 acres of tidal wetlands. Historically, there has been a substantial loss of tidal wetlands in the San Francisco Estuary. Protecting existing tidal wetlands, and restoring additional wetlands for recovery of special status species of fish, mammals, birds and plants are a high priority (Suisun Marsh Plan; Recovery Plan for Tidal Marsh Ecosystems of Northern and Central California, August 2013; Suisun Marsh TMDL for Methylmercury, Dissolved Oxygen and Nutrient Biostimulation, September 2012). The tidal marsh wetlands of Suisun Marsh, including those at the Site, provide beneficial uses including estuarine habitat, aquatic and wildlife habitat, fish spawning habitat, fish migration (refuge), and the preservation of rare and endangered species (Basin Plan). The Water Board has a vested interest in protecting tidal wetlands and making sure that any development activities are authorized (typically via a 401 Certification) and conducted in such a manner as to avoid, minimize and mitigate for impacts.

The Water Board was denied its opportunity to review an application for 401 Certification for activities at the Site, inspect work, and establish necessary requirements and mitigation to minimize and offset water quality impacts and threats to beneficial uses. As such, the harm that occurred is to the regulatory program. Had an application for 401 Certification been received, a critical analysis of the activities on the Site would have allowed the Water Board to require appropriate mitigation measures aimed at protecting beneficial uses of water.

Deviation from Requirement

The deviation from requirement is major. A major deviation from requirement is one where the requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions). The Dischargers' failure to engage with the Water Board and other agencies about their plans to develop the Site and, specifically, submit an application for a 401 Certification, has rendered the requirement ineffective and unable to protect water quality and beneficial uses.

The resulting per day factor is 0.85 based on the above potential harm and deviation from requirement from the matrix in Table 3 of the Enforcement Policy.

Initial Liability Amount

For violations lasting more than 30 days, the Enforcement Policy allows adjustment of the per-day basis.

A multiday adjustment is appropriate because Violation 2 did not cause daily detrimental impacts. For this adjustment, the Enforcement Policy provides that an initial liability shall be assessed for the first day of the violation, plus each five-day period until the 30th day, plus each 30 days of violation thereafter. Thus, the total 1545 of days of violation is adjusted to 57 days for assessment purposes.

Initial Liability (collapsed): $\$10,000/\text{day} \times (0.85) \times (57 \text{ days}) = \$484,500$

STEP 4 – ADJUSTMENTS TO INITIAL LIABILITY

The remaining factors in Steps 4 through 10 apply to both Violation 1 and 2.

The Enforcement Policy specifies that three additional factors should be considered for modification of the amount of initial liability: the discharger's culpability, efforts to clean up or cooperate with regulatory authority, and the discharger's compliance history.

Culpability

The Enforcement Policy specifies that higher liabilities should result from intentional or negligent violations as opposed to accidental violations. It specifies use of a multiplier between 0.5 and 1.5, with a higher multiplier for intentional or negligent behavior.

Violation 1: The culpability multiplier is 1.3. Mr. Sweeney has the experience to know that filling waters of the State and United States requires authorization from multiple agencies. In June 2011, and prior to his conduct in this matter, Mr. Sweeney engaged with the Army Corps of Engineers (Corps) and the Suisun Resource Conservation District (SRCD), to gain authorization for levee work at Chipps Island (Club 915) as the new owner. However, Mr. Sweeney did not adhere to conditions of Regional General Permit 3 (RGP3), despite direction from the Corps and SRCD, and his levee work resulted in an illegal discharge of fill. He received a Notice of Alleged Violation from the Corps on October 24, 2011. Given his prior experience with the Corps and SRCD at Club 915, and past notice of the consequences of unauthorized discharge, Mr. Sweeney's conduct at the Site was unreasonable and demonstrated a willful indifference to regulatory process that is intended to protect water quality, beneficial uses, and to prevent illicit discharges.

The Club, acting by and through its president and manager Mr. Sweeney, failed to respond any differently once it owned the Site. Therefore, the recommended multiplier for the Club is likewise 1.3.

