By Fax

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ENDORSED FILED
Clerk of the Superior Court
DEC 23 2015
J. WOOD
By _____ DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SOLANO

POINT BUCKLER CLUB, LLC, Petitioner and Plaintiff, v. BRUCE H. WOLFE, Executive Officer of the California Regional Water Quality Control Board, San Francisco Bay Region; CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN FRANCISCO BAY REGION; and DOES 1 through 20; Respondents and Defendants.	No. FCS046410 PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF ASSIGNED TO JUDGE Kinnicutt FOR ALL PURPOSES

INTRODUCTION

1. Point Buckler Club, LLC ("Plaintiff" or the "Club") owns a small island, often called "Point Buckler", in Suisun Marsh. Point Buckler has been used as a duck club since at least the 1940s, although in recent years the island has fallen into disrepair. Plaintiff wants to rejuvenate the duck club.

2. Nearly all of the interior of Point Buckler is above high tide. In order to use the island as a duck club, water has to be pumped onto the island and held at a level above high tide by a levee system. In 2014, Plaintiff did work (the "Work") to repair and maintain that levee system. Material was excavated from an interior ditch and placed on the existing levee or, where part of the levee system had been breached or eroded away, in the breach or in an appropriate area above the

debris line.

3. The Work was done in accordance with the individual management plan that had been prepared for the island (the "Plan") and certified by the San Francisco Bay Conservation and Development Commission ("BCDC") as being in conformity with the Suisun Marsh Preservation Act.

4. Nevertheless, in September 2015, the California Regional Water Quality Control Board, San Francisco Bay Region (the "Regional Board"), and Bruce H. Wolfe, in his capacity as Executive Officer of the Regional Board (jointly "Defendants"), issued Cleanup and Abatement Order No. R2-2015-0038 (the "Order") to stop and undo the Work. The Order requires the Club to submit a "Corrective Action Workplan" (the "Workplan"), now due on January 1, 2016, that is "acceptable to the Regional Water Board Executive Officer" and "that includes the following":

> A workplan proposal for corrective actions designed to: (a) restore tidal circulation to all of the tidal channels and interior marsh habitat that existed prior to the Discharger's levee construction activities; and (b) provide compensatory mitigation habitat to compensate for any temporal and permanent impacts to the functions and values provided by the impacted wetlands, tidal marshlands, and drainage channels impacted by the Discharger's levee construction, vegetation removal, and other Site development activities.

5. This provision, if implemented, would prevent Plaintiff from maintaining duck ponds on the island or otherwise operating the island as a duck club.

6. Plaintiff have asked Defendants to extend the deadline of January 1, 2016 so that talks may continue about the need for this provision, but Defendants have refused to extend the deadline.

7. Due process requires a government agency to hold a hearing before, or in some cases after, depriving a person of a property interest. Here, Defendants have refused to hold any hearing, and have therefore violated the due-process protections of the United States and California Constitutions.

8. Due process also requires that a person receive a fair hearing. When a government agency is the decision maker, it must separate its decision-making functions from its prosecutorial functions, and prohibit ex parte communications between the two groups. Here Defendants did not separate its decision-making from its prosecutorial functions, and allowed ex parte communications

between the two groups, thereby violating the due-process protections of the United States and California Constitutions.

9. The Suisun Marsh Preservation Act provides for the protection of duck clubs, and it requires state agencies, including the Regional Board, to act consistently with its provisions. By ordering Defendants to take action that would prevent the island from being used as a duck club, Defendants acted inconsistently with, and thereby violated, the Suisun Marsh Preservation Act.

10. The Suisun Marsh Preservation Act gives primary responsibility for the lands at issue to the California State Lands Commission. Defendants violated this act by not even consulting with, much less giving primary responsibility to, the State Lands Commission.

11. The Porter-Cologne Act gives the Regional Board authority to issue cleanup and abatement orders in some situations in which there is a discharge of "waste". The Work was not a discharge of waste. The Regional Board therefore exceeded its authority in violation of the Porter-Cologne Act.

12. The Regional Board's authority to issue cleanup and abatement orders is limited to situations in which the discharge of waste creates a condition of pollution. Here the Work did not create a condition of pollution. The Regional Board therefore exceeded its authority in violation of the Porter-Cologne Act.

13. Because of these violations, and others, Plaintiff have filed a petition (the "State Board Petition") with the State Water Resources Control Board (the "State Board"), which has authority to review decisions of the Regional Board. Plaintiff asked the State Board to stay the Order, and to act on that request by October 30, 2015. The State Board has not ruled on the stay request or the petition.

