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March 9, 2016

By Federal Express

The Honorable Harry S. Kinnicutt
Department 3
Solano County Superior Court
Hall Of Justice
600 Union Avenue
Fairfield, California 94533

Subject: In The Matter Of The Inspection At Point Buckler Island
No. MISC002135

Dear Judge Kinnicutt:

On behalf of Point Buckler Club, LLC, I am submitting this report about the Affidavit For Inspection Warrant ("Affidavit") submitted to this Court by the San Francisco Bay Regional Water Quality Control Board ("Regional Board").

I. INTRODUCTION

The Regional Board applied to this Court for an inspection warrant in accordance with Code of Civil Procedure ("CCP") § 1822.50 et seq., which requires that the applicant provide "a statement that consent to inspect has been sought and refused…." (CCP § 1822.51.) In a section entitled "Consent Denied", the Regional Board described a series of e-mail exchanges between the Regional Board and me, as counsel for Point Buckler Club, LLC. That description runs for more than two pages. Missing from that description is any reference to the e-mail I wrote in which the Club *consented* to a site inspection in early March, and responded to the Regional Board's declarations of urgency. Because of the Regional Board's omission of these important facts, the Court may not have had a full understanding of the situation at the time it issued the warrant.

The Club is not applying for an order, and therefore is not filing a formal motion. (*See* CCP § 1003 ("[a]n application for an order is a motion").) The Court may act as it sees fit.

II. BACKGROUND

Point Buckler Island has been used as a duck club since a least the 1940s. A levee around the island is identified on a map dated 1942. In the 1980s, an "individual management plan" was prepared for the island and certified by the San Francisco Bay Conservation and Development Commission ("BCDC") in accordance with the Suisun Marsh Preservation Act, which gives special status to duck clubs. That plan, which remains in effect, calls for the maintenance of the levee around the island. Maintenance can be done in accordance with the plan without a permit from BCDC.

The U.S. Army Corps of Engineers has issued a "regional general permit" that authorizes maintenance and repair of duck-club levees, and the Regional Board has certified that the Corps' permit is consistent with California law. For most levee work, the relevant paperwork is a simple form submitted to the Corps that describes the work to be done. The Corps also issues "after the fact" permits, in which work done without permits can be brought into compliance.

In 2014, levee maintenance and repair work was done at the island. Paperwork was not submitted to the Corps. In September 2015, the Regional Board issued a cleanup-and-abatement order that called for at least partial destruction of the levee. The Club and its counsel met with the Regional Board in October and again in November 2015, and hosted a site visit in October 2015 that was attended by representatives of the Regional Board, BCDC, the Corps, and the U.S. Environmental Protection Agency.

Agencies that attend to endangered species, including the California Department of Fish and Wildlife and the U.S. National Marine Fisheries Service, have visited the island and told the Club that they will not be taking any enforcement action. An e-mail to the same effect has also been sent by the U.S. Fish & Wildlife Service.

During the Club's meeting with the Regional Board, the Club tried to persuade the Regional Board to move away from levee destruction and toward a process in which the levee was brought into compliance. The Club recognized that the Regional Board might impose penalties and additional requirements. The Regional Board's response was not encouraging.

In those meetings, the Club explained that it did not intend to violate the cleanup-and-abatement order, and requested that the Club's deadline for providing a levee-destruction plan be moved from its then-existing date of January 1, 2016. As counsel for the Club, I was clear that if the deadline was not moved, I would have to go to court to get a stay. In return for the requested extension, the Club offered to collect data at a cost of tens of thousands of dollars. Nevertheless, the Regional Board refused to extend the deadline.

The Club then applied to this Court for a stay. (Point Buckler Club, LLC v. Wolfe, No. FCS046410.) On December 29, 2015, this Court granted the stay. On January 5, 2016, the Regional Board rescinded the cleanup-and-abatement order. Following the rescission, Regional Board staff requested access to the island to collect data to be used in a hearing before the Regional Board itself.

For reasons that are not clear to the Club, the Regional Board seems hell-bent on preventing the restoration and maintenance of duck ponds and of vegetation that would be attractive to ducks. Why won't the Regional Board discuss a solution that restores tidal flow (if that's what the Regional Board wants) *and* allows for duck ponds?

