BRISCOE IVESTER & BAZEL LLP
155 SANSOME STREET
SEVENTH FLOOR
SAN FRANCISCO CALIFORNIA 94104
(415) 402-2700
FAX (415) 398-5630

Lawrence S. Bazel
(415) 402-2711
lbazel@briscoelaw.net

16 October 2015

By E-Mail

Bruce H. Wolfe
Executive Officer
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Subject: Cleanup and Abatement Order R2-2015-0038
Point Buckler LLC

Dear Mr. Wolfe:

On behalf of Point Buckler Club, LLC (the "Club"), we are responding to paragraph B.1.b of Cleanup and Abatement Order R2-2015-0038 (the "Order"), which reads as follows:

> No later than October 16, 2015, the Discharger shall submit, acceptable to the Regional Water Board Executive Officer, the following: ….
>
> b. Description of any permits and other authorizations obtained from local, State, and federal agencies and local or regional districts for any filling, grading, vegetation removal, levee and structure construction activities, or other activities that have disturbed land or water features at the Site since the Discharger acquired it.

This letter report identifies authorizations, applicable to the work at Point Buckler Island, arising under the Suisun Marsh Preservation Act, the Federal Clean Water Act, the California Environmental Quality Act, and under the authority of the State Lands Commission. This letter report also discusses Water Code §§ 13260 and 13264, Clean Water Act §§ 401 and 402, and the basin plan, all of which the Order asserts have been violated.

As you know, the Club has filed an amended petition (the "Amended Petition") with the State Water Resources Control Board. A copy is attached to this letter report as Exhibit 1.

I. Authorization Under The Suisun Marsh Preservation Act

As discussed in detail in the Amended Petition, the Suisun Marsh Protection Plan 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. (Amended Petition, section VIII.A.)[1]

The importance of duck clubs is recognized by the Suisun Marsh Preservation Act, which exempts duck clubs from the general requirement for marsh development permits established by Public Resources Code § 29500.[2]

The act required the Suisun Resource Conservation District ("SRCD") to prepare "a water management program for each managed wetland in private ownership" that "shall specify all necessary development". (Pub. Res. Code § 29412.5.) This "component", as the act refers to it, is known as an "individual management plan" or "IMP". SRCD prepared an individual management plan for the Club, which at that time was known as the Annie Mason Point Club, and the San Francisco Bay Conservation and Development Commission ("BCDC") has certified it. (Amended Petition, section VIII.B.) A copy of this individual management plan ("IMP") is attached as Exhibit 2.

The Suisun Marsh Preservation Act exempts from the general permitting requirement (in section 29500) work 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.

(Pub. Res. Code § 29501.5.) This exemption is confirmed by the Suisun Marsh Protection Plan, which reports that:

---

[1] The Suisun Marsh Protection Plan can be found at: http://www.bcdc.ca.gov/laws_plans/suisun_marsh.shtml.

[2] The Suisun Marsh Preservation Act has been codified at Public Resources Code §§ 29000 et seq. This act directs BCDC to implement the Suisun Marsh Protection Plan. (Pub. Res. Code §§ 29004(b), 29113, 29200, 29202.)

> 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.

(Suisun Marsh Protection Plan at 34.)

The individual management plan for Point Buckler specifies maintenance of the ditches and levees:

> Proper water control necessitates inspection and maintenance of levees, ditches, and water control structures. Ditches need to be kept clear of vegetation blockages or silt build-ups to allow circulation and drainage. …. Water control structures should also be kept in working order. Levees require frequent inspection and attention to prevent major breaks from occurring.

(IMP at 2.) By exempting these activities—"maintenance of levees, ditches, and water control structures"—from the requirement for a marsh development permit, the Suisun Marsh Preservation Act authorizes the Club to perform this work without going through the permitting procedures that would otherwise apply.

Note that the exemption in § 29501.5 applies to activity identified in an individual management plan. There is no time limit on when the work can be done. On the contrary, the individual management plan envisions inspection and maintenance in perpetuity.

The individual management plan for the Club was received by BCDC in 1984, after the levees had been repaired. (IMP at 1.) The plan itself says that the island "now has the water control structures and tight levees necessary for proper water management", according to the owner. (*Id*.) This statement is confirmed by Exhibit 3, which is an aerial photograph from 1984, and which shows intact levees. Additional work was apparently done to repair levees in 1990, according to a "wetlands maintenance management report" incorporated into the plan. (IMP at 14.)

The individual management plan for the Club is also noteworthy for what it says about the vegetation on the island, which the Order appears to believe is valuable. The plan reported "olney and hardstem bulrush in the low areas, and saltgrass in the higher areas", and an aerial

photograph showing intermixed tule growth. "[N]one of these plants', the plan explains, "has a relatively high use and selection value for waterfowl". (IMP at 1.) According to the plan, "the situation has greatly improved" as a result of the facility repair, and improved water control, on the island. (*Id*.)

Documents provided by BCDC include no amendment or modification of the individual management plan for Point Buckler Island. The initial plan is therefore still in effect. This conclusion is consistent with the statement, by BCDC staff, that Exhibit 2 is the Club's plan.

