Lawrence S. Bazel

From: Whyte, Dyan@Waterboards <Dyan.Whyte@waterboards.ca.gov>
Sent: Monday, February 01, 2016 4:21 PM
To: Lawrence S. Bazel
Cc: Austin, Tamarin@Waterboards
Subject: RE: Water Board Feb. 22 Mtg. and site access request

Dear Larry –

We are in receipt of your emails and attached figures sent on January 31, 2015. I appreciate you identifying issues for discussion and noting a desire to finding a way to resolving these issues. We are happy to meet with you and your client; however I must note that we would like access to Point Buckler Island beforehand so that we can gather some additional data to help inform our conversation. We are not prepared to answer many of the questions you pose in your email without a better understanding of the existing condition of the Island. I for one have not been to the Island and would like to look at the levee work and channels first hand before engaging in a conversation about the regulatory aspects of the work performed. Furthermore, since there have been a number of questions about topography of the Island and State jurisdiction, we prefer to generate this data ourselves using licensed professionals.

As mentioned in my most recent email, we request access the week of February 16, 2016, for 2 days and request some flexibility in the dates if weather conditions create a safety hazard. If there is a logistical reason why you cannot accommodate this request for that week we can come at a later date, and reschedule our February 22 meeting accordingly.

Dyan

Dyan C. Whyte
Assistant Executive Officer

California Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay St., Suite 1400
Oakland, CA 94612

From: Lawrence S. Bazel [mailto:lbazel@briscoelaw.net]
Sent: Sunday, January 31, 2016 7:27 PM
To: Whyte, Dyan@Waterboards
Cc: Austin, Tamarin@Waterboards; Matthew Bullock; Matthew Goldman
Subject: RE: Water Board Feb. 22 Mtg. and site access request

Here are the first two of the files I referred to. The third and fourth are each 8 MB, so I'll send them separately.

Larry

LAWRENCE S. BAZEL
155 Sansome Street, Seventh Floor
San Francisco, California 94104
Office: (415) 402-2700 Direct: (415) 402-2711

From: Lawrence S. Bazel
Sent: Sunday, January 31, 2016 7:21 PM
To: Whyte, Dyan@Waterboards <Dyan.Whyte@waterboards.ca.gov>
Cc: Austin, Tamarin@Waterboards <Tamarin.Austin@waterboards.ca.gov>; Matthew Bullock <Matthew.Bullock@doj.ca.gov>; Matthew Goldman <Matthew.Goldman@doj.ca.gov>
Subject: RE: Water Board Feb. 22 Mtg. and site access request

Dear Dyan,

Thanks for e-mailing me to talk about an agenda for the meeting on 22 February, and inviting me to talk about what I hope to accomplish at that meeting.

I would like to find a way to resolve this matter, and hope that the meeting will give us some sense of the path that will get us there. Although I understand that the Regional Board is very unhappy with Point Buckler Club, I'm not clear about what the real concerns are---and therefore can't intelligently respond to them. Here are my thoughts about some issues that we should put on the agenda, along with my explanation of why I'm proposing them.

1. Tidal wetlands. The Regional Board appears to think that the island consists entirely of tidal wetlands. We think that with the exception of a few small channels and the artificial ditch, the island inside the work area is not and was not tidal wetland, but rather is dry and was dry before the work was done in 2014. This issue appears to need resolution before anything else can be worked out.

Some data may be helpful here. Last October, we submitted a technical report in which Applied Water Resources used NOAA aerial photographs, taken at MHW and MLLW, to identify the parts of the island that were wet before the work was done. Figure 3 from that report, attached, shows that even at high tide water was found on the island inside the work area only in a few channels, plus the artificial ditch (which was shown in another figure). The rest of the island inside the work area was dry. I'm also attaching a figure prepared by Regional Board staff showing that, according to Lidar measurements, the great majority of the island is above MHHW. These data seem more than sufficient to establish that the great majority of the island was not tidal wetland before the work. If the Regional Board thinks differently, we could really use some information about why.