III. THE OMITTED E-MAIL

The Water Code section applicable to cleanup-and-abatement orders authorizes the issuance of a warrant only if consent is withheld: "[Site] access shall be obtained with the consent of the owner or possessor of the property or, if the consent is withheld, with a warrant [issued in under CCP § 1822,50 et seq.]" (Water Code § 13304(b)(3).) CCP § 1822.51 specifies that "the affidavit shall contain either a statement that consent to inspect has been sought and refused or facts or circumstances reasonably justifying the failure to seek such consent".

A. The Missing E-Mail That Provided The Club's Consent

In a section entitled "Consent Denied", the Affidavit provides a lengthy description of several e-mails between Dyan Whyte (Assistant Executive Officer of the Regional Board) and me. (Affidavit 8:24-11:2.) That description ends with the e-mail I sent on February 11, and with the statement that "Mr. Bazel then proposed scheduling a site visit for March 17-18, or March 21-28, 2016." (*Id.* 10:25-11:2.)

Missing from the Affidavit, however, is any reference to the e-mail I sent on February 16, three days before the Affidavit was filed. (*See* Declaration of Lawrence S. Bazel ("Bazel Decl."), Exhibit 1 at 1.) That e-mail consented to a site inspection in early March:

> Actually, my availability is limited this week and next [i.e. through February 26], not for the entire next month. I figured that I'd give myself the beginning of March to get whatever experts I needed, and have the inspection in the second half of March. Since you want to move more quickly, I'll see about an inspection date in the first half of March, but next week [i.e. the last week of February] is not good. [¶] ...I can't imagine that your studies will be invalid if they are done in *early March* rather than the last week of February....

(*Id.*, Ex. 1 at 1, emphasis added.) The Regional Board correctly understood that this e-mail provided the Club's consent to an inspection in early March. The Affidavit concedes that consent was denied only for an inspection *before* early March:

> [The Club's manager and counsel] have denied consent to the [Regional Board] staff to access Point Buckler Island *during the urgent time prior to early March....*

(Affidavit 11:13-16, emphasis added.) This sentence implicitly acknowledges my e-mail of February 16, but no direct mention of my e-mail appears anywhere in the Affidavit.

B. The Club's Response To the Regional Board's Need For Urgency

The Affidavit also omitted my response to the Regional Board's need for urgency.

The Affidavit describes a very specific opinion from an expert (Affidavit 10:11-14), which was not conveyed to me. Nor was the fact that the Regional Board took a boat ride around the island to check the state of the vegetation. (*See id.* 11:3-13.) Instead, on February 10, the Regional Board provided three reasons for urgency:

> I emphasize that given [1] tides and [2] seasonal changes in vegetation, as well as the [3] pending schedule for issuing a revised Cleanup and Abatement Order, we have an urgent need to inspect the Island.

(Bazel Decl., Ex. 1 at 4.) In my e-mail of February 11, I noted that there were no major differences in tides over the next month, and raised questions about the schedule for issuing a revised order. (*Id.*, Ex. 1 at 3.) The Regional Board has since dropped these two arguments. The Affidavit asserts that I "did not address the urgent need to view the island before the vegetation grows." (Affidavit at 10:25-11:1.) But the e-mail I was responding to, as quoted above, referred only to "seasonal changes in vegetation", without explaining why seasonal changes in vegetation would be of any significance.

Moreover, the Affidavit is wrong. In my e-mail of February 16—the one the Regional Board omitted from its Affidavit—I did indeed "address the urgent need to view the island before the vegetation grows". The Regional Board first explained this issue to me in its e-mail of February 12:

> Given the warm weather and increases in daylight hours, we need to observe existing conditions before spring vegetation growth. The spring growth will obscure some of the information we need to evaluate. In order

> to have a shared understanding of the site, we need to see the ground surface in tidal areas and transitions to uplands areas before the spring growth fully emerges.

(*Id.*, Ex. 1 at 2.) I was not persuaded that a few days would make any real difference:

> Although I hear your concern about plants beginning to grow, I can't imagine that your studies will be invalid if they are done in early March rather than the last week of February—or that there will be any real difference in the difficulty of conducting the studies or interpreting the results.