Violation 2: The culpability multiplier is 1.3. Mr. Sweeney is an active member of the Suisun Marsh community and involved with a number of duck clubs including the following:

- Club 915 – Fin and Feathers Club owned by Chipps Island Sport and Social Club, LLC;
- Club 910 – Dante Farms Club owned by SWS Chipps Island, LLC; and
- Club 940 – Spinner Island Hunt + Social Club owned by Spinner Island, LLC. (John Sweeney, letter to Suisun Marsh Club Owners, April 10, 2016)

Mr. Sweeney has prior experience in gaining permit authorization under RGP3 from the Corps through coordination with the SRCD for performing maintenance activities that would discharge fill into waters of the State and United States (i.e., Suisun Marsh). Mr. Sweeney communicated through a series of emails with the SRCD and Corps from June 20, 2011, through June 24, 2011, to gain work authorization for maintenance of a levee breach at Club 915. Mr. Sweeney submitted a Corps authorization request for urgent and unforeseen maintenance activity on June 23, 2011, to the SRCD who then sent it to the Corps via email. Authorization was granted and

the SRCD forwarded the authorization to Mr. Sweeney informing him, “You are ok to proceed fixing the breach as long as you follow the RGP3 and Biological opinion.” (Orlando Rocha, SRCD, June 24, 2011 3:57 PM email; June 20, 2011 through June 24, 2011 emails). Mr. Sweeney temporarily repaired the exterior levee on Chipps Island with a cargo container which is not a covered method under RGP3 and this action resulted in a Notice of Alleged Violation from the Corps for illegal fill to waters of the United States on October 24, 2011. Through this process, Mr. Sweeney gained knowledge of the regulatory framework for work in the Suisun Marsh and the permitting requirements of the Corps and SRCD. Given his prior experience with the permit authorization process, Mr. Sweeney was intentionally negligent in not applying for permits for his work at the Site. Had Mr. Sweeney coordinated with the SRCD for work at the Site he would have been made aware of other permitting required for the work performed, including 401 Certification. Additionally, in a personal Facebook posting, Mr. Sweeney states that he plans to develop the Site without permits, further demonstrating his disregard for regulatory process (Sweeney, John. Facebook. Feb. 22, 2014).

At no point has the Club taken steps to ameliorate Mr. Sweeney’s failure to obtain a 401 Certification. The same culpability multiplier is therefore appropriate for both Dischargers.

Cleanup and Cooperation

The Enforcement Policy provides for an adjustment to reflect the extent to which a violator voluntarily cooperated in returning to compliance and correcting environmental damage. The adjustment is a multiplier between 0.75 and 1.5, with a higher multiplier where there is a lack of cooperation.

The cleanup and cooperation multiplier for both Violations 1 and 2 is 1.1. This factor is designed to measure the Dischargers’ willingness to return the Site to compliance and is not based on a discharger exercising its rights to contest the administrative or civil penalty process. No cleanup has been performed to date, although the Dischargers are fully aware of the unauthorized fill, and no efforts have been taken to restore the Site to its condition prior to the unpermitted activities. Additionally, the Dischargers have only been minimally cooperative.

The Regional Board issued Cleanup and Abatement Order R2-2015-0038 on September 11, 2015. Mr. Sweeney and Club counsel Lawrence Bazel and John Briscoe met with the Water Board on October 7, 2015, and November 20, 2015, to discuss the regulatory requirements and unauthorized fill activities (note the Club petitioned the Cleanup and Abatement Order to the State Board on October 11, 2015, and the order was rescinded January 5, 2016.). During the second meeting, which also included BCDC, all parties agreed that in order to determine specific regulatory authority, a technical approach was required. The Club agreed to provide a technical report to the Water Board that included a topographic survey, wetland delineation, and other pertinent information from the Site. In letters between the Club on December 1, 2015, and the Water Board on December 9, 2015, the earlier meetings agreements and expectations for the technical report were formalized with a due date of February 15, 2015.

During early January 2016, the Water Board Prosecution Team concluded that the Club would likely not provide the technical report by the February deadline, thus delaying cleanup and resolve to the dispute. During email correspondences with Lawrence Bazel starting January 22,

2016, Water Board staff requested permission 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 Lawrence Bazel, Water Board staff noted that informal access to the island had not been granted or denied for the fourth time and expressed the urgency to visit the island during the proposed dates due to tides, seasonal changes in vegetation, and the need to confirm and augment existing data. 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, and the inspection warrant was executed on March 2, 2016, to investigate water quality, survey topography and map the extent of fill material, document site activities, and assess the condition of wetland soils and vegetation (Solano Superior Court Inspection Warrant Misc002135).