Documents provided by BCDC do not include any permit authorizing abandonment of the managed wetlands at the Club.[3]

The Suisun Marsh Preservation Act, therefore, provides authorization for levee and ditch maintenance at the island.[4]

II. Authorization Under The Federal Clean Water Act

Section 404(a) of the federal Clean Water Act allows the U.S. Army to issue permits authorizing the discharge of dredged or fill material. In July 2013, the San Francisco District of the U.S. Army Corps of Engineers issued Regional General Permit 3 ("RGP3"), which specifies that "the landowners represented by the Suisun Resource Conservation District (SRCD) are authorized to place and maintain structures and/or perform work, and discharge dredged or fill material in areas subject to Corps jurisdiction" under the terms of the permit. (RGP3[5] at 1.) The permit covers a wide variety of activities in ditches, on levees, in managed wetlands, and associated with water control structures. (*Id*. at 1-6.) Among other things, it covers maintenance and creation of interior ditches, maintenance and repair of levees, creating drainage swales and

---

[3] It appears that a managed wetland cannot be abandoned without a permit from BCDC. (Pub. Res. Code § 29500 (requiring permit for development); Pub. Res. Code § 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").

[4] The act also imposes on the Regional Board a "judicially enforceable duty" to act in conformity with the act. (Amended Petition, section IX.D.)

[5] Available at: http://www.spn.usace.army.mil/Missions/Regulatory/RegulatoryOverview/RegionalGeneralPermits.aspx

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. (*Id*.)

Section 401(a) of the federal Clean Water Act provides for a procedure in which states can certify that a permit to be issued under the act complies with state law. Here, the Regional Board issued a section-401 certification for RGP3 in June 2013.[6] This certification explains that it covers "158 privately owned duck clubs represented by SRCD". (*Id*. at 2.) The certification specifies that the "total amount of annual excavation and temporary fill for the project would vary from year to year, but would be limited to a maximum of 443,000 cubic yards of earthen material." (*Id*. at 3.)

Point Buckler is one of the duck clubs represented by SRCD. The Suisun Marsh Preservation Act gives SRCD "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". (Pub. Res. Code § 9962(a).) The current list of SCRD clubs includes the Club as number 801.[7]

The work at issue, therefore, comes within the scope of the authorizations provided by RGP3 and its associated section-401 certification.

The Regional Board has also issued a section-401 certification in support of Corps permitting of dredging exterior channels.[8] This certification explains that the "Project purpose is to provide higher quality fill material for exterior levee repairs, and to improve drainage in cut channels, by removing accumulated silt that impairs managed wetland drainage and water control structure tidal operations." (Certification at 1.) The certification recognizes the value of levees:

> The exterior levee system protects thousands of acres of State and private land managed for wildlife habitat, endangered species habitats, Delta

---

[6] Available at http://www.suisunrcd.org/permits.html.

[7] Available at http://www.suisunrcd.org/land_owners.html (identified as Buckler Point, Inc.).

[8] Available at http://www.suisunrcd.org/permits.html.

> water quality, and physical infrastructure such as dwellings, structures, gas wells, power transmission lines, petroleum pipelines, and County roads.

(*Id*.) The certification authorizes the dredging of one million cubic yards of material,

Although this certification may not be directly applicable here, it is relevant because of its authorization of activities that are similar to those at issue here—but far more extensive and arguably much more threatening to the environment.

III. Authorization Under The California Environmental Quality Act

CEQA mitigation measures must be "fully enforceable". (Pub. Res. Code §§ 21081, 21081.6; Amended Petition, section IX.F.4.) The work at Point Buckler is a mitigation measure required by CEQA. In 1984, it was identified by DWR as mitigation for Delta diversions. (*Id*.; Amended Petition, section VIII.C.) 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." (Section-401 Certification at 4.)

As a result, Point Buckler has been authorized 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 RGP3 and the Regional Board's certification.

IV. Authorization By The State Lands Commission

The Suisun Marsh Preservation Act gives State Lands primary responsibility over lands under its jurisdiction. (Amended Petition, section IX.E.) State Lands has asserted jurisdiction over the land where the dock is located, and has signed a lease "authorizing an existing uncovered floating boat dock, five wood pilings, gangway, and walkway located in the Annie Mason Slough". (Transmittal letter.) The lease and transmittal letter are attached as Exhibit 4.

V. Water Code §§ 13260 And 13264

The Porter-Cologne Act (Water Code §§ 13000 et seq.) does not directly prohibit the unauthorized discharge of waste into waters of the state. Instead, it requires a person proposing to discharge waste (that could affect the quality of the waters of the state) to file a report of waste discharge. (Water Code § 13260.) If the discharge would not create a condition of pollution or nuisance, and is not subject to CEQA, then the discharger may begin discharging 140 days after filing the report. (Water Code § 13264.) The Regional Board may, however, respond to the report by issuing waste discharge requirements (Water Code § 13263) or a waiver (Water Code § 13269).

Notwithstanding Water Code § 13260, the Regional Board appears to have concluded that a report of waste discharge *is not* required for any activities covered by RGP3 or other general permits (such as the general industrial and general construction stormwater permits) or for any discharge of dredged and fill material permitted by the Corps under section 404 of the Clean Water Act.

