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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SOLANO

IN THE MATTER OF THE INSPECTION AT: Point Buckler Island APN 0090-020-010 SEC 18 & 19 T3N R1W	Case No. ____ **AFFIDAVIT FOR INSPECTION WARRANT**

A. Affiant Information

1. I, Benjamin Martin, declare as follows: The San Francisco Bay Regional Water Quality Control Board has the authority to conduct the inspection prayed for herein pursuant to California Water Code section 13267(c) and California Code of Civil Procedure section 1822.50 et seq. I am authorized by the San Francisco Bay Regional Water Quality Control Board to conduct investigations and inspections of places where violations of California Water Code, Division 7 (*Porter-Cologne Water Quality Control Act*), may be present.

2. I am an Environmental Scientist employed by the San Francisco Bay Regional Water Quality Control Board (Regional Water Board), and my work address is 1515 Clay Street, Suite 1400, Oakland, California. I presently work for the Enforcement Section, responding to complaints and conducting investigations. I have a Master of Science degree in Fisheries Science from Auburn University. As an Environmental Scientist, I have worked in regulatory enforcement for the past year and a half; my responsibilities include determining compliance with the California Water Code (Wat.

Code § 13000 et seq.) and the federal Clean Water Act (33 U.S.C. § 1251 et seq.). These responsibilities include protecting public health and safety, and preserving and protecting water quality in ground and surface waters, including their beneficial uses. I am responsible for conducting inspections and investigations of places where violations of the California Water Code and federal Clean Water Act may be present, including places where unauthorized fill and waste have been placed where it discharges or threatens to discharge into surface and ground waters, such as at Point Buckler Island. As an Environmental Scientist, I have conducted inspections and determined compliance in storm water management, and wastewater treatment for industrial, agriculture, and construction facilities. I am a participating member of the Santa Clara County, Contra Costa County, and Sonoma County Environmental Task Force groups.

3. I have 131 hours of specialized environmental training that includes environmental crimes training and investigative training. Of the specialized environmental training, I have 29 hours environmental investigations training, 32 hours of response to oil spills training, 24 hours storm water compliance training, 6 hours of emergency response training, and the remaining 40 hours in an environmental law university course.

B. San Francisco Bay Regional Water Quality Control Board Regulatory Authority

4. Pursuant to section 13222 of the California Water Code, the Regional Water Board is authorized to adopt regulations to carry out its powers and duties under Division 7, also known as the *Porter-Cologne Water Quality Control Act*.

5. Pursuant to section 13263 of the California Water Code, the Regional Water Board is authorized to establish discharge requirements that protect ground and surface waters of the state of California.

6. This Affidavit is made in support of a request for an inspection warrant; to establish reason to believe that conditions of nonconformity with the federal Clean Water Act (33 U.S.C. § 1251 et seq.) and the California Water Code, regarding violations by Point Buckler Club, LLC and/or John Sweeney; and to set forth reasons why it is necessary to have the Regional Water Board execute said warrant; and to permit Regional Water Board staff to conduct an inspection of the Point Buckler Island property to determine the extent of violations that exist on Point Buckler Island.

C. Location and Basis for Warrant

7. Point Buckler Island is located in Suisun Bay in unincorporated Solano County, California. The property to be inspected is located off the western tip of Simmons Island, approximately 10 miles south of the City of Fairfield, California and approximately 8 miles east of the City of Benicia, California; assessor's parcel number is (APN) 0090-020-010 comprising a total of 51.5 acres. (Exhibit 1, ParcelQuest Web Based Assessor Data Search). Point Buckler Island is also known as Annie Mason Point Club and Club #801. The Island is currently operated as a premier kite boarding destination for Silicon Valley executives[1]. On the property, over half the Island area is interior of a recently constructed levee, where a number of mobile storage containers have been positioned. Along the southeast corner, a boat dock is installed for access to Point Buckler Island. Looking at historic aerial photographs obtained from the US Geological Survey (www.earthexplorer.gov) and Google Earth (earth.google.com), it appears that approximately two years ago, levee construction was initiated on Point Buckler Island without any permitting or regulatory oversight. The new levee was constructed by digging a borrow ditch and placing fill around the perimeter of the Island. Fill was placed directly into waters of the United States and covered vital tidal marsh habitat. Though some portions of fill were placed on a derelict levee, these unauthorized activities cut off

[1] See www.pointbucklerisland.com and https://www.facebook.com/pointbucklerclubVIP/

tidal flow into the Island's interior tidal marsh habitat and is in violation of the California Water Code and the Clean Water Act. (See Exhibit 1 for excerpted aerial photos.)