Neither Mr. Sweeney nor the Club ever submitted the technical report due February 15, 2016. The Dischargers have not demonstrated interest in restoring any part of the Site, and they have only discussed plans to obtain after-the-fact permits. Additionally, the Water Board has not received any application for a 401 Certification for any work, despite communications between the Dischargers and the Water Board.

History of Violations

The Enforcement Policy provides that where there is a history of repeat violations, a minimum multiplier of 1.1 should be used.

Violation 1: The history multiplier is 1.0 because the Dischargers have no past violations with the Water Board.

Violation 2: The history multiplier is 1.0 because the Dischargers have no past violations with the Water Board.

STEP 5 – DETERMINATION OF TOTAL BASE LIABILITY

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 2 for discharge violations and in Step 3 for non-discharge violations.

Violation 1 (Volume):

Total Base Liability = \$4,616,477 (Initial Liability) x 1.3 (Culpability Multiplier) x 1.1 (Cleanup and Cooperation Multiplier) x 1.0 (History of Violations Multiplier)

Total Base Liability = \$6,601,562

Violation 1 (Days):

Total Base Liability = \$2,749,700 (Initial Liability) x 1.3 (Culpability Multiplier) x 1.1 (Cleanup and Cooperation Multiplier) x 1.0 (History of Violations Multiplier)

Total Base Liability = \$3,932,071

Violation 2:

Total Base Liability = \$484,500 (Initial Liability) x 1.3 (Culpability Multiplier) x 1.1 (Cleanup and Cooperation Multiplier) x 1.0 (History of Violations Multiplier)

Total Base Liability = \$692,835

COMBINED TOTAL BASE LIABILITY

The combined Total Base Liability Amount for Violations 1 and 2 is: \$6,601,562 + \$3,932,071 + \$692,835 = **\$11,226,468**.

STEP 6 – ABILITY TO PAY AND TO CONTINUE IN BUSINESS

The Enforcement Policy provides that if there is sufficient financial information to assess the violator's ability to pay the Total Base Liability or to assess the effect of the Total Base Liability on the violator's ability to continue in business, then the Total Base Liability amount may be adjusted downward if warranted.

In this case, Water Board Prosecution Staff has sufficient information to suggest the Dischargers have the ability to pay the proposed liability. To assess the Dischargers' ability to pay or ability to continue in business, the Water Board staff utilized publically available resources to conduct a preliminary analysis. The Dischargers currently hold at least three properties either in the Sweeney family trust, or under the Point Buckler Club, LLC name, with a combined assessed value of over \$3 million. The Site is one such property with a county-assessed value of \$159,901 (as of 2014). Based on the debt leveraged against the property by Mr. Sweeney and the Club, the actual property value is assumed to be at least \$1.2 million (equal to the lien amount) (Deed of Trust, APN 0090-020-010, Solano County, recorded December 9, 2015.) No additional liens were found on the Site in the public records search and therefore, the property is considered unencumbered for the purposes of this analysis. Debt secured against the property was financed by Mr. Sweeney and is assumed to retain its value in cash form or land improvements. The second property has a county-assessed value of \$2,999,999 (Marin County). According to public record, the property may be encumbered, as two refinance recordings were noted for \$1.2 million in 2005, and \$159,000 in 2007. Assuming these loans have been reduced by one-third based on recurring payments, the property is assumed to be leveraged to approximately \$906,000, leaving approximately \$2.1 million in equity. An additional property, which has been used as Mr. Sweeney's listed address, (171 Sandpiper Dr., Pittsburg) is held under the family trust name with an undisclosed assessed value. For the purposes of this analysis, the property value can be assumed to be the sale price of \$200,000 (2009). Sweeney has also sold several properties within the last 10 years with undisclosed financial gains.

