JOHN BRISCOE (053223)
LAWRENCE S. BAZEL (114641)
MAX ROLLENS (308984)
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
(415) 402-2700
Fax (415) 398-5630
jbriscoe@briscoelaw.net
lbazel@briscoelaw.net
mrollens@briscoelaw.net

Attorneys for Point Buckler Club, LLC and John D. Sweeney

STATE OF CALIFORNIA

REGIONAL WATER QUALITY CONTROL BOARD, SAN FRANCISCO BAY REGION

In the matter of: TENTATIVE ORDER ADOPTION OF CLEANUP AND ABATEMENT ORDER for: POINT BUCKLER ISLAND, SOLANO COUNTY	OPPOSITION TO ISSUANCE OF CLEANUP AND ABATEMENT ORDER Hearing Date: August 10, 2016

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I. INTRODUCTION

In the 1970s, the Legislature enacted the Suisun Marsh Preservation Act, which protects duck clubs and duck ponds because they grow plants that provide food for ducks and other waterfowl. Although duck ponds are artificial managed wetlands, they are considered "vital" because they provide food and habitat that natural tidal marsh does not. The Suisun Marsh Preservation Act requires that individual management plans be prepared for duck clubs, and requires that duck clubs comply with their management plans.

Point Buckler is a small island in the Suisun Marsh. It has had a levee around it, and has been managed as a duck club, since at least the 1940s. In the 1980s, in accordance with the Suisun Marsh Preservation Act, an individual management plan was prepared for Point Buckler (the "Club Plan"). The Club Plan called for a tight levee. Tight levees are needed for duck ponds because they allow water to be maintained at a constant level, rather than rising and falling with the tides. Nevertheless, breaches in the levee appeared in the 1990s and 2000s. In 2014, the levee was repaired in accordance with the Club Plan. That repair is the subject of this dispute.

The prosecution team asserts that the levee repair was an abomination, and that John D. Sweeney and Point Buckler Club, LLC (jointly the "Club") should be ordered to destroy all or part of the levee. The Club opposes the prosecution team's request for at least ten reasons.

First, the Technical Report[1] on which the prosecution team relies has made serious factual errors by depending on arcane calculations and ignoring the real evidence on the ground. It has produced a set of elevations for the island that cannot be right. According to the Technical Report, for example, the tide rose above the crest of repaired levee—more than seven inches above the levee crest—on a day when the Technical Report team was on a boat circling the island. If the tide had truly been above the levee crest, water would have flowed across the top of the levee and poured into the center of the island. But the Technical Report team did not see any water flowing over the levee. If seven inches of water had flowed across that unpaved, ungraveled, unreinforced levee made only of dirt and peat, the water would left erosion marks across the top (or gouged deep cuts in it). But

[1] Siegel Environmental (May 12, 2016) Point Buckler Technical Assessment Of Current Conditions And Historic Reconstruction Since 1985.

when the Technical Report team inspected the top of the levee two weeks later, they reported no sign that water had ever flowed across the top. The tide was just as high in early July, and once again no water flowed over the levee. Because no water flowed over the levee, the Technical Report must be wrong about the elevation of the tide on that day, about the elevation of the levee, or about both.

Second, the Technical Report fails a similar reality test on a key factual issue: the elevation of the "high tide line". The Technical Report claims that the Regional Board has authority to regulate activity *below* the high tide line, but concedes that it has no authority to regulate activity *above* the high tide line. The Technical Report acknowledges that the high tide line can be determined from the "debris line" or "wrack line", a more-or-less continuous line of debris that floats up on a high tide and is stranded when the tide recedes. But then the Technical Report ignores the actual debris line on the island, which is a distinct line readily observed on virtually all the aerial photographs along the southern and western sides of the island. The debris line is made of white or light-colored material including wood, dried vegetation, and even styrofoam. The Club was aware of the debris line during the levee repair, and intentionally stayed above it whenever it could. As a result, the Regional Board does not have authority over most of the levee repair.

Third, the Technical Report fails yet another reality test when it claims that virtually the entire island was subject to daily inundation by the tides. This conclusion is contradicted by eyewitness evidence: even during the many months of levee repair, the Club never saw the island flooded. It is contradicted by the debris line: if the island had been flooded, the debris would have been carried to the center of the island, rather than remaining at the edges. And it is contradicted by the aerial photographs: if the island had been flooded at high tide, the aerial photographs would have shown ponding.

Fourth, the lead author of the Technical Report was in no position to provide an unprejudiced assessment of the Club. He had produced a widely disseminated map that included incorrect information about Point Buckler and several other islands (as everyone now agrees), and Mr. Sweeney had accused him of scientific fraud. The prosecution team should have hired a consultant who had no ax to grind.