8. According to the ParcelQuest Web Based Assessor Data Search, the owner of record of the real property described above is listed as Point Buckler Club, LLC, at 171 Sandpiper Drive, City of Pittsburg, California, 94565. (See Exhibit 2.)

9. In his Declaration in Support of Ex Parte Application for Stay of Administrative Decision; or, in the Alternative, for a Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction in Solano County Superior Court Case No. FCS046410, John D. Sweeney stated he was the manager of Point Buckler Club, LLC, and that:

> In 2014, I personally did work (the "Work") to maintain and repair the levee ringing the island. . . . I dug out material from an artificial ditch inside the levee and placed the material on the existing levee. Some material was placed where the levee had been breached and (where part of the levee had eroded away) on solid ground inside the former levee location. I repaired one of two tide gates. The Work stopped in September 2014, when the [Point Buckler Club, LLC] learned that there were regulatory objections to the Work.

(See pages 1 and 2 in the Declaration of John D. Sweeney in Support of Ex Parte Application attached in Exhibit 3.)

10. The aerials and party admission evidence indicates to me that discharges of earthen material from the levee construction activities likely caused deleterious bottom deposits, turbidity or discoloration, and adversely affected beneficial uses to waters of the state. With my experience and educational background, I assert that such bottom deposits can damage aquatic biota, smother non-motile life forms and destroy spawning and feeding areas. The discharge of fine-grained sediments from levee construction in the water column could have potentially caused clogging in the gill structures of fish, made water-column feeding difficult or impossible, and eliminated light penetration that is needed for primary production. Additionally, fill that was placed cut off tidal channels

to the Island interior for use by aquatic organisms such as Delta Smelt (listed threatened species under both state and federal Endangered Species acts), Longfin Smelt (listed threatened species under state law), and Chinook Salmon (endangered under federal Endangered Species Act) thus adversely impacting the beneficial use for preservation of rare and endangered species. The discharge of earthen material from the construction activities caused burial of existing estuarine habitat, smothered organisms (plant and animal) and ultimately cut off the Island from natural tidal influence thus causing a long term restriction of the beneficial uses of fish migration and spawning.

11. The purpose of executing the warrant is to address past and on-going violations of California Water Code and the federal Clean Water Act, and to aid in determining what actions are necessary in composing a path forward to restoring the Island. If this warrant is granted, the site inspection would consist of employing expert consultants to conduct (a) a topographical survey to construct a digital elevation model of the Island, and (b) a forensic wetland survey designed to identify and characterize the extent of wetlands and other waters of the state and current conditions at the Island. The inspectors will perform in situ water quality measurements for temperature, pH, dissolved oxygen, and salinity. No water samples or soil samples will be seized from Point Buckler Island itself, but possibly from surrounding waters of the state. The site inspection needs to occur as quickly as possible, and not later than by early March because vegetation is quickly growing due to warm temperatures and recent rainfall. The seasonal vegetation will obscure critical visual information, and may obstruct survey equipment.

D. Procedural Background and Potential Violations

12. On January 30, 2015, the San Francisco Bay Conservation and Development Commission (BCDC) notified Point Buckler Club, LLC, and John Sweeney that staff had observed violations of the Suisun Marsh Preservation Act during a site visit on November 19, 2014 that included: filling in three major tidal channels; conducting work outside of allowable times to protect Chinook Salmon, Delta Smelt, Clapper Rail, and

Salt Marsh Harvest Mouse; unauthorized dock enlargement; and placing two mobile army trailers and two shipping containers on the Island. The notice stated that the once tidally active marshland was drained and converted to upland as a result of the levee construction. The BCDC requested Point Buckler Club, LLC, and Mr. Sweeney to stop work on the Island until they submitted a permit application (with the caveat that if an environmental specialist suggested intermediate measures to minimize adverse habitat impacts to seek the BCDC's review to take action).

