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STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the matter of: CLEANUP AND ABATEMENT ORDER NO. R2-2015-0038; POINT BUCKLER CLUB, LLC	No. AMENDED PETITION FOR REVIEW AND REQUEST FOR STAY (ACTION ON STAY REQUESTED BY OCTOBER 30, 2015)

TABLE OF CONTENTS

I. INTRODUCTION 1

II. IDENTIFICATION OF PETITIONER 3

III. REGIONAL BOARD ACTION TO BE REVIEWED 3

IV. DATE OF REGIONAL BOARD ACTION 3

V. STATEMENT OF REASONS WHY THE REGIONAL BOARD ACTION WAS IMPROPER 3

VI. MANNER IN WHICH PETITIONER IS AGGRIEVED 3

VII. STATE BOARD ACTION REQUESTED BY PETITIONER 4

VIII. BACKGROUND 4

A. In The 1970s, The Legislature Acted To Protect Suisun Marsh 4

B. The Suisun Marsh Preservation Act Exempts Work Specified In The Point Buckler Management Plan From A BCDC Permit 6

C. The Department Of Water Resources Provided For A Duck Club At Point Buckler As Mitigation For Its Delta Diversions 8

D. Point Buckler LLC Proceeded To Implement The Individual Management Plan Without Awareness Of Any Need For Additional Authorizations 9

E. The Work Did Not Cause Tidal Marsh To Dry Out 10

IX. POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION 11

A. The Regional Board Violated Petitioner's Due Process Rights By Refusing To Hold A Hearing 11

B. The Regional Board Violated Petitioner's Due Process Rights By Engaging In Ex Parte Communications And Violating The Separation-Of-Functions Rule 14

C. The Regional Board Violated The Void-For-Vagueness Doctrine 15

D. The Regional Board Violated The Conformity Requirement Of The Suisun Marsh Preservation Act 16

E. The Regional Board Violated The Primary Responsibility Provision Of The Suisun Marsh Preservation Act 17

F. The Regional Board Violated Water Code § 13304 And Therefore Lacked Authority To Issue The Order 17

1. The Work Is Not A Condition Of Pollution Because It Promotes, Rather Than Harms, The Beneficial Uses 18

2. The Work Is Not A Condition Of Pollution Because It Is Authorized By The Suisun Marsh Preservation Act 19

3. The Work Is Not A Condition Of Pollution Because It Comes Within Permits Issued By The Corps Of Engineers and Certified By The Regional Board 20

4. The Work Is Not A Condition Of Pollution Because It Is A Mitigation Project Required by CEQA 21

5. The Construction Material Is Not "Waste" 23

G. The Factual Assertions In The Order Are Not Supported By Substantial Evidence 25

H. The Demand For Restoration Of Tidal Circulation Is An Abuse Of The Regional Board's Discretion 25

X. TRANSMITTAL OF PETITION TO REGIONAL BOARD 26

XI. REQUEST FOR STAY 26

A. Substantial Harm To The Petitioner 26

B. No Substantial Harm To Other Persons Or The Public Interest 26

C. Substantial Questions Of Fact Or Law 27

XII. CONCLUSION 27

I. INTRODUCTION

Petitioner Point Buckler Club, LLC would like to restore a duck club on the island it owns in the Suisun Marsh. This effort should be easy. The Suisun Marsh Preservation Act is extremely duck-club friendly. It specifically exempts duck clubs from obtaining a marsh development permit when the work is consistent with an individual management plan certified by the San Francisco Bay Conservation and Development Commission ("BCDC"). Here there is a certified plan, and the work is consistent with it.

The Suisun Marsh Protection Plan makes clear that duck clubs are especially favored. It recognizes that duck clubs are a "vital component" of the wintering habitat of migrating waterfowl because they encourage production of preferred waterfowl food plants that would not otherwise be available. The Water Quality Control Plan for the San Francisco Bay Basin ("Basin Plan") recognizes these values by including wildlife habitat and noncontact recreation among the beneficial uses for Grizzly Bay, where the island is located.

The work at issue—digging out interior ditches and using the material to maintain or replace existing levees—is generally authorized by the U.S. Army Corps of Engineers and certified by the Regional Board, which has issued section-401 certifications for two permits. These permits authorize hundreds of thousands of cubic yards of material to be excavated from interior ditches and used for the purposes of maintaining and replacing levees in the Suisun Marsh.

If for no other reason, restoration of the duck club at Pint Buckler should be encouraged because it is a mitigation measure imposed by the State Water Resources Control Board ("State Board") and Regional Water Quality Control Board for the San Francisco Bay Region ("Regional Board") on the California Department of Water Resources ("DWR") for water diversions from the Delta.

Nevertheless, the Regional Board has been duck-club-hostile. If there were any irregularity in any permitting needed for the duck club, the Regional Board could have identified that irregularity and demanded that it be resolved. But it has not shown an interest in correcting permit irregularities, and certainly has not given Petitioners an opportunity to make corrections. Instead, with almost no preamble, the Regional Board has issued Cleanup and Abatement Order No. R2-2015-0038 (the

"Order"), which requires Petitioner to restore tidal circulation to the interior of the island. This Order kills the duck club, which at times needs to restrict tidal circulation and raise the water level within the island in order to flood the duck ponds. The island is unusual. The duck ponds are above high tide, and have been flooded by maintaining the levees, closing the tide gates, and pumping water into the island. As part of its mitigation, DWR provided the pump.

Worse still, the Regional Board killed off the duck club in violation of the Constitutional due process rights of Petitioner and its owners. The Regional Board has taken Petitioner's property without an opportunity for a hearing, in which Petitioner could have reviewed whatever evidence the Regional Board has obtained—the Regional Board has not presented its evidence to Petitioner—and provided information that would have assisted the decision-maker.

The Regional Board has also engaged in impermissible ex parte communications. Staff who are prosecuting this action have communicated with the advisory team, and apparently with the decision-maker, outside of the Petitioner's presence.

The Regional Board has violated the Suisun Marsh Preservation Act by taking action inconsistent with that act.

The Regional Board has violated the Porter-Cologne Act by issuing a cleanup and abatement order without meeting the conditions prescribed by Water Code § 13304. The Board justifies the Order on the grounds that waste has been discharged into waters of the state and has created a condition of pollution, but the work at issue was not and cannot be a condition of pollution. It cannot be a condition of pollution because the Legislature has authorized the work through the Suisun Marsh Protection Act, because the Regional Board and State Board have called for the work as a mitigation measure to be implemented by DWR, and because the Regional Board has issued two section-401 certifications in which it necessarily concluded that this type of work does not create a condition of pollution. Also, the material used was not a waste.