Fifth, the Technical Report did not fairly assess the effects of the levee repair on beneficial uses. The levee was repaired for the purpose of restoring duck ponds, and duck ponds indisputably promote the beneficial uses of wildlife habitat (by providing food and habitat for waterfowl) and recreation. Yet there is not a word in the Technical Report about the benefits that the duck ponds would provide. The Technical Report asserts that the levee repair was detrimental to several beneficial uses, principally those involving fish. But it has no direct evidence of harm, and relies on speculation.

Sixth, the Tentative Order[2] would violate the Suisun Marsh Preservation Act (the "Preservation Act"), which requires that the Club maintain the levee in accordance with its Club Plan. The Preservation Act also imposed a "judicially enforceable duty" on the Regional Board, which must act in accordance with the Preservation Act. The Tentative Order violates the Preservation Act because it calls for at least seven breaches in the levee, whereas the Club Plan calls for a tight levee.

Seventh, the Tentative Order would violate the Porter-Cologne Act and Water Code § 13304, which authorizes the issuance of a cleanup and abatement order only when there has been a "discharge of waste" to "waters of the state" that creates a "condition of pollution or nuisance". Here the Tentative Order is inconsistent with all three of the elements. As explained above, most of the levee repair was done above the high tide line, and the Technical Report quite properly does not claim that land above the high tide line is "waters of the state". The levee repair did not create a "condition of pollution or nuisance" for many reasons, beginning with the obvious fact that duck ponds are not a condition of pollution or nuisance. Legally, an act required by statute cannot be a nuisance, and here the Suisun Marsh Preservation Act requires duck clubs to comply with their individual management plans. The levee repair was also part of a mitigation project required by CEQA. Finally, the Tentative Order goes far beyond the levee repair, and would regulate activities that are plainly not a "discharge of waste", including the keeping of pet goats, the cutting of dead vegetation, the temporary placement of portable equipment, and the excavation of dirt.

[2] Tentative Order, Adoption of Cleanup And Abatement Order for: Point Buckler Island, Solano County (as amended)

Eighth, the Tentative Order violates due process. It imposes requirements so vague that no one can objectively determine whether the requirements have been met. The Tentative Order acknowledges that they are vague by making compliance subject to the personal determination of Bruce Wolfe, the Executive Officer. But due process does not allow requirements to be so vague that compliance must be determined by a person. And Mr. Wolfe has been removed from this matter in response to the Club's assertions that due process was violated when he crossed over from the prosecution team to the advisory team.

Ninth, the Tentative Order violates Water Code § 13267, which requires the Regional Board to balance costs and benefits before requiring the production of technical reports. No balancing has been done, and the Tentative Order includes only a conclusory statement that does not pass muster.

Tenth, the Tentative Order violates CEQA. There is a categorical exemption for actions to protect the environment, but the Tentative Order does not refer to that exemption. The reason, no doubt, is that that exemption does not apply when there is construction, and the Tentative Order calls for construction. The Tentative Order therefore attempts to use another exemption, but that one also does not apply when there is construction.

Last, but certainly not least, the Tentative Order should not be issued because it is neither necessary nor appropriate. The parties have gotten off to a bad start, but are now on track to resolve this dispute through standard permitting procedures. The Club expects to submit permit applications to the U.S. Army Corps of Engineers (the "Corps"), to Regional Board staff, and to the San Francisco Bay Conservation and Development Commission ("BCDC"). The Club has met with staff to discuss those applications, and expects to continue meeting to resolve the issues and obtain permits for the levee repair. A cleanup and abatement order is more likely to get in the way of productive discussions then it is to help them along.

The Regional Board should not condone the factual errors in the Technical Report. Nor should it attempt to resolve all the factual and legal issues during the short time scheduled for this matter in a regular monthly meeting. Instead, the Tentative Order should be taken off calendar and evaluated in a special hearing (like the hearing used in the Byron-Bethany matter) in December 2016 or later together with the prosecution team's complaint asserting administrative civil liability. The

issues are complex, and there is no reason to hear the two matters separately. At the very least, the Tentative Order should be sent back to the prosecution team with directions to consider the factual and legal issues raised in this brief.

II. BACKGROUND

A. The Island Has Been A Duck Club Since At Least The 1940s

Duck clubs use levees to maintain control over water levels in the duck ponds. (Declaration of John D. Sweeney ("Sweeney Decl."), ¶ 2.) An aerial photo dated 1948 shows that Point Buckler was ringed by a levee at that time. (Technical Report, fig. A-1.) Conversations with previous owners of the island confirm that it was used as a duck club back to the 1920s. (Sweeney Decl., ¶ 2.)