13. On September 11, 2015, the Regional Water Board issued a Cleanup and Abatement Order (Order No. R2-2015-0038) to Point Buckler Club, LLC, care of John Sweeney. The Order was based on the unauthorized levee construction, how it adversely affected beneficial uses and violated California Water Code and the federal Clean Water Act, and required an impact assessment and a corrective action workplan. Violations described in the Order included that Point Buckler Club, LLC:

a. Failed to submit a report of waste discharge pursuant to California Water Code sections 13376 & 13260.
b. Failed to obtain a permit for discharging into navigable waters and failed to obtain a water quality certification for the activities that resulted in fill to waters of the United States pursuant to Clean Water Act sections 301 and 401.
c. Failed to obtain coverage under the State's National Pollutant Discharge Elimination System General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities (State Water Resources Control Board Order 2009-0009-DWQ) for the levee construction and other land disturbance activities pursuant to the federal Clean Water Act section 402.
d. Discharged, or placed where it could be discharged, to waters of the state and United States silt, sand, clay, or other earthen materials from any

activity in quantities sufficient to cause deleterious bottom deposits, turbidity, or discoloration in surface waters or to unreasonably affect or threaten to affect beneficial uses. These activities violated the *San Francisco Bay Basin (Region 2) Water Quality Control Plan*[2] Prohibition 9, issued pursuant to California Water Code, Division 7, Article 3, Chapter 4, subsection 13243.

The Cleanup and Abatement Order required Point Buckler Club, LLC to submit an impact assessment report describing all levee construction, boat dock construction, and any other discharges of fill material or structures into water of the state and the activities' potential impacts. The impact assessment was to then be used in comprising a Corrective Action Workplan to describe how Point Buckler Club, LLC would restore tidal circulation and interior marsh habitat that existed prior to the levee construction activities, and provide compensatory mitigation habitat to compensate for any temporal and permanent impacts to the functions and values provided by the impacted wetlands, tidal marshlands, and drainage channels caused by their unpermitted activities.

14. Point Buckler Club, LLC, has petitioned the Cleanup and Abatement Order to the State Water Resources Control Board, and filed for an Ex Parte Application for Stay of Administrative Decision, or in the alternative, for a Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction in Solano County Superior Court (Case No. FCS046410). The Court issued a stay, and the Regional Water Board rescinded its Cleanup and Abatement Order at issue. However, the proposed inspection may gather information that will be used to consider remedial alternatives and possible enforcement.

[2] Commonly referred to as the *Basin Plan*, the document and information can be found on the San Francisco Bay Regional Water Quality Control Board's website: http://www.waterboards.ca.gov/sanfranciscobay/basin_planning.shtml

15. The Regional Water Board staff met with Point Buckler Club, LLC, attorneys and Mr. John Sweeney on October 7, 2015, and again during a site visit on October 21, 2015. The purpose of the site visit was to observe and document site conditions, and to better understand (1) the nature and extent of construction activities, including the volume of fill placed for construction on the levee; (2) whether the scope of work done was in the purvey of the US Army Corps of Engineers Regional General Permit 3; and (3) the extent of waters of the state and United States and tidal marsh habitat the was adversely impacted by levee constructions. Regional Water Board staff concluded that a topographical survey and wetland delineation is required to provide the needed information, which would assist in determining what actions are necessary to restore the Island. Follow up communications requested the information from Point Buckler Club, LLC, and has not been provided; therefore, the Regional Water Board is requesting to conduct the necessary work under the requested inspection warrant.

16. On January 5, 2016, Regional Water Board Executive Officer Bruce Wolfe rescinded the Cleanup and Abatement Order (Order No. R2-2015-0038) based on Point Buckler Club, LLC and the Board's Prosecution Team requests for a public hearing before the Board itself to consider the facts.

17. California River Watch issued a Notice of Violation and Intent to File Suit under the Endangered Species Act section 9 (16 U.S.C. § 1540(g)) to Point Buckler LLC, Point Buckler Club LLC, and John Sweeney on January 14, 2016. The notice alleges harm to an unauthorized take of threatened and/or endangered species: Delta Smelt, Central California Steelhead, Green Sturgeon, Sacramento Winter-Run and Central Valley Spring-Run Chinook Salmon, Salt Marsh Harvest Mouse and California Ridgeway Rail.

E. Consent Denied

18. In response to a request to meet, Dyan Whyte, Assistant Executive Officer, emailed Mr. Lawrence Bazel agreeing to meet with him and his client, and requested consent from the Point Buckler Club, LLC for the Regional Water Board staff to inspect

Point Buckler Island a second time. Ms. Whyte explained the need to better understand the Island's conditions prior to meeting. The Regional Water Board staff needed more information about habitat, topography, construction activities, and potential impact to waters of the state. She asked for access on February 8 and 9, 2016, to delineate habitats, survey topography, document the nature and extent of construction activities. (See Exhibit 4.)