The Order violates California Environmental Quality Act ("CEQA") because it interferes with the implementation of required mitigation.

The Order violates the Constitutional void-for-vagueness doctrine because it requires reports that must personally satisfy an individual. This standard is too vague to pass Constitutional muster.

Petitioner requests a stay. Because of the short deadlines in the Order, Petitioner requests that the State Board act on the stay request by October 30, 2015, which is the day before the first submission in the Order is due.

The State Board should rescind the Order on the grounds that it violates the due-process requirement for a hearing, it violates the due-process prohibition on ex parte communications and requirement for separation of functions, it violates the Suisun Marsh Preservation Act and Suisun Marsh Protection Plan, it violates the Porter-Cologne Act, it violates CEQA, it violates the void-for-vagueness doctrine, and it is an abuse of the Regional Board's discretion.

II. IDENTIFICATION OF PETITIONER

Petitioner is Point Buckler Club, LLC, and should be contacted through counsel:

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III. REGIONAL BOARD ACTION TO BE REVIEWED

Cleanup And Abatement Order No. R2-2015-0038; Point Buckler LLC, Solano County, attached to the Amended Declaration of Lawrence S. Bazel ("Amended Am. Bazel Decl.") as Exhibit 1.

IV. DATE OF REGIONAL BOARD ACTION

The Executive Officer of the Regional Board issued the Order on September 11, 2015.

V. STATEMENT OF REASONS WHY THE REGIONAL BOARD ACTION WAS IMPROPER

The Regional Board action was improper for the reasons set out in the points and authorities in section IX below.

VI. MANNER IN WHICH PETITIONER IS AGGRIEVED

Petitioner is aggrieved because the Constitutional rights of itself and its members have been violated, and because it is being prohibited from maintaining and restoring the duck club that existed

at the property and is authorized—and even required—by various statutes and other legal requirements, as specified in section IX below.

VII. STATE BOARD ACTION REQUESTED BY PETITIONER

Petitioner requests that the Order be stayed, and that the State Board act on the stay by October 30, 2015. The Regional Board has just informed Petitioner by telephone that the November 1, 2015 deadline in the Order will be extended by 30 days. Petitioner is requesting action by October 30, 2015 so that, if the State Board does not act, Petitioner has an opportunity to move for a stay in superior court before the Order's deadline. If the State Board cannot issue a stay by October 30 Petitioner requests that the State Board act to postpone the submissions required by the Order until the State Board can act on the stay request.[1]

Petitioner also requests that the State Board should rescind the Order on the grounds that it violates due process, it violates the Suisun Marsh Preservation Act and Suisun Marsh Protection Plan, it violates the Porter-Cologne Act, it violates CEQA, it violates the void-for-vagueness doctrine, and it is an abuse of the Regional Board's discretion.

VIII. BACKGROUND

A. In The 1970s, The Legislature Acted To Protect Suisun Marsh

In 1974, the California Legislature enacted the Nejedly-Bagley-Z'berg Suisun Marsh Preservation Act of 1974, which directed the San Francisco Bay Conservation and Development Commission ("BCDC") and the Department of Fish and Game to prepare the Suisun Marsh Protection Plan "to preserve the integrity and assure continued wildlife use" of the Suisun Marsh. (Suisun Marsh Protection Plan[2] at 9.)

The Suisun Marsh Protection Plan, which was published in 1976 and updated in 2007, emphasizes the importance of duck clubs to the Suisun Marsh. Duck clubs, which "encourage production of preferred waterfowl food plants", "are a vital component of the wintering habitat for waterfowl migrating south":

> In the Suisun Marsh, about 50,700 acres of managed wetlands are currently maintained as private waterfowl hunting clubs and on publicly-owned wildlife management areas and refuges. Because of their extent, location and the use

[1]

[2] http://www.bcdc.ca.gov/laws_plans/suisun_marsh.shtml

> of management techniques to encourage production of preferred waterfowl food plants, managed wetlands of the Suisun Marsh are a vital component of the wintering habitat for waterfowl migrating south on the Pacific Flyway, and also provide cover, foraging and nesting opportunities for resident waterfowl. Managed wetlands also provide habitat for a diversity of other resident and migratory species, including other waterbirds, shorebirds, raptors, amphibians, and mammals. Managed wetlands can protect upland areas by retaining flood waters and also provide an opportunity for needed space for adjacent wetlands to migrate landward as sea level rises.

(*Id*. at 12 (Environment Finding 5).) Duck clubs "have made considerable contributions to the improvement of the Marsh habitats for waterfowl":

> The Marsh is well known for waterfowl hunting in California. ….
>
> The recreational values of the Marsh, particularly for duck hunting, have been a significant factor in its preservation. Private duck clubs…have made considerable contributions to the improvement of the Marsh habitats for waterfowl as well as other wildlife.

(*Id*. at 28.) Duck clubs "have worked to maintain the area's habitat value and to protect the natural resources of the Marsh":

> Market hunting of waterfowl began in the Suisun Marsh in the late 1850s, and the first private waterfowl sport hunting clubs were established in the early 1880s. …. Generations of hunting club owners and members have worked to maintain the area's habitat value and to protect the natural resources of the Marsh. Today, waterfowl hunting is the major recreational activity in the Suisun Marsh…

(*Id*. (Recreation and Access Finding 2).)

The Suisun Marsh Protection Plan establishes, as its first recreational policy, an encouragement of duck clubs:

> Continued recreational use of privately-owned managed wetlands should be encouraged.

(*Id*. at 29 (Recreation and Access Policy 1).)

Under "Land Use and Marsh Management", the Suisun Marsh Protection Plan once again emphasizes the importance of duck clubs:

> Within [the primary management] area, existing land uses should continue, and land and water areas should be managed so as to achieve the following objectives: …
>
> • Provision of habitat attractive to waterfowl
>
> • Improvement of water distribution and levee systems …

(*Id*. at 33.) The concepts are reinforced by the findings in this section, which emphasize the importance of managing to "to enhance the habitat through the encouragement of preferred food plant species":

> The managed wetlands are a unique resource for waterfowl and other Marsh wildlife, and their value as such is increased substantially by the management programs used by waterfowl hunting clubs and public agencies to enhance the habitat through the encouragement of preferred food plant species.

(*Id*. at 34 (Land Use and Marsh Management Finding 2).)