(*Id.*, Ex. 1 at 1.) The Regional Board made no additional attempt to convince me that the plant growth really was urgent.

The Regional Board did not respond to my e-mail of February 16. On February 23, I asked the Regional Board to propose dates for the inspection and to inform me if it took unilateral action to secure site access. (*Id.*, Ex. 2, second page.) The Regional Board did not inform me that it had requested the warrant, nor did it provide any papers, until after the warrant was issued. (*Id.*, Ex. 2, first page.)

C. The State Of Discussions At The Time Of The Affidavit

The Affidavit does not clearly explain that the parties were quibbling over a few days. The Regional Board wanted to visit the site at the end of February, and the Club wanted the visit to be in early March. The inspection warrant issued by this Court provided for access (given the requirement for 24-hour notice) beginning on Friday, February 26, and extending into the second week in March. The effect of the inspection warrant, therefore, was to provide access during an interval almost identical to the one the Club had agreed to.

As it turned out, the Regional Board did not conduct an inspection in February. It conducted its inspection on March 2—i.e. in early March. There was no need for the warrant.

I recognize that not all the blame can be attributed to the Regional Board. In retrospect, it's clear that the question I'm asking of the Regional Board can also asked of the Club: What was so important about those few days? In my defense, I can say that I was focused on a major brief that was due at the end of February; I had not retained experts I wanted for the inspection; and I did not feel the urgency that the Regional Board asserted. The Regional Board may also have been frustrated by the number of e-mails it took to get the Club's consent. We should all try harder next time.

IV. CONCLUSION

In its Affidavit, the Regional Board omitted any reference to my e-mail consenting to a site inspection in early March. That omission was material, because CCP § 1822.51 requires a showing that consent had been requested and denied.

The Affidavit also did not make clear that the Regional Board was applying for an inspection warrant only because it wanted a site visit during the last week of February, rather than a few days later in early March.

"Honesty in dealing with the courts is of paramount importance, and misleading a judge is, regardless of motives, a serious offense." (*Paine v. State Bar of California* (1939) 14 Cal.2d 150, 154; *see Grove v. State Bar* (1965) 63 Cal.2d 312, 315 ("[i]t is settled that concealment of material facts is just as misleading as explicit false statements, and accordingly, is misconduct calling for discipline"); *Di Sabatino v. The State Bar* (1980) 27 Cal.3d 159, 162-163 (an attorney clearly has an affirmative duty to inform a court fully and completely as to all relevant facts and circumstances).)

The Regional Board, as an agency of the State of California, should be held to a high standard. It should not omit material e-mails from its discussion of the facts, especially when it knows that opposing counsel will have not an opportunity to correct the record.

Sincerely,

Lawrence S. Bazel

cc: Counsel for the Regional Board in No. MISC002135
C. Carrigan and L. Drabandt (by mail)
L. Drabandt (by e-mail)
Counsel for the Regional Board in No. FCS046410
M. Bullock (by e-mail)
M. Goldman (by e-mail)

DECLARATION OF LAWRENCE S. BAZEL

I, Lawrence S. Bazel, declare:

1. I am a lawyer admitted to practice in the State of California, and am counsel for Point Buckler Club, LLC in matter number FCS046410 before this Court. I have personal knowledge of the following facts, and would competently testify to them if called as a witness.

2. Attached as Exhibit 1 to this declaration is an accurate copy of an e-mail string to and from Dyan Whyte. For convenience, pagination has been added.

3. Attached as Exhibit 2 to this declaration is an accurate copy of an e-mail I sent to Dyan White on February 23, 2016, and of her reply.

I declare under penalty of perjury of the State of California that the statements made in this declaration are true and correct, and that I signed this declaration on March 9, 2016.

Lawrence S. Bazel

EXHIBIT 1

Lawrence S. Bazel

From: Lawrence S. Bazel
Sent: Tuesday, February 16, 2016 9:16 PM
To: Whyte, Dyan@Waterboards
Cc: Austin, Tamarin@Waterboards; Matthew Bullock; Matthew Goldman
Subject: RE: Site access request

Dear Dyan,

Actually, my availability is limited this week and next, not for the entire next month. I figured that I'd give myself the beginning of March to get whatever experts I needed, and have the inspection in the second half of March. Since you want to move more quickly, I'll see about an inspection date in the first half of March, but next week is not good.