19. Mr. Bazel replied to Ms. Whyte's email on January 31, 2015 and denied consent to access Point Buckler Island until after the parties met. He stated, "The club has previously provided access for site visits to several regulatory agencies, including the Regional Water Board, and expects to provide additional access in the future, but I would prefer to postpone these discussions until after our meeting." Mr. Bazel provided additional information and claims about the unresolved issues to be discussed at the meeting. (Exhibit 4.)

20. On February 1, 2016, Ms. Whyte again emailed Mr. Bazel and requested access to the Island to generate topography and other site condition data by licensed professionals that the Regional Water Board had already asked Point Buckler Club, LLC, to provide. She proposed access the week of February 16, 2016. (Exhibit 4.)

21. Mr. Bazel replied on February 3, 2016, and stated the week of February 16, 2016, was not good for them. He also asked what the plan was for the site visit, and who would attend. (Exhibit 4.)

22. Ms. Whyte responded on February 4, 2016, that "…we request access to the Island in order to delineate habitats, survey topography, and document the nature and extent of levee construction activities." She explained again that the information is needed to confirm and augment existing data, and to have a meaningful discussion with Mr. Bazel to assist in answering his questions. Ms. Whyte requested Mr. Bazel to propose an alternative time for accessing the Island, or to clarify whether his client was denying access and to provide the basis for the denial by February 8, 2016. (Exhibit 4.)

23. Mr. Bazel replied on February 8, 2016, asking for further clarification about who specifically would visit the Island and to describe the kind of survey and work would be performed by the survey team and technical professionals. He stated, “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.” Additionally, he specifically requested that we would not include Dr. Stuart Siegel in the visit to the Island due to past conflicts with the club. (Exhibit 4.)

24. During several conversations in February 2016, Dr. Peter Baye, Coastal Ecologist and Botanist, and Dr. Stuart Siegel, Professional Wetland Scientist, have expressed to me and Ms. Whyte the urgent need to access the Island prior to seasonal vegetation growing and obscuring views and growing over survey points. Dr. Baye specifically stated that the later the site visit was in February, the more likely the vegetation will encumber the survey efforts, and that it would be very difficult to obtain specific information to make clear inferences during early to mid-March 2016.

25. Ms. Whyte responded on February 10, 2016, confirming that informal access to the Island had not been granted or denied for the fourth time, and her hope to avoid needed to obtain a warrant. She further offered the dates of February 24, 25 or 26, 2016, to accommodate schedules. She provided the names and titles of the technical professionals as well as the name of the survey crew consulting firm (CLE Engineering) with a promise to provide specific names of the survey crew beforehand, and agreed to not include Dr. Siegel in the survey crew. She also expressed the urgency to visit the Island during the proposed dates due to tides and seasonal changes in vegetation and a need to confirm and augment existing data. Lastly, Ms. Whyte asked for a response by February 11, 2016, to allow time for rescheduling the work crew. (Exhibit 4.)

26. Mr. Bazel replied on February 11, 2016, that he did not believe the site visit was urgent since he looked at the tide schedule for the next month or so. Note that he is not a wetlands expert, and he did not address the urgent need to view the Island before the

vegetation grows. Mr. Bazel then proposed scheduling a site visit for March 17-18, or March 21-28, 2016. (Exhibit 4.)

27. On February 17, 2016, Ms. Whyte, Dr. Siegel, Agnes Farres from the Regional Water Board, and I performed a boat survey with the Solano County Sheriff Marine Patrol around the perimeter of Point Buckler Island to determine how quickly vegetation was growing on the Island, obscuring views and blocking access for survey equipment, and to determine whether there was any construction activity on the Island. We confirmed that spring vegetation growth had begun and will soon fully emerge given the predicted warm weather and increases in daylight hours, along with the recent rain storm. We conclude that continued vegetation growth will certainly obscure some of the information needed to evaluate the Island and it is imperative that we gain access to the Island before March.

28. These facts demonstrate that Point Buckler Club, LLC as the property owner, John Sweeney as the manager, and Lawrence Bazel as the retained attorney have denied consent to the San Francisco Bay Regional Water Quality Control Board staff to access Point Buckler Island during the urgent time frame prior to early March for an inspection consistent with California Code of Civil Procedure section 1822.51.