Finally, the Suisun Marsh Protection Plan reports that in the 1980s individual management plans ("IMPs") were developed and certified for each duck club, and that managers can implement these plans—including "enhancements"—without obtaining permits from BCDC:

> Individual management plans were developed for each waterfowl hunting club in the 1980s, and were reviewed by the California Department of Fish and Game and certified by the San Francisco Bay Conservation and Development Commission. …. Land managers can conduct ongoing management activities described in the plans, such as maintenance, repairs, and enhancements, without having to apply for separate permits from the Commission for each activity.

(*Id*. (Land Use and Marsh Management Finding 3).)

In 1977, the Legislature enacted the Suisun Marsh Preservation Act, which has been codified at Public Resources Code §§ 29000 et seq.[3] This act directs BCDC to implement the Suisun Marsh Protection Plan. (PRC §§ 29004(b), 29113, 29200, 29202.)

B. The Suisun Marsh Preservation Act Exempts Work Specified In The Point Buckler Management Plan From A BCDC Permit

Although the Suisun Marsh Preservation Act establishes a program for marsh development permits (PRC § 29500), there is an exception for development "specified in the component of the local protection program prepared by the Suisun Resource Conservation District and certified by" BCDC—that is, any development specified in the individual management plans:

> Notwithstanding the provisions of Section 29500, within the primary management area no marsh development permit shall be required for any development specified in the component of the local protection program prepared by the Suisun Resource Conservation District and certified by the Commission pursuant to Section 29415.

(PRC § 29501.5.) Note that this provision does not require the development to be in a managed

[3] http://www.bcdc.ca.gov/laws_plans/suisun_marsh_preservation_act.shtml

wetland. All that is required is a certified IMP.

As noted above, the Suisun Marsh Protection Plan reports that IMPs were certified for each duck club. (Suisun Marsh Protection Plan at 34 (Finding 3).)

BCDC staff provided Petitioner with a copy of the certified management plan for Point Buckler, which at that time was known as the Annie Mason Point Club. (Sweeney Decl., ¶ 2.) The IMP, which was received by BCDC in 1984, describes the club at that time. (*Id*., Exhibit 1.) There was a single levee with a perimeter ditch system and two gates that were used for flooding and draining. (*Id*.) The IMP refers to "maintenance of levees, ditches, and water control structures." (*Id*., Exhibit 1 at 2.) "Ditches need to be kept clear of vegetation blockages or silt build-ups to allow circulation and drainage." (*Id*.) "The dense growth of undesirable vegetation in the pond needs to be reduced by burning and/or discing". (*Id*.) "Removing the old vegetation and turning over the soil provides a seed bed for the establishment of new vegetation which is more preferred by waterfowl." (*Id*.) The IMP also identifies interior and exterior levee repairs. (*Id*., Exhibit 1, last page.)

An aerial photo from 1984 shows that the levees at that time had been repaired, and were intact. (Am. Bazel Decl., Exhibit 2.) This photograph is consistent with the IMP which notes that "the club reports that it now has the water control structures and tight levees necessary for proper water management." (Sweeney Decl., Exhibit 1 at 1.)

A document provided by BCDC, entitled "General Information", which appears to have been prepared no later than 1980, reports that existing vegetation at the island had "a relatively low use and section value for waterfowl" and that "changing the habitat to a highly productive and selective one for waterfowl should be relatively easy." (Am. Bazel Decl., Exhibit 10, next-to-last page.) It also reports that "[t]he main problem hampering proper management of the club is water control." (*Id*/) If the levee system and irrigation structures are repaired "adequate water control will be achieved". (*Id*., last page.)

The levees that had been repaired by 1984 appear to have been damaged in the mid-1980s, and repaired again in 1990. (*See* Am. Bazel Decl., Exhibit 11 (Wetlands Maintenance Management Report dated 1990 referring to use of 4,000 cubic yards to repair levees).) Once the levees had been repaired, DWR apparently installed a pump, as discussed in the next section.

Documents provided by BCDC include no amendment or modification of the individual management plan for Point Buckler Island. (Am. Bazel Decl., ¶ 13.) The initial plan is therefore still in effect.

Nor has BCDC issued a permit authorizing abandonment of the managed wetlands at Point Buckler. (*Id.*)[4]

C. The Department Of Water Resources Provided For A Duck Club At Point Buckler As Mitigation For Its Delta Diversions

The Suisun Marsh Protection Plan identifies increasing salinity as a threat to the Suisun Marsh:

> Numerous upstream storage facilities, together with diversions of water from the Delta and the tributary streams of the Delta, have substantially reduced the amount of fresh water flowing into the Delta with a resultant increase in salinity intrusion into the Marsh….

(Suisun Marsh Protection Plan at 14.) Increasing salinity, the Protection Plan found,

> will limit the distribution and abundance of important waterfowl food plants and ultimately reduce the wetland diversity and the capability of the Marsh to support wintering waterfowl.

(*Id*. (Finding 4).)

In 1984, the California Department of Water Resources ("DWR"), which operates the State Water Project, published a Plan Of Protection For The Suisun Marsh Including Environmental Impact Report. The purpose of the plan was "to mitigate the effects of the Federal Central Valley Project (CVP) and the State Water Project (SWP) on the Suisun Marsh."[5] (Plan at 1.) The plan was required by State Board Water Right Decision 1485. (*Id*. at 7.) Because the plan was issued to comply with D-1485, the State Board must have approved it.

DWR's mitigation facilities included the "Annie Mason Island Pump Facility", that "would operate "when water quality on the island required improvement from October through April." (*Id*.

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[4] It appears that a managed wetland cannot be abandoned without a permit from BCDC. (PRC § 29500 (requiring permit for development); PRC § 29114 (defining "development" to include "change in the density or intensity of use of land" and "change in the intensity of use of water"); 14 CCR § 10125 (defining "substantial change in use" to include "abandonment" of a "managed wetland").

http://www.bcdc.ca.gov/permits/obtain_permit.shtml (activities requiring permit approval)

[5] Available online.

at 79, 103.) "The pumping equipment will be built and installed when the landowner has improved the island's levee system to provide adequate protection of the island." (*Id*. at 103.)

Although the plan itself does not specify how the pump would provide mitigation, the reasoning is clear. The ponds on the island are above high tide, as can be seen from aerial photographs taken in 2013 and 2015. (Discussed below.) These ponds may have been dug out before the pump was installed, but if so they quickly filled in. In any case, the owner of the island at the time reports that DWR installed a pump, and an old pump is now visible at the island. (Sweeney Decl., ¶ 3.) The purpose of the pump—to flood the ponds—counted as mitigation because it helped preserve the island's duck habitat and its growth of vegetation preferred by ducks. Without the pump and the flooding of the ponds, the vegetation would revert to non-preferential species.