Although I hear your concern about plants beginning to grow, I can't imagine that your studies will be invalid if they are done in early March rather than the last week of February—or that there will be any real difference in the difficulty of conducting the studies or interpreting the results.

If you're planning for a hearing in April or May, we should talk about scheduling and other procedural issues. I would like sufficient time to evaluate your team's report and prepare a response to it. Since your team's report will apparently be based on technical data and evaluations, I'll need at least 30 days to respond. Here's a suggested schedule: You provide me with your team's report 60 days before the hearing; I provide you with my response 30 days before the hearing; and you provide your reply 15 days before the hearing. We should also discuss a schedule for disclosing witnesses and the substance of their testimony.

The Regional Board meeting on 8 April seems too soon for a hearing. The meeting on 13 May is a possibility, but 10 June might be better.

I'd like sufficient time before the Regional Board so that we can cover all the issues, and so that I can cross-examine your witnesses. Do you have proposed time limits for the hearing? Do you have any objection to cross-examination?

Although I've seen e-mails copied to people who were identified as being part of one team or another, it would be helpful to see a list of who is on your team, and who is advising the Regional Board.

Thanks

Larry

LAWRENCE S. BAZEL

From: Whyte, Dyan@Waterboards [mailto:Dyan.Whyte@waterboards.ca.gov]
Sent: Friday, February 12, 2016 4:37 PM
To: Lawrence S. Bazel <lbazel@briscoelaw.net>
Cc: Austin, Tamarin@Waterboards <Tamarin.Austin@waterboards.ca.gov>; Matthew Bullock <Matthew.Bullock@doj.ca.gov>; Matthew Goldman <Matthew.Goldman@doj.ca.gov>
Subject: Site access request for Feb 24-26

Dear Larry,

Thank you for your response and agreeing to provide us site access in mid-March. However, it is imperative that we access the Island before March. Given the warm weather and increases in daylight hours, we need to observe existing conditions before spring vegetation growth. The spring growth will obscure some of the information we need to evaluate. In order to have a shared understanding of the site, we need to see the ground surface in tidal areas and transitions to uplands areas before the spring growth fully emerges. We are happy to work with your experts so that we can gain a common understanding of facts, but cannot wait another month do so in the field. You stated that your availability is limited for the next month. I note that you have retained Terry Huffman to assist on wetlands issues, so perhaps he or his field crew can be present for this inspection. If you are concerned about groundtruthing or overseeing the work of the professional survey crew, we would be happy to come back afterwards with your experts to locate any bench marks and critical survey markers so that they can independently verify accuracy.

You asked about the schedule for issuing a cleanup and abatement order. While I have not had any contact with the Water Board's advisory team on this matter, I remind you that in my January 4, 2016, communication to the advisory team, for which you were included, I stated that "In order to address the procedural due process claims, the Prosecution Team in the attached memo recommends that you rescind the CAO at this time and further recommend that the full Board hold a hearing on a revised CAO in the April or May timeframe."

Again, our request is for access to the Island February 24-26. Please confirm whether you intend to grant access by Tuesday, February 16 so that I can begin rescheduling our work crew.

Thank you,

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

510-622-2441
510-926-2870

From: Lawrence S. Bazel [mailto:lbazel@briscoelaw.net]
Sent: Thursday, February 11, 2016 4:37 PM
To: Whyte, Dyan@Waterboards
Cc: Austin, Tamarin@Waterboards; Matthew Bullock; Matthew Goldman
Subject: RE: Water Board Feb. 22 Mtg. and site access request

Dear Dyan,

Thank you for the information on the people you intend to bring and the kinds of information they will be collecting. We do not doubt that you will be collecting data in a scientifically sound manner, but I still feel a need to be advised by our

own experts. We expect to bring Terry Huffman, whom we have retained to assist us on wetlands issues. We will need some time, however, to find other experts to advise us on the other types of information you will be collecting, and I'm very busy this month.