14. Because the State Board has not acted on the stay request, Plaintiff requests that this Court stay the Order pending the State Board's decision on the Petition.

15. If the State Board dismisses or denies the Petition, Plaintiff requests that this Court set aside the Order and issue a writ of mandate and other injunctive and declaratory relief.

PARTIES

16. The Club is a California limited liability company authorized to do business in

California.

17. Bruce H. Wolfe is the Executive Officer of the Regional Board.

18. The Regional Board is an agency of the State of California.

19. The true names of Does 1 through 20 are unknown to Plaintiff, who therefore sue them under these fictitious names. Plaintiff are informed and believe that each of the Does is responsible in some manner for the events that give rise to this suit, and are liable in some manner for those events.

JURISDICTION AND VENUE

20. A superior court has jurisdiction over claims brought under Code of Civil Procedure ("CCP") § 1094.5, Water Code § 13330, and CCP § 1085.

21. Venue is proper in the County of Solano under CCP § 392(a)(1) and under CCP § 393 because Point Buckler is located in Solano County, California.

ADDITIONAL FACTS

22. Point Buckler has been known by other names, including Annie Mason Point.

23. According to aerial photographs, the levee system at Point Buckler was in place by 1940. Levee systems are used by duck clubs to control the depth of water for the purposes of growing selected plants that provide food for ducks and other waterfowl, and to provide habitat for ducks and other waterfowl.

24. In the 1970s, the California Legislature Acted to protect the Suisun Marsh. In 1974, it directed BCDC and the California Department of Fish and Game to prepare the Suisun Marsh Protection Plan "to preserve the integrity and assure continued wildlife use" of Suisun Marsh.

25. The Suisun Marsh Protection Plan, which was published in 1976 and updated in 2007, emphasizes the importance of duck clubs to Suisun Marsh. It notes that duck clubs "are a vital component of the wintering habitat of waterfowl migrating south".

26. In 1977, the Legislature enacted the Suisun Marsh Preservation Act, which directs BCDC to implement the Suisun Marsh Protection Plan. The Suisun Marsh Preservation Act exempts from its permitting requirements work specified by an individual management plan certified by BCDC.

27. According to documents obtained from BCDC, the Plan was prepared in the 1980s. According to BCDC, the Plan was certified by BCDC in accordance with the Suisun Marsh Preservation Act.

28. The Plan specifies that the levees at Point Buckler would be maintained and repaired.

29. In the 1980s, the California Department of Water Resources ("DWR") prepared an environmental impact report ("EIR") in support of its plans to divert water from the Sacramento-San Joaquin Delta to areas south of the Delta. These diversions, the EIR recognized, would tend to raise the salinity level in the Suisun Marsh, which would harm duck clubs there. In mitigation, DWR identified several projects to assist the duck clubs. One of those projects was the installation and maintenance of a pump on Point Buckler. This pump would assist in the flooding of the island and the maintenance of appropriate salinity levels for duck-friendly vegetation.

30. A pump was installed at the island, along with a generator to power it, but the pump and generator are no longer operable.

31. In 2014, after the Work was done, several agencies raised concerns about whether it was done in accordance with all applicable requirements. Because of these concerns, the Club has not proceeded with the additional work needed for the duck club, which would include discing the soils, planting vegetation that would provide food for the ducks, installing a new pump, and flooding parts of the island.

32. In September 2015, the Regional Board issued the Order. The Order specifies, among other things, that the Workplan be submitted.

33. The cost and effort required to prepare and implement this workplan would be substantial. Third parties would need to be hired. Depending on how Defendants interpret the Order, the work required to prepare and implement the Workplan could have a cost or value exceeding $100,000, and even $1,000,000.

34. Mitigation habitat in Suisun Marsh costs hundreds of thousands of dollars per acre.

35. Plaintiff has sold memberships in the Club with the intent that the island would be used as a duck club, as it has in the past. The Work was done to repair and maintain the facilities needed for a duck club. The Workplan would prevent Plaintiff from using the island as a duck club.

36. The Order specifies that the Workplan shall be submitted by November 1, 2015. Defendants have since extended that deadline to January 1, 2016.

37. In October and again in November, Plaintiff met with Defendants, provided a copy of the Petition, submitted additional written information, and explained that the Work was consistent with the Suisun Marsh Preservation Act and other applicable law.

38. On December 1, 2015, Plaintiff wrote Defendants and requested an additional extension of time. On December 9, 2015, Defendants denied that request and refused any extension of the deadline.

39. Before issuing the Order, the Regional Board did not hold a hearing of any sort in which Plaintiff was present. After the Order was issued, Plaintiff twice requested, in writing, that the Regional Board hold a hearing, and both times the Regional Board refused.