F. Additional Cause for Inspection Warrant in Quick Time Frame

29. During the February 17, 2016 boat tour, we also observed recent unauthorized grading on the east side of the Island that appeared to be maintenance or repair to the levee, and placement of two mobile helicopter landing pads. This unauthorized grading provides further urgency to inspect the Island to obtain topography information before it is compromised by additional grading, and in effort to prevent new violations of California Water Code and the federal Clean Water Act. This is supported with my having recently reviewed Mr. Sweeney's Facebook page where on February 22, 2014 he posted, "I need a crew to frame and out the prefab together but won't be till August. Not Building to code or w permits." This statement demonstrates Mr. Sweeney's willingness to

disregard local, state, and federal rules and laws, and further emphasizes the need to access the Island soon. (Exhibit 5.)

30. The National Marine Fisheries Service (NMFS) through the National Oceanic and Atmospheric Administration (NOAA) and the US Department of the Interior enforce the Endangered Species Act (16 U.S.C. §§ 1531-1544) and may have a legal interest in the citizen suit noticed by California River Watch. The January 14, 2016 notice gives 60 days until California River Watch intends to file suit, adding to the urgency of this inspection.

G. Participants

31. In light of the above circumstances, I request that permission be given to conduct this inspection warrant without the consent and/or presence of the owner. Lawrence Bazel, on behalf of Point Buckler Club, LLC, and/or its manager, John Sweeney, have not consented to allowing a site inspection by the San Francisco Bay Regional Water Quality Control Board as requested in a timely manner prior to the Island being taken over by seasonal vegetation, and did not verbally acknowledge that he would grant permission. It is my strong belief that Mr. Bazel, Mr. Sweeney, and the Point Buckler Club, LLC will deny permission to access and enter the Point Buckler Island for this inspection. I request that Dyan Whyte (Professional Geologist), Bill Hurley (Professional Civil Engineer), Brian Thompson (Certified Engineering Geologist and Hydrogeologist), and Agnes Farres (Environmental Scientist) from the San Francisco Bay Regional Water Board be allowed to accompany me to perform the inspection.

32. I also request that Dr. Baye and Dr. Siegel, along with five survey members of CLE Engineering, Inc. (most likely Daniel Gillenwater, James Kulpa, Darren Gewant, Kyle Berger, and Justin Dankle, Professional Land Surveyor) be allowed to accompany me and during the inspection executed under the requested warrant. Dr. Baye and Dr. Siegel are presently retained by the Regional Water Board for their expert technical abilities in performing a topographic survey of the Point Buckler Island and delineating

the extent of the high tide line to determine placement of fill in waters of the United States.

33. I also request that Don Tanner, Special Agent of the National Marine Fisheries Service, be allowed to accompany me and other Regional Water Board representatives during the inspection. Mr. Tanner will employ his specialized skills in determining whether there was a take of any endangered species during the unauthorized levee construction pursuant to Endangered Species Act Section 9 (16 U.S.C. § 1531 et seq.).

34. I also request that Paul Jones, Wetlands Specialist for the US Environmental Protection Agency, be allowed to accompany me and other Regional Water Board representatives during the inspection. Mr. Jones will employ his technical skills in wetland ecology and Clean Water Act section 404 (33 U.S.C. § 1344) enforcement in helping determine the extent of fill to waters of the US and harm to aquatic resources associated with the unauthorized levee construction.

35. I also request that the County of Solano Sheriff's Department be allowed to escort me and the other participants during the inspection to ensure our physical safety and to provide us with boat access. County of Solano sheriffs will have access to the same areas described above to provide security for inspection participants.

WHEREFORE, I respectfully request an inspection warrant issue pursuant to California Code of Civil Procedure sections 1822.50 et seq. to permit an inspection and investigation of the premises named in the caption above, as set forth fully in the Inspection Warrant,

AND to permit the inspection for a maximum of two days between February 24, 2016, through February 26, 2016, between the hours of 8:00 a.m. and 6:00 p.m. (more than one day is requested should dangerous weather conditions arise).

I affirm under penalty of perjury that the above information is true and correct to the best of my knowledge.

_____
Benjamin Martin, Affiant

SUBSCRIBED AND SWORN TO BEFORE ME,

DATE:

_____
JUDGE OF THE SUPERIOR COURT