You expressed an urgency to the visit, for reasons several including "the pending schedule for a revised Cleanup and Abatement Order." I haven't received any scheduling information. What is the pending schedule?

The other items you mention, tides and seasonal vegetation, do not seem like they will be changing much over the next few weeks. I took a quick look at the tides over the next month or so, and I didn't see any major differences.

Under the circumstances, we would like to schedule the site visit at a time beginning in mid-March. Thursday and Friday, 17-18 March, are available, as are the weeks of 21 March and 28 March.

Thank you for your willingness to meet with us as soon as you complete your findings. We remain hopeful that a resolution can be found. Thank you also for accommodating our concerns about Dr. Siegel.

Larry

Briscoe Ivester & Bazel LLP

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

From: Whyte, Dyan@Waterboards [mailto:Dyan.Whyte@waterboards.ca.gov]
Sent: Wednesday, February 10, 2016 12:08 PM
To: Lawrence S. Bazel <lbazel@briscoelaw.net>
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 Larry,

This is my fourth request for access to Point Buckler Island. I note that you still have not confirmed whether your client will grant or deny informal access, you have not proposed an alternative date, and you have not stated the basis for the denial of access on the dates previously requested. We are hoping your client will grant informal access on February 24, 24, or 26, without the need for a warrant.

I will do my best to provide you with the additional information you have requested and a proposal for an alternative date. I emphasize again that we are trying to confirm and augment existing data and answer many of the questions you have raised, so that we can expeditiously resolve this case. We plan to bring a survey crew to conduct a high resolution topographic survey. This work will be performed by CLE Engineering. I do not have a list of names for the survey crew, but can provide that beforehand. We also plan to do a reconnaissance of the Island conducting activities such as making exploratory soil and vegetation observations, surveying in any identified areas of interest or concern, and taking measurements and samples of soil and water. In addition to the survey crew, the technical professionals will include the following Water Board staff: Dyan Whyte (Professional Geologist), Bill Hurley (Professional Civil Engineer), Brian Thompson (Certified Engineering Geologist and Hydrogeologist), Ben Martin (Environmental Scientist), and Agnes Farres

(Environmental Scientist). We will also be inviting Dr. Peter Baye (Coastal Ecologist/Botanist), Dr. Dan Martell (wetlands expert), and Don Tanner (NOAA Fisheries). Although we are surprised that you wish to limit site access to Dr. Stuart Siegel, since he has significant background in this area, if it will facilitate gaining informal access to the site, we will accommodate your request.

I emphasize that given tides and seasonal changes in vegetation, as well as the pending schedule for issuing a revised Cleanup and Abatement Order, we have an urgent need to inspect the Island. Since your client has denied access for the week of February 16, 2016, we have worked with our experts and crews to be available February 24, 25, or 26. If your client wishes to have experts observe our work, we welcome that. We will be collecting data in a transparent and scientifically sound manner using appropriate licensed and qualified professionals. As previously stated, we'd be willing to meet with you as soon as we compile our findings so that we can discuss next steps and possible resolution of this matter. If you've collected any additional data, we can compare our findings. Please confirm whether you intend to grant access by Thursday, February 11 so that I can begin rescheduling our work crew.

Thank you,

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

510-622-2441
510-926-2870

From: Lawrence S. Bazel [mailto:lbazel@briscoelaw.net]
Sent: Monday, February 08, 2016 6:01 PM
To: Whyte, Dyan@Waterboards
Cc: Austin, Tamarin@Waterboards; Matthew Bullock; Matthew Goldman
Subject: RE: Water Board Feb. 22 Mtg. and site access request

Dear Dyan,

It is common, in my experience, for the property owner to have its own experts present when a site inspection is done. We would like to know what your team will be doing on the island, so that the club can figure out whether it should bring its own professionals to see what they see.

You say that one boat will bring a survey team of 4 to 6 people. Can you tell us who will be doing the survey work, and in general what kind of survey or surveys will be done?

The other boat, you say, may bring up to 8 technical professionals. What work do you expect them to be doing, and who do you expect to do that work?