40. Regional Board staff have informed Plaintiff that before issuing the Order the Regional Board assembled a prosecution team and an advisory team.

41. The prosecution team communicated with the advisory team about the substance of the Order, before the Order was issued, at times when Plaintiff was not present.

42. The State Water Resources Control Board ("State Board") is authorized to review actions of the Regional Board. A timely petition (the "Petition") was filed with the State Board requesting review of the Order and asserting that the Order violated the due-process requirements of the United States and California Constitutions, as well as many other provisions of law. The State Board has informed Plaintiff that the Petition will be dismissed on January 10, 2016, unless specified events take place.

43. The Petition requested that the State Board grant a stay of the Order, and that the State Board act by October 30, 2015. The State Board has not acted on the stay request. Plaintiff has exhausted its administrative remedies.

FIRST COUNT

(Due Process)

44. Plaintiff incorporates by reference paragraphs 1 through 43 above.

45. Due process principles require reasonable notice and opportunity to be heard before

governmental deprivation of a significant property interest.

46. The Order deprives Plaintiff of significant property interests, including the use and enjoyment of its property, and of substantial amounts of money.

47. Defendants did not hold an adjudicatory hearing before issuing the Order.

48. Defendants did not hold an adjudicatory hearing after issuing the Order.

49. Defendants have violated due process by not holding an adjudicatory hearing before issuing the Order.

50. Defendants have violated due process under Federal and California law by not holding an adjudicatory hearing soon after issuing the Order.

51. Plaintiff is entitled to a stay of the Order, to a writ of mandate, and to injunctive and declaratory relief.

SECOND COUNT

(Due Process and California Administrative Procedure Act)

52. Plaintiff incorporates by reference paragraphs 1 through 51 above.

53. When an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal.

54. Consistent with these due-process requirements, the California Administrative Procedure Act generally prohibits ex parte communications and requires internal separation of functions.

55. Defendants have informed Plaintiff that a prosecution team and advisory team were created for the Order.

56. Defendants allowed, and engaged in, ex parte communications between the prosecution team and advisory team about the substance of the Order before and after the issuance of the Order. Plaintiff was not present during these communications.

57. Defendants did not internally separate the Regional Board's prosecution and advisory functions before and after issuing the Order.

58. Defendants have violated due process under Federal and California law, and the California Administrative Procedure Act, by allowing and engaging in ex parte communications

between the prosecution team and advisory team before and after the issuance of the Order.

59. Plaintiff is entitled to a stay of the Order, to a writ of mandate, and to injunctive and declaratory relief.

THIRD COUNT

(Void For Vagueness Or Lack Of Authority)

60. Plaintiff incorporates by reference paragraphs 1 through 59 above.

61. The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

62. The Order relies on penal statutes and specifically threatens penal liability.

63. To the extent these statutes authorize an Order requiring reports subjectively "acceptable" to a single person, they are unconstitutionally vague as applied. If the statutes themselves do not authorize subjectively acceptable reports, then the Executive Officer did not have authority to issue the Order.

64. Plaintiff is entitled to a stay of the Order, to a writ of mandate, and to injunctive and declaratory relief.

FOURTH COUNT

(Suisun Marsh Preservation Act: Conformity Requirement)

65. Plaintiff incorporates by reference paragraphs 1 through 63 above.

66. The Suisun Marsh Preservation Act imposes a judicially enforceable duty on state agencies to comply with, and to carry out their duties and responsibilities in conformity with, that act and the Suisun Marsh Protection Plan.

67. The Order violates this requirement because it is not in conformity with the act and the plan. The plan concludes that duck clubs are a "unique resource" and "a vital component of the wintering habitat for waterfowl migrating south". It says that duck clubs should be encouraged, and that land and water areas should be managed to provide "habitat attractive to waterfowl" and to improve "levee systems".

68. The act specifies that individual management plans should be prepared for each duck

club, and that development consistent with an individual management plan can be implemented without a marsh development permit.

69. The Order concludes that the improvement of levees at the property is a condition of pollution—even though the Suisun Marsh Protection Plan specifically says that land and water areas should be managed to improve "levee systems", and the individual management plan specifically calls for levee repair and maintenance at this very island.

70. The Order requires that tidal circulation be restored, even though the individual management plan calls for seasonal flooding, which would require levees that prevent tidal circulation.

71. Because the Order would prohibit actions that the Suisun Marsh Preservation Act and Suisun Marsh Protection Plan specifically call for, the Order is not "in conformity" with the Suisun Marsh Preservation Act and Suisun Marsh Protection Plan.