The mitigation required by the plan and its included EIR, therefore, was not just the pump, but rather the maintenance of Point Buckler as property managed for ponding and growth of vegetation preferred by ducks.

In 2005, DWR entered into the Revised Suisun Marsh Preservation Agreement with the U.S. Bureau of Reclamation, the California Department of Fish and Game, and the Suisun Resource Conservation District. (Am. Bazel Decl., Exhibit 3.) That agreement reiterated DWR's obligation to build the facilities it had agreed to build in the 1980s. (*Id*. at 14, ¶ VI.A (page 20 of 112).) That obligation included the pump at the Annie Mason Island Unit. (*Id*. at A-4 (page 73 of 112).)

D. Point Buckler LLC Proceeded To Implement The Individual Management Plan Without Awareness Of Any Need For Additional Authorizations

During the dry season of 2014, Petitioner used an excavator to deepen and widen the existing ditches, and placed the material removed on the levees. In some places, the existing levees had been eroded away, and a new levee and ditch were created inside the old location. Places where the levee had fully or partly breached—in two locations, the tide gates were in place, but the levee on top of them had eroded away—were repaired. The resulting levees are approximately 2-3 feet above the surrounding land. Of the two tide gates that had been in place, one is now functioning, and the other needs to be repaired. (Sweeney Decl., ¶ 4.)

Petitioner understood, from the previous owner, that maintenance of the levees was supposed to be done, and was not aware of any need for additional approvals. (*Id*., ¶ 5.)

Some additional work was done on the island. Among other things, a dock was secured to piles that were already in place. The dock was provided by BCDC, and is subject to a lease from the California State Lands Commission. (*Id*., ¶ 6.) Fourteen trees were planted and four small semicircular ponds were dug to enhance duck habitat. (*Id*.) Some grasses were mowed. (*Id*.)

E. The Work Did Not Cause Tidal Marsh To Dry Out

The Order appears to have been motivated, at least in substantial part, by the misconception that the levee work "cut off crucial tidal flow to the interior of the Site, thereby drying out the Site's former tidal marsh areas". (Order at 2, ¶ 8.) But the levee work has not dried out the interior of the island; on the contrary, the interior is now wetter than it used to be.

The best available evidence consists of two sets of photographs. First, there are two infrared photographs taken in 2013 (before the levee work was done) by the U.S. National Oceanographic and Atmospheric Administration ("NOAA") at high water and mean lower low water. (Sweeney Decl., Exhibits 2 and 3.) These show that water was present in the ditches and interior channels of the island, but there was no water present in any vegetated areas.

In fact, there is remarkably little difference between the two photographs, no doubt attributable to the fact that the ditches and channels on the island generally have vertical sides, which means that their width does not increase or decrease during the tidal cycle.

Second, there are aerial photographs, obtained from Google Earth, from April 2013 and April 2015, showing the island before and after the levee work. (Am. Bazel Decl., Exhibits 4 and 5.) These photographs show no sign of vegetation in the ditches and interior channels, either before or after.

In both photographs, the majority of the vegetation is brown, even though the photographs were both taken in April. The 2013 photograph has some areas that are green, but those seem to be the result of seasonal rains rather than tidal influence. There are, for example, areas of green on top of the existing levees, and in places disconnected from any ditch or channel. A Google Earth photograph from September 2008 shows that the interior of the island was almost completely brown. (Am. Bazel Decl., Exhibit 12.)

Most of the island may be what the Suisun Marsh Protection Plan calls "lowland grasslands" ("a 'transition zone'…which supports a mixture of plants common to both the wetlands and the upland grasslands") rather than tidal marshes ("which occur on the edges of the bays and sloughs, are not subjected to habitat management programs, but are exposed to the natural daily tidal rhythm"). (Suisun Marsh Protection Plan at 11.) Virtually all of the island is firm enough so that motor vehicles can be driven across it. (Sweeney Decl., ¶ 8.) And, other than the improved ditches and water levels inside the levees, conditions at the island are generally unchanged from before the work at issue. (*Id*., ¶ 14.)

In any case, the Google Earth photographs leave no doubt that the interior of the island has not dried up because of the levee work. The aerial photographs plainly show that in 2015, the ditches were larger and therefore held more water than they did in 2013, and the inland channels held as much water if not more. Because of this additional water, the Order is wrong when it says that the levee work "cut off crucial tidal flow to the interior of the Site, thereby drying out the Site's former tidal marsh areas". (Order at 2, ¶ 8.) The Order is also wrong because the aerials show that virtually the entire inland area dried up before the levee work was performed, and there is no sign of any additional drying up after the levee work was done.

IX. POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION

A. The Regional Board Violated Petitioner's Due Process Rights By Refusing To Hold A Hearing

The Regional Board violated Petitioner's Constitutional rights by refusing to hold a hearing. "Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest." (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.) Here there is governmental deprivation of at least two significant property interests: Petitioner's use and enjoyment of its real property, and the deprivation of substantial amounts of money.[6]

[6] The hearing requirement applies to "'adjudicatory' matters in which the government's action affecting an individual is determined by facts peculiar to the individual case", as opposed to "'legislative' decisions which involve the adoption of a broad, generally applicable rule of conduct on the basis of general public policy." (*Horn* at 613.) Here the Order is indisputably individual and adjudicatory, rather than general and legislative.

In *Horn*, the California Supreme Court held that property owners meet the substantial-deprivation standard when land-use decisions on *adjacent* parcels substantially interfere with their access to their own property. (*Id*. at 615.) Here the deprivation goes far beyond that. Petitioner is being prohibited from restoring and maintaining a duck club on its property, even though there has been a duck club there, and the property has been approved for use as a duck club. (*See* Sweeney Decl., Exhibit 1.) The Order requires Petitioner to "restore tidal circulation to all of the tidal channels…that existing prior to the…levee construction activities". (Am. Bazel Decl., Exhibit 1 at 5.) This requirement for tidal circulation prevents the property from being used a duck club, which requires that the tide gates be closed, and that the island be flooded, so that it can be used to provide duck habitat and grow plants that provide food for ducks. (Sweeney Decl., ¶ 10.)

The Order also requires that the Petitioner provide "compensatory mitigation habitat". (Ex. 1 at 5.) Mitigation habitat costs hundreds of thousands of dollars per acre. (Sweeney Decl., ¶ 13.) Money is a property interest protected by due process. (*See Mathews v. Eldridge* (1976) 424 U.S. 319, 332 (due process applies to terminations of Social Security disability benefits).)