If you are thinking of using Stuart Siegel, we request that you choose someone else. Bad blood has developed between Dr. Siegel and the club, and I have concerns about his ability to provide impartial unbiased testimony. As you can see from two e-mails dated 14 May 2015, Dr. Siegel characterized "dealing with Sweeney" as a "HIGH RISK situation", and yet 16 minutes later made a pitch to Mr. Sweeney to be hired by the club, with the tempting offer that "BCDC will accept my work whatever its findings are."

Among other things, Dr. Siegel and the club disagree about the map attached as Suisun-Map-2. As you can see, this map was prepared by Wetlands and Water Resources, Dr. Siegel's firm. It shows Point Buckler (identified as Taylor #801) as a "Completed Project" under the heading "Wetland Project". Everyone now seems to agree that no restoration project was ever planned for Point Buckler, much less completed. What may also interest you about the map is the green shading underneath the cross hatching, which characterizes Point Buckler as "Managed Marsh", a designation Regional Board staff seem to disagree with. Dr. Siegel may now be saying that by "completed project" he meant natural restoration---i.e. no project---but if so we have good reason to doubt either his use of language or his veracity.

When the Regional Board, BCDC, and other agencies toured the island last October, Dr. Siegel reported that "yes, the site is tidal wetland" (as you can see from the attached extract from BCDC's notes) even though he was standing on dry solid ground. Perhaps he used the phrase "tidal wetlands" loosely, as some people apparently do, to refer both to wetlands inundated by the tides, and also to nearby uplands. Perhaps, having reported that the site is a completed project in which tidal wetlands have been restored, he indulged his interest in proving himself right.

Whatever the case may be, this long list of issues---his past interest in working for the club, his personal dispute with the club, his loose use of language, and his personal interest in having the results of his investigation confirm his earlier work---should all disqualify him from providing testimony in this case.

Thank you for considering these requests.

Larry

Briscoe Ivester & Bazel LLP

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

From: Whyte, Dyan@Waterboards [mailto:Dyan.Whyte@waterboards.ca.gov]
Sent: Thursday, February 04, 2016 12:01 PM
To: Lawrence S. Bazel <lbazel@briscoelaw.net>
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 Larry,

As stated earlier, we request access to the Island in order to delineate habitats, survey topography, and document the nature and extent of levee construction activities. This information is needed in order for us to confirm and augment existing data, and answer many of the questions you have raised and asked to discuss. We anticipate two boats arriving at the island: one boat will carry a survey team of 4 to 6 people; and the other boat may bring up to 8 technical professionals. We are trying to see who may be available to join us

onsite depending on the schedule we work out with your client; the technical professionals may include representatives from other regulatory agencies and consultants in addition to Water Board staff. It is not necessary for you or your client to be present during the inspection, but we understand if your client or a representative would like to attend.

In your court documents you note that a hearing is needed to determine fundamental facts. The Water Board's Executive Officer agreed to grant a hearing. We assert that if we hope to resolve this matter, we need access to the Island such that we can gather the information needed to have a constructive and transparent dialogue about the fundamental facts.

Please propose an alternative time for access or clarify whether your client is denying this request and the basis for the denial by Monday, February 8.

Thank you,

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

510-622-2441
510-926-2870

From: Lawrence S. Bazel [mailto:lbazel@briscoelaw.net]
Sent: Wednesday, February 03, 2016 3:47 PM
To: Whyte, Dyan@Waterboards
Cc: Austin, Tamarin@Waterboards; Matthew Bullock; Matthew Goldman
Subject: RE: Water Board Feb. 22 Mtg. and site access request

Dear Dyan,

A site visit during the week of 16 February is not good for us, and we should therefore postpone the 22 February meeting.

Please let me know what you plan to do on the island, and who you intend to bring.