In addition to real estate, Mr. Sweeney also holds title on a 100 foot steel hull vessel, valued at \$895,000 based on the listed sales price (Delta Landing Craft Webpage, Accessed May 12, 2016. <http://www.deltalandingcraft.com/Links.html>). Additional assets have been identified including heavy construction equipment, additional watercraft, vehicles, and cash accounts; however, these

assets were not used in this analysis based on the complexity of ownership and availability of documentation.

Based on the information available, the Dischargers have various types of tangible assets that could be used to satisfy penalty payment. The analysis described above has revealed assets conservatively valued at \$4.2 million. If the Dischargers contest their ability to pay the recommended liability, and submit sufficient financial information that would allow the Water Board to consider a reduction other than what is suggested by the Prosecution Staff (see Other considerations – Tentative Cleanup and Abatement Order Issued Concurrently, *infra*), the Prosecution Team reserves the right to suggest an appropriate modification. The Dischargers may have additional financial documents relating to business revenue and assets, and personal asset valuation not currently available to the Prosecution Staff.

STEP 7 – OTHER FACTORS AS JUSTICE MAY REQUIRE

The Enforcement Policy provides that if the Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for “other factors as justice may require.” The Enforcement Policy includes the costs of investigation and enforcement as “other factors as justice may require,” that should be added to the liability amount.

Other Considerations – Staff Costs

Water Board Prosecution Staff considered staff costs in determining the final proposed liability. Prosecution Staff incurred \$41,641 in staff time to conduct a site visit, investigate this case, coordinate with other agencies, and prepare this analysis and supporting information. This consists of time spent by six members of the Prosecution Staff (including two Environmental Scientists, two Water Resource Control Engineers, one Engineering Geologist, and an Assistant Executive Officer) based on the low end of the salary range for each classification at a current total of 613 hours. Costs will continue to accrue during any settlement and/or hearing. The Enforcement Policy gives the Water Board discretion to consider staff costs in relation to the total base administrative civil liability. Although the final amount for staff costs cannot be determined until completion of the matter, such costs could be quite substantial when additional investigation and analysis is required or if there is a hearing on this matter before the Water Board.

Additionally, expert consultants were hired at a cost of approximately \$115,000 to perform a technical analysis of the Site including: compiling historic aerial imagery, performing a topographic survey/analysis, an ecological impact analysis, and compiling a thorough technical report that explains conditions prior to Site development up to its current state.

Other Considerations – Joint and Several Liability

For the penalties associated with both Violations 1 and 2, the Prosecution Team recognizes that Mr. Sweeney caused the fill, has operated the Site the entire time up to the present, and owned the Site up until the Club purchased the Site, and that the Club owned the Site from October 27,

2014 to the present. The Prosecution Team is not recommending a penalty of more than \$11,226,468 and recognizes that the Water Board does not allocate liability between parties and takes no position regarding contribution positions between parties.

Other considerations – Tentative Cleanup and Abatement Order Issued Concurrently

The Prosecution Team is recommending a penalty that is appropriate based on the conduct alleged in the complaint, and consistent with the Enforcement Policy. The violations alleged and the recommended penalty reflect the need to deter these Dischargers and similarly situated dischargers from ignoring permit requirements and harming critical wildlife habitat. While the penalty is significant, it is line with other actions taken by this Regional Water Board and the resulting harm caused by Dischargers' conduct. In addition, the Prosecution Team considered the expense the Dischargers are likely to incur in complying with the Tentative Cleanup and Abatement Order and is recommending reducing the penalty from \$11,226,468 to \$4,600,000. This reduced amount is the minimum staff can support and is consistent with the minimum liability associated with the volume of fill discharged.

The Total Base Liability after adjusting for other factors is \$4,600,000.

STEP 8 – ECONOMIC BENEFIT

The Enforcement Policy requires recovery of the economic benefit gained associated with the violations plus 10 percent. Economic benefit is any savings or monetary gain derived from the act or omission that constitutes the violation.

The adjusted Total Base Liability from Step 7 is unchanged because it is more than ten percent higher than the estimated economic benefit.