In July 2015, in the *West Side Irrigation District* case (copy attached as Am. Bazel Decl., Exhibit 6), the Sacramento Superior Court invalidated letters sent out by the State Board—letters that commanded far less than the Order—on the grounds they were issued "without any sort of pre-deprivation hearing". (*Id*. at 5.) The court distinguished between letters that are "coercive in nature" (*id*. at 2), which require a hearing, and purely informational letters, which do not. Here the Order is indisputably coercive in nature. The court concluded that "[e]very day the Letter remains in its current form constitutes a violation of those constitutional rights." (*Id*.)

Here, as in *West Side Irrigation District*, there was no pre-deprivation hearing. (Am. Bazel Decl., ¶ 15.) A pre-deprivation hearing should have been held.

State Board Order No. WQ 86-13, *In the Matter of the Petition of BKK Corporation*, acknowledges that a hearing must be held, but concludes that the hearing can be held after an order is issued:

> The Porter-Cologne Water Quality Control Act…does not require notice and an opportunity to be heard before issuance of a cleanup and abatement order. Due process is provided by an opportunity for a hearing after the order is issued.

(*Id*. at 4.)

> Where a state's interest is sufficiently compelling, the requirements of procedural due process may be satisfied by a hearing provided after issuance of an administrative order….

(*Id*. at 6.)[7]

Here, there were no interests that were "sufficiently compelling" to postpone a pre-deprivation hearing. This situation is quite different from those in which a municipality or industry is continually discharging infectious or toxic materials that threaten the public health. The levee work was completed last year. (Sweeney Decl., ¶ 4.) Petitioner is not proceeding with the work, which has been put on hold. (*Id*., ¶¶ 9, 14.) Other than the improved ditches and water levels inside the levees, conditions at the island are generally unchanged from before the work at issue. (*Id*., ¶ 14.) Because there was no compelling need to act in haste, there was time for a pre-deprivation hearing.

There is certainly time for a post-deprivation hearing. Counsel for Petitioner requested a hearing twice. (Am. Bazel Decl., ¶ 16 and Exhibit 13.) Nevertheless, the Regional Board has not held a hearing on this matter. (Sweeney Decl., ¶ 12.)

A hearing here would have benefited the Regional Board as well as Petitioner. It would have required the Regional Board to collect and organize its evidence—the Regional Board has not presented any evidence to Petitioner other than what is in the Order (Am. Bazel Decl., ¶ 17)—which would help protect the Regional Board from this petition. A hearing would also have given the Regional Board to hear Petitioner's side of the story, which should have prevented it from acting on mistaken assumptions. (See section VIII.E above.)

The Regional Board's refusal to provide a hearing is a violation of the United States Constitution. On this ground alone, the Order should be rescinded and the matter remanded to the Regional Board for a hearing.

In the *Sackett* case, a unanimous United State Supreme Court rejected a legal argument that "would have put the property rights of ordinary Americans entirely at the mercy of Environmental

[7] *BKK* notes that the State Board lacks authority to declare a statute unconstitutional, but no determination of unconstitutionality is required here. Nothing in Water Code § 13304 prohibits the Regional Board from holding a hearing before or after it has issued a cleanup and abatement order.

Protection Agency (EPA) employees." (*Sackett v. EPA* (2012) 132 S.Ct. 1367, 1375, Alito, J, concurring.) "In a nation that values due process, not to mention private property, such treatment is unthinkable." (*Id*.)

Here the violation of due process is even more unthinkable. Due process indisputably calls for a hearing. There is no principled argument to the contrary. And yet the Regional Board continues to refuse.

B. The Regional Board Violated Petitioner's Due Process Rights By Engaging In Ex Parte Communications And Violating The Separation-Of-Functions Rule

"When, as here, an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal." (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 742.) Consistent with these due-process requirements the California Administrative Procedure Act "generally prohibits ex parte communications…and requires 'internal separation of functions'". (*Id*. at 742, citing *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1, 18,) State Board staff have provided extensive answers to questions about these requirements.[8]

Here, Regional Board staff have informed Petitioner that a prosecution team and advisory team were formed. Petitioner was never given any notice of this division, and no opportunity to communicate with the advisory team or the decision maker before the Order was issued. (Am. Bazel Decl., ¶ 18.) The fact that the Order was issued provides evidence that there must have been communications between the prosecution team and the decision makers. These communications, which took place without the knowledge or participation of Petitioner, were impermissible ex parte communications. They were also a violation of the separation-of-functions requirement. Petitioner has been denied a fair hearing.

"In general, if a party has not received a proper administrative hearing, the matter is remanded back to the agency to provide 'a full and fair hearing.'" (*Sabey v. City of Pomona* (2013) 215 Cal.App.4th 489, 500, quoting *English v. City of Long Beach* (1950) 35 Cal.2d 155, 160.) The

[8] Ex Parte Questions And Answers, www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf

hearing must not be held before someone whose "role as a neutral arbitrator has been compromised". (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 99.)

Because of the ex parte communications, the Constitutional rights of Petitioner and its owners have been violated. The Order should be rescinded, and the matter remanded for a new hearing by an appropriate decision maker other than the Executive Officer, who has been tainted by ex parte communications.

C. The Regional Board Violated The Void-For-Vagueness Doctrine

The Order requires the submission of reports "acceptable to the Regional Water Board Executive Officer". Because this provision makes the required actions subject to a person's subjective approval, it violates the void-for-vagueness doctrine:

> [T]he 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.

(*Kolender v. Lawson* (1983) 461 U.S. 352, 357.)

In *Kolender*, a California statute required a person stopped by policy to provide "credible and reliable" identification. (*Id*. at 359.) The statute left, to the officer on the beat, the determination of whether the identification was sufficiently credible and reliable. (*Id*. at 360.) The United States Supreme Court concluded that the statute was "unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." (*Id*. at 361.)

Earlier this year, the Supreme Court re-stated the rule for unconstitutional vagueness:

> The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.

(*Johnson v. United States* (2015) 135 S.Ct. 2551, 2556, citing *Kolender*.)

In *Johnson*, the statute provided, in a "residual clause", for more serious punishment if the crime "otherwise involves conduct that presents a serious potential risk of physical injury to another." (*Id*. at 2555-2556.) The Supreme Court concluded "that the indeterminacy of the wide-

ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." (*Id*. at 2556)

Here the Order relies on penal statutes and specifically threatens criminal liability. (Order at 6; Water Code §§ 13269, 13387.)

To the extent the 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.