Thanks very much,

Larry

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

From: Whyte, Dyan@Waterboards [mailto:Dyan.Whyte@waterboards.ca.gov]
Sent: Monday, February 01, 2016 4:21 PM
To: Lawrence S. Bazel <lbazel@briscoelaw.net>
Cc: Austin, Tamarin@Waterboards <Tamarin.Austin@waterboards.ca.gov>
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

510-622-2441
510-926-2870

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
1515 Clay St., Suite 1400
Oakland, CA 94612

510-622-2441
510-926-2870

EXHIBIT 2

Lawrence S. Bazel

From:	Whyte, Dyan@Waterboards <Dyan.Whyte@waterboards.ca.gov>
Sent:	Thursday, February 25, 2016 7:49 AM
To:	Lawrence S. Bazel
Cc:	Austin, Tamarin@Waterboards; Matthew Bullock; Matthew Goldman; Drabandt, Laura@Waterboards
Subject:	Point Buckler Island Inspection
Attachments:	Warrant Affidavit Ben Martin 2.19.16.pdf; Inspection Warrant 2.19.16.pdf

Dear Larry,

This email responds to your inquiry about our need for an inspection prior to a meeting, and some of your process questions. We would prefer not to wait until mid-March to visit the Island because of vegetation issues and because it would delay ultimate resolution of this matter. To that end, we requested an inspection warrant and learned late yesterday afternoon that Judge Kinnicutt has signed it. This message is to provide your client with the 24 hours notice required by Civil Procedure Code section 1822.56. We intend to conduct our inspection on Friday, February 26, 2016, between 8:00 a.m. and 6:00 p.m if we can secure transportation, if not, we plan to go within the next 14 days and will provide you 24 hours notice beforehand. Because the warrant it in transit to the clerk's office, a signed copy will be provided to you once it is received by my office, sometime today. Attached is a copy of the affidavit and warrant submitted to the court. Please contact Senior Staff Counsel Laura Drabandt at (916) 341-5180 or laura.drabandt@waterboards.ca.gov if you have any legal questions.

In regards to the process questions you asked previously, our primary interest at this time is obtaining information that will help inform a decision process. While it is premature to provide specific information about a hearing that has not been scheduled, we are happy to provide some general information in response to your concerns. It will be general information because the Board and its advisors decide on final hearing procedures. Here is some information that should be sufficient until a hearing is scheduled.

- **Internal Separation** – As you note, we are separating functions to work on Point Buckler. You met most of the staff working with me to resolve this matter at our meeting on November 20. The following staff members ("the prosecution team") may not advise the Board if a hearing is scheduled: Agnes Farres, Benjamin Martin, Bill Hurley, Brian Thompson, Keith Lichten, and myself. Staff members currently advising the Board, and separated from any discussions regarding preparation of a cleanup and abatement order and/or Administrative Civil Liabilities complaint, include Bruce Wolfe and Marnie Ajello. The Board may wish to have other advisors once an item is scheduled and it becomes aware of the type of enforcement [delete what] it will have to consider. The Prosecution Team is advised by attorneys other than those that will advise the Advisory Team. Experts working with the Prosecution Team, both outside consultants and the staff listed above, will not interact with the Advisory Team. The Advisory Team may select technical advisors to assist it.

- **Hearing Process** - You are concerned about sufficient time to review a report from our team of experts. You mentioned wanting to see a report 60 days before a Board hearing with 30 days to provide comments.

Pending items that will be presented to the Board are generally issued to applicable parties and the public between 45 and 60 days before the scheduled hearing for a 30-day comment period.

- **Hearing Procedures** – You can be assured that both staff from the San Francisco Bay Regional Board and the opposing party will be given equal time to provide testimony at a hearing. The Board ultimately makes decisions on time limits for presentation at hearing, cross examination, and deadlines for written submissions. Sometimes the Board and its advisors will choose to define specific procedures for a hearing. You are welcome to make a request for any specific hearing procedures during the public comment period that will be given to your client when there is a pending item before the Board.

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

510-622-2441
510-926-2870

From: Lawrence S. Bazel [mailto:lbazel@briscoelaw.net]
Sent: Tuesday, February 23, 2016 11:36 AM
To: Whyte, Dyan@Waterboards
Cc: Austin, Tamarin@Waterboards; Matthew Bullock; Matthew Goldman
Subject: Point Buckler Island

Dear Dyan,

It's been a week since my last e-mail, and I haven't heard back from you. Do you have preferences for the dates of the site visit? Are you planning to visit the island without permission, or otherwise take unilateral action? If so, please let me know today.

Thanks very much,

Larry

Briscoe Ivester & Bazel LLP

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