2. Drying up the island (or the wetlands). The CAO accused the club of drying up the interior of the island. We think that the areas that were dry before the work generally remain dry now, and the areas that were wet generally remain wet. The small channels remain wet, although they are no longer affected by the daily tides. The interior ditches have been expanded, and moved in places, and four small semicircles have been dug, but the result is a wetter interior, not a drier one. The rest of the area inside the levee looks no drier than it did before the work was done, as you can see from the attached aerial photos from 2013 and 2015. If the Regional Board thinks differently, we would like to know why.

3. Duck ponds and a condition of pollution or nuisance. There were duck ponds on the island for decades, and the work was done as part of an effort to repair and maintain some of the duck ponds. To issue a cleanup and abatement order here, the Regional Board would need to identify a condition of pollution or nuisance. I don't see how the duck ponds can be a condition of pollution or nuisance. They provide wildlife habitat and recreation, both of which are beneficial uses. Isn't a beneficial use pretty much the opposite of a nuisance? The Suisun Marsh Protection Act and the Suisun Marsh Protection Plan recognize that duck ponds are especially valuable because they provide food and habitat for waterfowl---food and habitat that are not provided by natural conditions. I also don't see how the Regional Board can

act consistently with the Suisun Marsh Protection Act (which it is supposed to do) if the Regional Board is prohibiting a duck club from implementing its individual management plan. Am I missing something?

4. Corrective action and restoration plan. It isn't clear to me why the club can't restore the tidal wetlands and also the duck ponds, and also maintain some uplands. In a typical 404 situation, the project proponent wants to fill wetlands in order to build a project, and the regulatory agencies want to maintain wetlands. Here the club wants to create wetlands out of uplands. I'm not clear on why the creation of wetlands is so problematical.

5. Scope of the corrective action and restoration. Some of the work consisted of placing material on an existing levee. That work is squarely within RGP3, and should not be the subject of a CAO. Is this part of the work really in dispute? Another part of the work consisted, in places where the levee had eroded away, of putting material on dry land. Is the Regional Board's main concern the placement of material, or is it more interested in something else, such as maintaining tidal flow?

Because of this uncertainty about the key issues, the club is not ready to propose specific corrective actions, mitigation, or restoration. As we come to understand the key concerns, it can have more specific proposals. It can also collect relevant data. The club has previously provided access for site visits to several regulatory agencies, including the Regional Board, and expects to provide additional access in the future, but I would prefer to postpone these discussions until after our meeting.

Thanks again for inviting my comments on the agenda, and please let me know what you think.

Larry

LAWRENCE S. BAZEL

From: Whyte, Dyan@Waterboards [mailto:Dyan.Whyte@waterboards.ca.gov]
Sent: Friday, January 22, 2016 12:55 PM
To: Lawrence S. Bazel <lbazel@briscoelaw.net>
Cc: Austin, Tamarin@Waterboards <Tamarin.Austin@waterboards.ca.gov>
Subject: Water Board Feb. 22 Mtg. and site access request

Dear Mr. Bazel,

Per your request, we will be meeting on February 22 from 10-12 at our office in Oakland to discuss Point Buckler Island. Please propose an agenda for the meeting and let us know the purpose, or what you hope to accomplish, and who you will be bringing with you. This information will help us determine which staff should attend. We would like to hear about the following items from your client:

- Proposed corrective actions for work done at the island;
- Plans for future restoration or mitigation; and
- Plans for current and long-term use of the Island.

To have a productive meeting, we need a better understanding of Point Buckler Island and request access to it. There is information about habitat, topography, construction activities, and potential impacts to waters of the State that we need before decisions can be made and we can move forward with your client. We request access to the Island on February 8 and 9 so that we have time to get more information (i.e., delineate habitats, survey topography, document the nature and extent of construction activities) before our meeting. Please let

us know no later than Wednesday, January 27, 2016, if your client consents to provide access to Pt. Buckler Island for this work. We can coordinate these activities with Point Buckler personnel, if you wish.

Thank you,

Dyan

Dyan C. Whyte
Assistant Executive Officer

California Regional Water Quality Control Board
San Francisco Bay Region
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