B. Because The Island Was High And Dry, A Pump Was Installed To Flood The Duck Pond

There were ponds on the island in 1948. (Technical Report, fig. A-1.) A pond is visible in an aerial photograph taken in 1981. (*Id*., fig. A-3.) These ponds apparently silted in, perhaps when storms and wave action breached the levee. After 1981, there is no sign of any pond in any aerial photograph until two small ponds were dug in 2012. (*Id*., figs. A-4 to A-25; see section III.B.2 below.)

In 1984, as mitigation for the transfer of water from the Delta to southern California, the California Department of Water Resources ("DWR") proposed to install a pump and to maintain that pump. (Bazel Decl., ex. 1 ("DWR EIR") at 103; see section V.B.3 below.) DWR made clear, however, that it would not install the pump until the levee was repaired: "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.) A letter from DWR dated 1988 asserts that the pump has not yet been installed because the levee has not yet been repaired. DWR installed the pump and generator in the early 1990s, according to the owner of the island at the time. (Sweeney Decl., ¶ 2.)

An old pump and a generator are still there. (*Id*.) The pump is designed to float in the open water, and to draw water a few feet below the surface. (*Id*.) There was a hose to carry the pumped water over the levee and onto the island, where it would have flooded a large area that could be used as a duck pond. (*Id*.)

Duck clubs do not generally use pumps because they do not need them. (*Id.*, ¶ 3.) Duck ponds are typically below high tide levels. (*Id.*) Duck clubs open their tide gates, and water flows into the ponds. (*Id.*) When the water level is where they want it, they close the tide gate to maintain the water level. (*Id.*) At the end of the season they drain their ponds by opening the tide gate and allowing the water to drain out. (*Id.*) When the ponds are drained, clubs can remove dead vegetation by discing or burning. (*Id.*)

There is only one reason that a pump would have been installed at Point Bucker, and that DWR would have wanted the levees repaired. (*Id.*, ¶ 4.) The island was above high tide, and did not flood naturally. To flood a duck pond, the owner would have had to pump water onto the island. But there would be no point to pumping water onto the island if the levee were not tight, because the pumped water would simply drain off of the island into the surrounding waters. For the pump to flood a duck pond, which was its obvious purpose, the levee had to be tight. (*Id.*)

C. The Suisun Marsh Protection Plan Emphasizes The Importance Of Duck Ponds, Which Waterfowl Prefer Over Natural 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. (Bazel Decl., ex. 2 (Suisun Marsh Protection Plan) at 9.)

The Suisun Marsh Protection Plan (the "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 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 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 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.) These 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).)

Duck clubs, in short, "enhance the habitat" for waterfowl by growing "preferred food plant species" that do not occur naturally.

D. The Suisun Marsh Preservation Act Requires A Club Plan To Be Prepared For Each Duck Club, And Requires Each Duck Club To Comply With Its Plan

In 1977, the Legislature enacted the Suisun Marsh Preservation Act (the "Preservation Act"), which has been codified at Public Resources Code §§ 29000 et seq. The Preservation Act directs BCDC to implement the Suisun Marsh Protection Plan. (PRC §§ 29004(b), 29113, 29200, 29202.) The Preservation Act gives the Suisun Resource Conservation District ("SRCD") "primary local responsibility for regulating and improving water management practices" at duck clubs within Suisun Marsh. (PRC § 9962(a).) The Preservation Act requires SRCD to prepare a water management program for each duck club. (PRC § 29412.5.) These documents have come to be known as "individual management plans". The plans were submitted to BCDC, which was required to certify them if they met specified requirements. (*Id*.; PRC § 29415.)

In the 1980s individual management plans were developed and certified for each duck club:

> 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).) These plans allow duck clubs to implement repairs and "enhancements" without a permit from BCDC:

> 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*.)

The Preservation Act requires SRCD to "issue regulations requiring compliance with any water management plan or program for privately owned lands". (PRC § 9962(a).) The Legislature,

therefore, intended that an individual management plan would be prepared for each duck club, and that each duck club would comply with its plan.

The compliance obligation of each duck club runs with the land. In the words of SRCD's Suisun Marsh Management Program (the "Management Program"):

> Each private managed wetland ownership…shall be managed in conformity with the provisions and recommendations of the individual management program…. If there is a change in land ownership, the new landowner assumes this responsibility.

(Bazel Decl., ex. 3 at 18; *see* PRC § 29401(d) (requiring management program).)

E. The Preservation Act Imposes A Judicially Enforceable Duty On The Regional Board

The Preservation Act requires all California state agencies to "carry out their duties and responsibilities in conformity with" that act and with the policies of the Protection Plan:

> 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(a), *see* § 29004 (referring to the Protection Plan).)