D. The Regional Board Violated The Conformity Requirement Of The Suisun Marsh Preservation Act

The Suisun Marsh Preservation Act imposes a "judicially enforceable" requirement on state agencies to act in conformity with the act and the Suisun Marsh Protection Plan:

> **Imposition of Judicially Enforcement Duty on State Agencies.**
>
> (a) This division imposes a judicially enforceable duty on state agencies to comply with, and to carry out their duties and responsibilities in conformity with, this division and the policies of the protection plan.

(PRC § 29302.)

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". (See section VIII.A above.) 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". (*Id*.)

The act specifies that individual management plans should be prepared for each duck club, and that development consistent with the plan can be implemented without a marsh development permit. In short, the act and plan are very pro-duck-club.

The Order is very anti-duck-club. It 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. (Order at 3, ¶ 12; see section VIII.A above.) The Order requires that tidal circulation be restored, even though the

individual management plan calls for seasonal flooding, which would limit tidal circulation. (Order at 5, ¶ 2, see section VIII.A above.)

Because the Order is so strongly anti-duck-club, and because it 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 Act and Plan. It thereby violates the act.

E. The Regional Board Violated The Primary Responsibility Provision Of The Suisun Marsh Preservation Act

The Order asserts that Petitioner has caused a condition of pollution on tidelands. But the State Lands Commission claims state ownership of the tidelands at the island, as established by its entering into a lease with Petitioner for the dock at the island. (See section VIII.D above.) The Suisun Marsh Preservation Act gives State Lands primary responsibility over lands under its jurisdiction:

> **Responsibilities of State Lands Commission.**
>
> (a) 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.

(PRC § 29307.)

The Order violates this provision because it takes primary responsibility for management of the tidelands at issue away from State Lands.

The Order also violates the Suisun Marsh Preservation Act by creating duplication and conflict, contrary to the act:

> **Minimizing Duplication and Conflicts.**
>
> It is the intent of the Legislature to minimize duplication and conflicts among existing state agencies carrying out their regulatory duties and responsibilities in connection with the subject matter of this division.

(PRC § 29300.)

F. The Regional Board Violated Water Code § 13304 And Therefore Lacked Authority To Issue The Order

The Order asserts that it has authority under Water Code § 13304 because Petitioner

> has caused or permitted waste to be discharged or deposited where it has been discharged into waters of the State and created or threatens to create a condition of pollution.

(Order at 3, ¶ 12.) This assertion of authority is consistent with Water Code § 13304(a), which provides for the issuance of a cleanup and abatement order when a person has caused waste to be discharged into waters of the state, and that waste creates a condition of pollution:

> A person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall, upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.

The Regional Board lacks authority under Water Code § 13304 to issue the Order both because the work at issue is not a condition of pollution, and because the material placed is not waste.[9]

1. The Work Is Not A Condition Of Pollution Because It Promotes, Rather Than Harms, The Beneficial Uses

Water Code § 13050(l) provides, in pertinent part, that:

> (1) "Pollution" means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following:
>
> (A) The waters for beneficial uses.
>
> (B) Facilities which serve these beneficial uses.

Here the Order identifies the applicable beneficial uses as those for Suisun Bay. (Order at 1, ¶ 4.) But the basin plan establishes beneficial uses for Grizzly Bay. (Water Quality Control Plan (Basin Plan) for the San Francisco Bay Basin[10], Table 2-1 (Existing and Potential Beneficial Uses of Water Bodies in the San Francisco Bay Region), Suisun Basin.) Because Point Buckler borders or is within Grizzly Bay, the beneficial uses for that water are apply. Those uses are: commercial and sport fishing (COMM), estuarine habitat (EST), fish migration (MIGR), preservation of rare and

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[9] The Order does not assert that it has authority under § 13304 because of a violation of waste discharge requirements or other order or prohibition issued by a regional board. Nor does it assert that Petitioner has caused a condition of nuisance.

[10] http://www.waterboards.ca.gov/sanfranciscobay/basin_planning.shtml

endangered species (RARE), wildlife habitat (WILD), water contact recreation (REC1), and noncontact water recreation (REC2). (*Id.*; *see* section 2.1 (defining beneficial uses).)

The principal effect of the work at issue is to *promote*, rather than harm, noncontact recreation and wildlife habitat. Wildlife habitat will be promoted because the levee work allows the island to be managed as a duck club. Now that the levees are in place, the water level can be raised above high-tide, so that pond areas within the island can be disced, flooded, and managed to grow vegetation and provide habitat the ducks prefer. (Sweeney Decl., ¶¶ 9-10.) Noncontact recreation will be promoted because the duck club is a recreational facility.

Although the Order recites that the work at issue has "adversely impacted" several beneficial uses, the Regional Board has provided no evidence that the work at issue "unreasonably affects" any beneficial use, which is required to show a condition of pollution. The Order is based on the assumption that the levees dried out vegetation on the island, but this assumption is false. (See section VIII.E above.) The Order's other assertions of adverse effect appear to be nothing more than speculation.

Nor has the Regional Board provided any evidence that the work at issue unreasonably effects "[f]acilities which serve these beneficial uses". The Order is itself a "condition of pollution" because it unreasonably interferes with the facilities—the levees—that serve the beneficial uses of wildlife habitat and recreation.

Because the work at issue has not caused a condition of pollution, the Regional Board lacks authority under Water Code § 13304 to issue the Order.

2. The Work Is Not A Condition Of Pollution Because It Is Authorized By The Suisun Marsh Preservation Act

It should go without saying that an activity is not a condition of pollution when that work has been authorized by the Legislature. Here the Legislature has authorized the use of Suisun Marsh for duck clubs, and has established a procedure that has specifically authorized Petitioner to conduct the work at issue. (See section VIII.B above.) Moreover, the Legislature has prohibited the Regional Board from acting inconsistently with the policies and provisions of that act and plan. (See section IX.D above.)

Note that the question here is not whether the Regional Board can impose permitting requirements in addition to those imposed by the Suisun Marsh Preservation Act. If a project has not been fully permitted, the Regional Board may require that work cease until the relevant permits are obtained. But a cleanup and abatement order is not a stop-work order. For there to be a legitimate cleanup requirement here, there must be a condition of pollution—not just a condition in which an approvable project has not yet obtained all its permits.

Because the work at issue here has been authorized by the Legislature, it cannot be a condition of pollution. The Regional Board lacks authority under Water Code § 13304 to issue the Order.

3. The Work Is Not A Condition Of Pollution Because It Comes Within Permits Issued By The Corps Of Engineers and Certified By The Regional Board

The San Francisco District of the U.S. Army Corps of Engineers has issued Regional General Permit 3 ("RGP3"), which in accordance with the federal Clean Water Act authorizes, among other things, maintenance and creation of interior ditches, maintenance and repair of levees, creating drainage swales and raising the interior of managed wetlands, discing, pump installation, constructing cofferdams, maintaining and replacing water control structures, installing new water control structures, and maintenance and repair of salinity control gates. (Am. Bazel Decl., Exhibit 14.)