72. The Order therefore violates the Suisun Marsh Preservation Act.

73. Plaintiff is entitled to a stay of the Order, to a writ of mandate, and to injunctive and declaratory relief.

FIFTH COUNT

(Suisun Marsh Preservation Act: Primary Responsibility Requirement)

74. Plaintiff incorporates by reference paragraphs 1 through 73 above.

75. The Suisun Marsh Preservation Act specifies that the State Lands Commission shall have the primary responsibility for carrying out the management recommendations in the protection plan on lands owned by the state and under the jurisdiction, control, or supervision of the State Lands Commission, including tidelands, submerged lands, swamp and overflowed lands, and beds of navigable rivers and streams.

76. Defendants have violated the Suisun Marsh Preservation Act by not respecting the primary responsibility of the State Lands Commission.

77. Plaintiff is entitled to a stay of the Order, to a writ of mandate, and to injunctive and declaratory relief.

SIXTH COUNT

(Water Code § 13304: Not Waste)

78. Plaintiff incorporates by reference paragraphs 1 through 77 above.

79. Water Code § 13304 authorizes a regional board to issue a cleanup and abatement order only under specified conditions.

80. The Order asserts that Defendants have authority under Water Code § 13304 because the Club allegedly has caused or permitted waste to be discharged or deposited where it has been discharged into waters of the State and created or threatened to create a condition of pollution.

81. The material placed as part of the Work is not and was not "waste", as that term is used in Water Code § 13304 and the Porter-Cologne Act.

82. Plaintiff is entitled to a stay of the Order, to a writ of mandate, and to injunctive and declaratory relief.

SEVENTH COUNT

(Water Code § 13304: Not Condition of Pollution Because Work Promotes Beneficial Uses)

83. Plaintiff incorporates by reference paragraphs 1 through 82 above.

84. Water Code § 13304 authorizes a regional board to issue a cleanup and abatement order only under specified conditions.

85. The Order asserts that Defendants have authority under Water Code § 13304 because the Club allegedly has caused or permitted waste to be discharged or deposited where it has been discharged into waters of the State and created or threatened to create a condition of pollution.

86. The Porter-Cologne Act requires regional boards to prepare basin plans that identify the beneficial uses of the waters within the drainage basins of the State of California.

87. Defendants have prepared a basin plan (the "Basin Plan") that identifies the beneficial uses of various areas of Suisun Marsh, including Grizzly Bay.

88. The beneficial uses identified in the Basin Plan for the waters relevant to the Order identify non-contact recreation and wildlife habitat as two beneficial uses of those waters.

89. The Work promotes the beneficial uses of non-contact recreation and wildlife habitat.

90. The Work did not create a condition of pollution because it promotes, rather than

harms, the beneficial uses identified in the Basin Plan for the relevant waters.

91. Plaintiff is entitled to a stay of the Order, to a writ of mandate, and to injunctive and declaratory relief.

EIGHTH COUNT

(Water Code § 13304: Not Condition of Pollution Because Work Authorized By Statute)

92. Plaintiff incorporates by reference paragraphs 1 through 91 above.

93. Water Code § 13304 authorizes a regional board to issue a cleanup and abatement order only under specified conditions.

94. The Order asserts that Defendants have authority under Water Code § 13304 because the Club allegedly has caused or permitted waste to be discharged or deposited where it has been discharged into waters of the State and created or threatened to create a condition of pollution.

95. The Work is not a condition of pollution because it is authorized by the Suisun Marsh Preservation Act.

96. Plaintiff is entitled to a stay of the Order, to a writ of mandate, and to injunctive and declaratory relief.

NINTH COUNT

(Water Code § 13304: Not Condition of Pollution Because Within Corps Permits)

97. Plaintiff incorporates by reference paragraphs 1 through 96 above.

98. Water Code § 13304 authorizes a regional board to issue a cleanup and abatement order only under specified conditions.

99. The Order asserts that Defendants have authority under Water Code § 13304 because the Club allegedly has caused or permitted waste to be discharged or deposited where it has been discharged into waters of the State and created or threatened to create a condition of pollution.

100. The U.S. Army Corps of Engineers has issued a permit issued under authority of section 404 of the federal Clean Water Act (a "Section 404 Permit") known as "Regional General Permit 3" or "RGP3".

101. RGP3 is a general permit for, among other things, work done to maintain levees at duck clubs in Suisun Marsh.

102. Defendants have certified, in accordance with section 401 of the Clean Water Act, that RGP3 is consistent with relevant California requirements.

103. The Corps has also issued a general dredging permit authorizing dredging work done by duck clubs in the Suisun Marsh, and Defendants have certified that general permit in accordance with section 401 of the Clean Water Act.