Prosecution Staff contends that while the Dischargers failed to obtain proper permits, the Dischargers' actions would never have been authorized. For the purposes of assessing the economic benefit, it is reasonable to assume that had the construction activities been allowable under current permitting guidelines, the Dischargers avoided costs associated with obtaining proper coverage. Regional Board Prosecution Staff estimate the cost of obtaining a 401 Certification to be approximately \$63,450. Mitigation would also have been required, with basic estimates to purchase credits from Elsie Gridley Mitigation Bank at approximately \$200,000 per acre. Additionally, annual fees associated with the 401 Certification and post-construction monitoring would be approximately \$900. This analysis does not include additional costs associated with hiring a consultant to properly draft the permit application and implement permit conditions, and costs associated with monitoring. Assuming 10% of Point Buckler island footprint (51.5 acres) required mitigation, the total avoided permitting costs amount to approximately \$1,093,450 plus \$900 for one year of additional fees. The BEN financial model provided by the United States Environmental Protection Agency was used to compute the economic benefit of noncompliance. Cost estimate and other assumptions are detailed in the Economic Benefit Analysis tables created by Bryan Elder (May 12, 2016). For computational purposes, the penalty payment date was established as August 10, 2016. Changes to this date will

affect the total economic benefit. Based on specific assumptions within the model, the total economic benefit of the failure to obtain permit coverage is approximately \$809,864.

In actuality, the Dischargers realized an economic benefit related to the profits derived from unauthorized land improvements. The Dischargers developed the Site with the intention of selling membership interest in an exclusive recreational club – Point Buckler Club. According to the Club’s Facebook page, there are 10 memberships available for purchase (Point Buckler Club, Facebook. May 12, 2016). Although price and interest details are not specified, Mr. Sweeney operates another club (Spinner Island Club), which advertises memberships with a 5% ownership interest (Spinner Island Hunt + Social Club Website, Accessed on May 12, 2016. <http://spinnerisland.com/ownership.html>). Being a similar sized island (Spinner Island - 55 acres, Point Buckler – 51.5 acres), it can be assumed that a similar number of memberships are available. Therefore, it is assumed that 50% of the real property related to Buckler Point Club is available for membership interest. Assuming the Dischargers have sold those memberships; membership sales equal 50% of the land and business value. On November 20, 2015, Mr. Sweeney loaned Point Buckler Club, LLC \$1.2 million using the Point Buckler property as collateral (Deed of Trust, Solano County, Assessor’s Parcel Number (APN) 0090-020-010, Solano County, recorded Dec. 9, 2015). This conservatively assumes the land value to be approximately equal to the loan amount, or \$1.2 million. Based on this assessment, the membership value is equal to \$600,000. Considering some individual California Delta duck club memberships can be in excess of \$100,000, this is a fair and reasonable estimate (Duck Club Listing Website, Accessed on May 12, 2016. <http://www.wtmorgan.com/properties.htm>). Therefore, it is likely the Dischargers sold, or will sell, memberships for profit in excess of \$600,000.

In summary, the Dischargers avoided costs associated with proper permitting and gained financially from illegal land improvements. The total economic benefit is estimated to be \$1,409,864.

If more information is gathered through the discovery process or other ways in anticipation of a contested hearing, this analysis and amount may change. Any new information will be added to the evidentiary record in accordance with the Hearing Procedures or Advisory Team’s approval.

STEP 9 – MAXIMUM AND MINIMUM LIABILITY

a) *Minimum Liability*

The minimum administrative civil liability for the violations is \$1,550,850. This is based on the Dischargers’ economic benefit plus 10 percent pursuant to California Water Code Section 13385.

b) *Maximum Liability*

The maximum administrative civil liability for Violation 1 is \$23,761,860 , based on the maximum allowed by Water Code section 13385: \$10,000 for each day in which the violations occurs; and (2) \$10 for each gallon exceeding 1,000 gallons that is discharged

and not cleaned up. For violation 1 the adjusted Total Base Liability is within the maximum liability allowed by statute; thus is unchanged.

The maximum administrative civil liability for Violation 2 is \$15,450,000, based on the maximum allowed by Water Code section 13385: \$10,000 for each day in which the violation occurs. For violation 1 the adjusted Total Base Liability is within the maximum liability allowed by statute; thus is unchanged.

STEP 10 – FINAL LIABILITY

The final liability proposed is **\$4,600,000** for Violations 1 and 2, based on consideration of the penalty factors discussed above. It is within the minimum and maximum liabilities.