In accordance with Clean Water Act § 401, the Regional Board has certified the permit as being in compliance with California law. (Am. Bazel Decl., Exhibit 15.) This certification explains that it covers "158 privately owned duck clubs represented by SRCD". (*Id*. at 2.) Point Buckler is one of the duck clubs represented by the Suisun Resource Conservation District.[11] The certification specifies that the "total amount of annual excavation and temporary fill for the project would vary

[11] *See* PRC § 9962(a) (SRCD has "primary local responsibility for regulating and improving water management practices on privately owned lands within the primary management area of the Suisun Marsh in conformity with [the Suisun Marsh Preservation Act] and the Suisun Marsh Protection Plan"); Sweeney Decl., Exhibit 1 (individual management plan submitted to BCDC by SRCD for club 801, Annie Mason Point Club); Am. Bazel Decl., Exhibit 9 (current list of SCRD club names and numbers includes club 801, identified as Buckler Point, Inc).

from year to year, but would be limited to a maximum of 443,000 cubic yards of earthen material." (*Id*. at 3.)

Because the Corps and the Regional Board have provided a general authorization for the work at issue here, the work cannot be a "condition of pollution". If the whopping "443,000 cubic yards of earthen material" approved by the Regional Board created a condition of pollution, the Regional Board would not have been authorized to issue the certification. (*See* Water Code § 13263(a) (requiring regional boards to implement basin plans).)

Since those 443,000 cubic yards of earthen material do not create a condition of pollution, why does the work at Point Buckler? The Regional Board does not say, and therefore does not establish a condition of pollution. The Regional Board should, at the very least, have explained why the work at Point Buckler is so different from the work elsewhere that it cannot be tolerated.

The Regional Board has also issued a 401 certification for levee maintenance dredging. (Am. Bazel Decl., Exhibit 16.) This certification applies to 133 miles of levees, and allows a maximum of one million cubic yards of dredged material. (*Id*. at 2.) These quantities are obviously orders of magnitude greater than the work at issue. The Regional Board has not explained why, if these activities do not create a condition of pollution, the work at issue does.

It does not matter whether the work at issue has fully complied with the requirements of RGP3 and the board's certification. If the work at Buckler Island is not fully permitted, then the Regional Board may have authority to stop work pending that permitting. But because the work has not created a condition of pollution, the Regional Board does not have authority to issue a cleanup and abatement order.

4. The Work Is Not A Condition Of Pollution Because It Is A Mitigation Project Required by CEQA

CEQA mitigation measures must be "fully enforceable":

> [N]o public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless both of the following occur:
>
> (a) The public agency makes one or more of the following findings with respect to each significant effect:

> (1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.

(PRC § 21081.)

> (a) When making the findings required by paragraph (1) of subdivision (a) of Section 21081…, the following requirements shall apply:
>
> (1) The public agency shall adopt a reporting or monitoring program for the changes made to the project or conditions of project approval, adopted in order to mitigate or avoid significant effects on the environment. ….
>
> (b) A public agency shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures. Conditions of project approval may be set forth in referenced documents which address required mitigation measures….

(PRC § 21081.6.)

Here, the work at Point Buckler is a mitigation measure required by CEQA. In 1984, it was identified by DWR as mitigation for Delta diversions. (See section VIII.C above.) In 2005, it was incorporated into the Suisun Marsh Mitigation Agreement of 2005. (*Id.*) In 2013, the Regional Board relied on that agreement—and on its mitigation provisions—when it certified RGP3. The Regional Board specifically found that the "[p]ermanent and temporary impacts related to the current operation and maintenance of managed wetlands in the proposed Project area have been offset by the Suisun Marsh Mitigation Agreement of 2005." As a result, Point Buckler has been identified as required mitigation for two projects: DWR's water diversions from the Delta, and the long list of maintenance, repair, and construction activities covered by RCP3 and the Regional Board's certification.

Mitigation is, by definition, a measure that must be undertaken to benefit the environment and thereby counter or make up for the adverse environmental effects of the project being approved. Because mitigation *benefits* the environment, it cannot be a condition of pollution. Because CEQA requires mitigation measures to be implemented, the Regional Board lacks the authority to issue a cleanup and abatement order that prevents mitigation from being implemented.

For these reasons—the work at issue benefits and implements the beneficial uses of wildlife habitat and noncontact recreation, the work has been authorized by the Legislature in the Suisun Marsh Preservation Act and Suisun Marsh Protection Plan, and the work is a mitigation measure that

must be implemented under CEQA—the work at issue cannot be a "condition of pollution". The Regional Board therefore lacks authority to issue the Order.

5. The Construction Material Is Not "Waste"

The Porter-Cologne Act, which was enacted in 1969, follows from the federal Water Quality Act of 1965. (Am. Bazel Decl., Exhibit 8.) The latter provided for the establishment of "water quality criteria" and for a "plan for the implementation and enforcement of the water quality criteria", which jointly would be a state's "water quality standards". (*Id*. at 907-908.) The Porter-Cologne provided for the development of "water quality control plans" that include "water quality objectives". (Water Code §§ 13050(j), 13164, 13170.) The Water Quality Act of 1965 provided for the regulation of the "discharge of matter… which reduces the quality of such waters below the water quality standards". (Am. Bazel Decl., Exhibit 8 at 909.) The California Legislature, however, chose not to use a term as broad as "matter". Instead, it limited authority under the Porter-Cologne Act to the discharge of *waste*. As noted above, Water Code § 13304 applies only to discharges of *waste*.

Waste means waste. The Porter-Cologne Act defines "waste" as follows:

> "Waste" includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.

(Water Code § 13050(d).) This definition makes clear that the statutory term "waste" includes "all…waste substances", including "waste placed within containers", but it does not include anything that is not waste.

The scope of the Porter-Cologne Act is therefore quite different from the federal Clean Water Act, which regulates the discharge of a "pollutant", and defines that word to include much more than wastes. (33 USC §§ 1311(a), 1362(6).) Cases interpreting the discharge of a pollutant under the Clean Water Act are not relevant here.

What is relevant, however, is the California Supreme Court's discussion of the word "waste" in a case involving the collection of discarded recyclables:

> The commonly understood meaning of "waste" is something discarded "as worthless or useless." (Amer. Heritage Dict. (1985) p. 1365, col. 1; 19 Oxford English Dict. (2d ed. 1989), p. 958, col. 1.)