104. The Work is not a condition of pollution because it comes within permits issued by the Corps of Engineers and certified by Defendants.

105. Plaintiff is entitled to a stay of the Order, to a writ of mandate, and to injunctive and declaratory relief.

TENTH COUNT

(Water Code § 13304: Not Condition of Pollution Because CEQA Mitigation Project)

106. Plaintiff incorporates by reference paragraphs 1 through 105 above.

107. Water Code § 13304 authorizes a regional board to issue a cleanup and abatement order only under specified conditions.

108. The Order asserts that Defendants have authority under Water Code § 13304 because the Club allegedly has caused or permitted waste to be discharged or deposited where it has been discharged into waters of the State and created or threatened to create a condition of pollution.

109. In compliance with the California Environmental Quality Act ("CEQA"), and in mitigation for water diversions from the Sacramento-San Joaquin Delta, DWR has committed to install and maintain a pump on Point Buckler.

110. The purpose of the pump is to assist in maintaining a duck club, and therefore duck habitat, on Point Buckler.

111. Implicit in this mitigation provision is the concept that Point Buckler will be maintained as a duck club.

112. The Work is not a condition of pollution or nuisance because it is part of a mitigation project required by CEQA.

113. Plaintiff is entitled to a stay of the Order, to a writ of mandate, and to injunctive and declaratory relief.

ELEVENTH COUNT

(Water Code § 13304: No Jurisdiction Over Uplands)

114. Plaintiff incorporates by reference paragraphs 1 through 113 above.

115. Water Code § 13304 authorizes a regional board to issue a cleanup and abatement order only under specified conditions.

116. The Order asserts that Defendants have authority under Water Code § 13304 because the Club allegedly has caused or permitted waste to be discharged or deposited where it has been discharged into waters of the State and created or threatened to create a condition of pollution.

117. The great majority of the Work was done in upland areas that are not waters of the State.

118. Neither Water Code § 13304, nor any other authority cited in the Order, gives Defendants authority to regulate work done in areas that are not waters of the State.

119. Plaintiff is entitled to a stay of the Order, to a writ of mandate, and to injunctive and declaratory relief.

TWELFTH COUNT

(Water Code § 13330: Independent Judgment On The Evidence)

120. Plaintiff incorporates by reference paragraphs 1 through 119 above.

121. Water Code § 13330 provides that in proceedings challenging a Regional Board decision, the superior court shall use its independent judgment on the evidence.

122. The Order relies on false assertions of fact, including but not limited to the assertion that the Work dried up a tidal wetland.

123. The Order is not supported by evidence.

124. Plaintiff is entitled to a stay of the Order, to a writ of mandate, and to injunctive and declaratory relief.

THIRTEENTH COUNT

(Code of Civil Procedure § 1094.5)

125. Plaintiff incorporates by reference paragraphs 1 through 124 above.

126. CCP § 1094.5 provides that the inquiry in proceedings such as this one shall extend to

the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

127. Here Defendants have proceeded without, or in excess of, jurisdiction.

128. There was not a fair trial.

129. There was prejudicial abuse of discretion.

130. Plaintiff is entitled to a stay of the Order, to a writ of mandate, and to injunctive and declaratory relief.

FOURTEENTH COUNT

(Declaratory Relief)

131. Plaintiff incorporates by reference paragraphs 1 through 130 above.

132. The Declaratory Relief Act (CCP §§ 1060 *et seq.*) provides that where there is an actual controversy between the parties, a court may provide declaratory relief.

133. There is an actual controversy between the parties.

134. Plaintiff is entitled to declaratory relief.

PRAYER FOR RELIEF

Plaintiff respectfully requests the following relief:

1. A stay of the Order;
2. A writ of mandamus setting aside the Order;
3. Preliminary and permanent injunctive relief including but not limited to an order enjoining Defendants from taking action to enforce the Order;
4. Declaratory relief;
5. Plaintiff's costs, including attorney fees,
6. Such other relief as the Court deems just and proper.

DATED: December 23, 2015

BRISCOE IVESTER & BAZEL LLP

By:_____

Lawrence S. Bazel
Attorneys for Plaintiff
POINT BUCKLER CLUB, LLC

VERIFICATION

I, JOHN SWEENEY, declare:

I am the Manager of POINT BUCKLER CLUB, LLC and am authorized to execute this verification on behalf of it. I have read the attached petition and complaint and am familiar with its contents. The facts provided in the petition and complaint are true of my personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the statements in this verification are true and correct.

Dated: December 23, 2015

John Sweeney