The legal analysis should follow the practical analysis. The purpose of § 13260 is to notify the Regional Board of a discharge, so that the Regional Board can impose appropriate requirements on that discharge. But when a report of waste discharge would be pointless—because a permit has already been issued, or because the Corps will be issuing the permit—then a report of waste discharge need not be submitted.

If § 13260 were interpreted to require reports of waste discharge when permits had already been issued or are under the jurisdiction of the Corps, there would be a huge waste of paperwork and an unnecessary strain on Regional Board resources. To the best of our knowledge, the Regional Board has not asserted that the duck clubs covered by RGP3 are in violation of § 13260 because they have not filed a report of waste discharge.

The Order asserts that the Club has violated Water Code § 13260 and also § 13264, which imposes specified prohibitions when a report has not been filed in accordance with § 13260. (Order at 2, ¶ 10.a.) Because the work at issue here is regulated by RGP3 and the Corps, there is no need to file a report of waste discharge, and the Club should not be considered in violation of Water Code § 13260 or § 13264.

VI. Clean Water Act § 401

The Order also asserts a violation of Clean Water Act § 401. (Order at 2, ¶ 10.b.) But, although a certification is needed to obtain a permit, any failure to provide that certification is not a violation of the Clean Water Act. Section 301(a) specifies what is a violation of the act:

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(33 USC § 1311(a).) Noticeably absent from this prohibition is section 401 (33 USC § 1341). As a result, any failure by the Club to request a 401 certification would not be a violation of federal law. It would also not be a violation of California law.

There is also no violation for a simple and practical reason: the Regional Board has already issued a section-401 certification for RGP3. Because the activities at issue come within RGP3, there is and was no need for the Club to file an application for a 401 certification.

VII. Clean Water Act § 402

The Order asserts that the Club is in violation of Clean Water Act § 402 because it did not sign on to the general construction stormwater permit. (Order at 2-3, ¶ 10.c.) But the work at issue was done during the dry season, and there is no evidence of any discharge of stormwater.

The Clean Water Act regulates only actual discharges, not potential discharges:

> [I]n the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.

(*Waterkeeper Alliance, Inc. v. United States EPA* (2d Cir. 2005) 399 F.3d 486, 505.)

In *Waterkeeper*, the Second Circuit invalidated EPA's CAFO rule on the ground that it regulated potential discharges rather than actual discharges:

> The CAFO Rule violates this statutory scheme. It imposes obligations on all CAFOs regardless of whether or not they have, in fact, added any

> pollutants to the navigable waters, i.e. discharged any pollutants. After all, the Rule demands that every CAFO owner or operator either apply for a permit—and comply with the effluent limitations contained in the permit—or affirmatively demonstrate that no permit is needed because there is "no potential to discharge." In the EPA's view, such demands are appropriate because all CAFOs have the potential to discharge pollutants. While we appreciate the policy considerations underlying the EPA's approach in the CAFO Rule, however, we are without authority to permit it because it contravenes the regulatory scheme enacted by Congress; the Clean Water Act gives the EPA jurisdiction to regulate and control only actual discharges—not potential discharges, and certainly not point sources themselves.

(*Id*., citations omitted.)

As a result, the Club was not in violation of Clean Water Act § 402.

VIII. The Basin Plan

The Order asserts a violation of the applicable basin plan on the grounds that "the Discharger's unauthorized levee construction activities have resulted in the discharge of earthen fill into the site's tidal channels and around the perimeter of the site in quantities sufficient to cause deleterious bottom deposits, turbidity, or discoloration in surface waters or to unreasonably affect beneficial uses." (Order at 3, ¶ 10.d.) But, for a start, there is no evidence of any placement of material "around the perimeter of the site" other than into tidal channels. And, for those tidal channels, the placement of material should not be considered "deleterious". That placement promoted the beneficial uses, and was not a "condition of pollution". (Amended Petition, sections IX.F.1 through IX.F.4.)

"Additionally", the Order says, cutting off tidal circulation into the Site's interior tidal marshes has unreasonably affected or threatened to affect water quality and beneficial uses." (Order at 3, ¶ 10.d.) But there is no evidence of any tidal marshes that have been unreasonably affected. (Amended Petition, sections VIII.VIII.E and IX.G.)

The Club should therefore not be considered in violation of the basin plan.

IX. Conclusion

This letter report provides the information requested by section B.1.b of the Order. It also discusses violations asserted by the Order. The attached Amended Petition explains why the

work at issue at the Club was not a condition of pollution, and why a cleanup and abatement order is not an appropriate response. Nevertheless, the Club recognizes that the Regional Board has concerns about the work done, and remains interested in working together to develop a procedure in which the Regional Board's concerns can be resolved.

Thank you very much for your consideration of these questions, comments, and requests, and please call with any questions.

Sincerely,

Lawrence S. Bazel

cc: A. Farres (by e-mail)
K. Lichten (by e-mail)
A. Tamarin (by e-mail)
B. Hurley (by e-mail)