(*Waste Management of the Desert v. Palm Springs Recycling Center, Inc*. (1994) 7 Cal.4th 478, 485.)

> "Discard" means "to throw away." (Amer. Heritage Dict. (2d college ed. 1982) p. 402, col. 1.) …. That "discard" connotes throwing away or abandoning has been well recognized in cases dealing with waste and related issues. (*American Min. Congress v. U.S. E.P.A.* (D.C. Cir. 1987) 824 F.2d 1177, 1184 [U.S. App.D.C. 197]….)

(*Id*. at 486.) The *American Mining Case* cited by the California Supreme Court is also quite relevant, because it involves an attempt by EPA to regulate "secondary materials reused within an industry's ongoing production process". (*American Mining Congress*, 824 F.2d at 1178.) In its interpretation of the federal Resource Conservation and Recovery Act ("RCRA"), the DC Circuit concluded that that "'solid waste' (and therefore EPA's regulatory authority) [is] limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away." (*Id*. at 1193.)

Here, Petitioner has not thrown anything away. Instead, it has used onsite material to maintain and restore valuable improvements to the property, i.e. its levees and ditches. Just as no one would seriously contend that shingles nailed on the roof of a house are a waste, or that a cinderblock wall built to prevent flooding is a waste, no one should contend that the placement of material on Point Buckler was a waste.

Because the material was kept onsite as part of valuable improvements, it was not a waste. The *Lake Madrone* case, in which sediment was found to be a waste, is readily distinguishable. (*See Lake Madrone Water Dist. v. State Water Resources Control Bd*. (1989) 209 Cal.App.3d 163.) In that case, silt was flushed from behind a dam into the creek below. (*Id*. at 165-166.) The District argued that the silt was not a waste because it was "not discharged from any producing, manufacturing, or processing operation, or from land owned by the District." (*Id*. at 168.) The court rejected this argument. It concluded that the Porter-Cologne Act "was intended to include all interpretations of 'sewage,' 'industrial waste' and 'other waste'". (*Id*. at 169.) But it did not suggest that the act was intended to cover anything other than waste.

Ultimately, the court reasoned that the "dam receives a natural substance—silt—which, in its unconcentrated form in a creek is innocuous and, by furnishing a man-made artificial location for its concentration, changes the innocuous substance into one that is deadly to aquatic life." (*Id*. at 169-170.) This concept—that silt can be a waste in some situations but not in others—is consistent with *Waste Management*, in which the California Supreme Court made clear that an item (in that case a recyclable) is a waste if it is thrown away, and is not a waste if it is sold. (*Waste Management*, 7 Cal.4th at 486.)

Because the work at issue here was not the discharge of a "waste", the Regional Board does not have authority to issue the Order.

G. The Factual Assertions In The Order Are Not Supported By Substantial Evidence

The Order should also be overturned because the factual assertions are not supported by substantial evidence. The only harm specified is the alleged drying out of the interior of the island. (See section VIII.E above.) But the Regional Board did not consider the evidence readily available in Google Earth photos—evidence that directly contradicts the assertion that the island is tidal marsh that has been dried up. (*Id*.)

Although the Order includes other conclusory assertions of harm to beneficial uses, no evidence is cited. These assertions are, therefore, not supported by substantial evidence.

H. The Demand For Restoration Of Tidal Circulation Is An Abuse Of The Regional Board's Discretion

The Regional Board abused its discretion by demanding that tidal circulation be restored to the interior of the island. To flood the duck ponds, Petitioner needs to close the tide gates and pump water into the island. By requiring tidal circulation, the Regional Board is prohibiting the duck club.

But the duck club is either permitted or eminently permittable. The Regional Board has not considered the statutes and other legal requirements favoring the duck club, and therefore has not considered an important aspect of the problem. This is an abuse of discretion.

The Regional Board also abused its discretion by relying on a false assumption, and by not carefully evaluating the available scientific information. The Order appears to have been motivated by the false assumption that the work at issue has dried out interior tidal marshes on the island. (See

section VIII.E above.) A review of available Google Earth aerials, however, shows no evidence to support this assumption.

X. TRANSMITTAL OF PETITION TO REGIONAL BOARD

A copy of this petition will be transmitted to the Regional Board by e-mail concurrently with its filing with the State Board.

XI. REQUEST FOR STAY

Petitioner requests a stay as described in section VII above.

A. Substantial Harm To The Petitioner

If Petitioner is required to proceed comply with the Order while it is being reviewed by the State Board, Petitioner will be substantially harmed. It would have to pay substantial amounts of money to obtain the mitigation demanded. Mitigation banks charge approximately $100,000-200,000 per acre. The levee work cost hundreds of thousands of dollars. If it or any portion of it had to be removed, that would harm Petitioner by depriving it of valuable property improvements. Additional costs in the hundreds of thousands of dollars would be incurred if substantial removal were required. (Sweeney Decl., ¶ 13.)

Petitioner would be harmed because the Constitutional rights of itself and its members are being violated by the requirements of the Order, which was issued without a hearing. Petitioner is also being harmed by being prohibited from using the island for a duck club, which is what is has historically been used for and which benefits the public and the environment. (*Id.*)

Requiring tidal flows at the island would harm the vegetation and habitat that has been created by the elevated water levels that have existed for more than a year now. (*Id.*)

B. No Substantial Harm To Other Persons Or The Public Interest

There would be no substantial harm to other persons or the public interest if a stay is granted. The duck club restoration activities have been placed on hold. The public interest would be promoted by a stay because the Order threatens all duck clubs in the Suisun Marsh, which must maintain their levees and internal ditches. Other than the improved ditches and water levels inside the levees, conditions at the island are generally unchanged from before the work at issue. Petitioner is not aware of any harm to any sensitive species resulting from work at issue. (*Id.*, ¶ 14.)

C. Substantial Questions Of Fact Or Law

Substantial questions of fact or law exist as described in section IX above.

XII. CONCLUSION

Petitioner requests that the Order be stayed, and that the State Board act on the stay by October 30, 2015. If the State Board cannot issue a stay by that time, Petitioner requests that the State Board act to postpone the submissions required by the Order until the State Board can act on the stay request.

Petitioner also requests that the State Board should rescind the Order on the grounds that it violates due process, it violates the Suisun Marsh Preservation Act and Suisun Marsh Protection Plan, it violates the Porter-Cologne Act, it violates CEQA, it violates the void-for-vagueness doctrine, and it is an abuse of the Regional Board's discretion.

DATED: October 12, 2015

BRISCOE IVESTER & BAZEL LLP

By: _____
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