F. A Club Plan Was Prepared For Point Buckler

By 1984, SRCD had prepared an individual management plan for Point Buckler, which was then called "Annie Mason Point Club" or Club 801. (Bazel Decl., ¶ 5 and ex. 4 (the "Club Plan".) BCDC staff have reported that the plan was certified. (Sweeney Decl., ¶ 5.) The Club Plan includes a map identifying "levee repair" in several locations, and notes that levee problems from the 1970s had been resolved: "the situation has greatly improved and the club reports that it now has the water control structures and tight levees necessary for proper water management." (Bazel Decl., ex. 4at 16 (map), 4 (text).) "Proper water control", according to the Club Plan, "necessitates inspection and maintenance of levees, ditches, and water control structures." (*Id*., ex. 4 at 5.) The plan also refers to a standard list of recommendations "for more information on the maintenance and repair of water control facilities." (*Id*.) This reference appears to be to the Management Program, which includes "Suisun Marsh Levee Specifications". (*Id*., ex. 3 at C-11 through C-17.) The Management Program requires that "renovation, restoration, repair and maintenance of existing levees" must conform with these specifications. (*Id*., ex. 3 at C-6.) The Club Plan, in short, (1) specifies that "tight levees" are

"necessary for proper water management", (2) calls for "maintenance of levees", and (3) refers to specifications for the "restoration" and "repair" of levees.

The Club Plan also refers to the cleaning out of ditches and to the removal or burning of vegetation. "Ditches need to be kept clear of vegetation blockages or silt build-ups to allow circulation and drainage." (*Id.*, ex. 5 at 5.) "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.*)

Individual management plans must be reviewed every 5 years and may be modified. (PRC § 29422(a).) The Club plan has never been modified. (Bazel Decl., ¶ 5.)

G. The Levee Was Repaired In Accordance With The Club Plan

In 2014, Mr. Sweeney repaired the levee. (Sweeney Decl., ¶ 6.) He dug out material from an artificial ditch inside the levee and placed the material on the existing levee. (*Id.*) 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. (*Id.*) He repaired one of two tide gates. (*Id.*) Details were provided in a technical report prepared by Applied Water Resources and submitted to the Regional Board in October 2015. (Bazel Decl., ex. 5.)

Although the island is used for kiteboarding, the levee repair was not needed for kiteboarding because the great majority of Point Buckler is dry even at high tide, and was before the levee repair. (Sweeney Decl., ¶ 7.) The levee was repaired so that the duck club could be rejuvenated. (*Id.*) Work stopped in October 2014, when the Club learned that there were regulatory objections. (*Id.*) The Club would like to finish the levee repair, install a second tide gate, and do the additional work necessary for a fully functioning duck club, including discing the ponds, planting the vegetation that would provide food for ducks and other waterfowl, and otherwise restoring the duck ponds and waterfowl habitat. (*Id.*) However, the Club does not intend to proceed with this work unless the issues raised by the agencies have been resolved. (*Id.*)

The Work was consistent with the "tight levees" called for by the Club Plan, with levee "restoration" referred to in the Management Program, and with the overarching concept in both:

levees and other water control structures should be maintained and repaired in perpetuity so that duck ponds could provide food and habitat for waterfowl.

H. Staff Issued A Cleanup And Abatement Order Before Visiting The Island

Staff from the San Francisco Bay Conservation and Development Commission ("BCDC") were aware of the levee repair soon after it started. The work was observed by staff from the Suisun Resource Conservation District "SRCD") and BCDC. (Sweeney Decl., ex. 1.) Nevertheless, neither SRCD nor BCDC contacted the Club until after the levee repair was substantially completed. (Sweeney Decl., ¶ 8.)

Regional Board staff did not initially participate in the matter. Rather than leave the matter to BCDC, however, staff stepped in. In September 2015, Bruce Wolfe issued a cleanup and abatement order. (Bazel Decl., ex. 6.) No hearing was held either before or after the order, even though the Club asked for a hearing, and even though due process requires a hearing. (See section VI below.)

At the time the order was issued, Regional Board staff had not visited the island. Their first visit, at the invitation of the Club, was in October 2015. (Sweeney Decl., ¶ 9.) The September 2015 order relies on hearsay from BCDC and the California Division of Fish and Wildlife for the proposition that the levee repair "cut off crucial tidal flow to the interior of the Site, thereby drying out the Site's former tidal marsh areas". (Bazel Decl., ex. 6 at 2, ¶ 8.) This "drying out" assertion appears to be the sticking point of this dispute. Staff have asserted that the levee repair dried out tidal marsh. The Club has protested that this assertion is not true, to no avail. (*E.g*. Bazel Decl., exs. 7-8.)

If the drying out was so important to the regulatory agencies, why didn't any of them ever ask the Club to restore the tidal flow by open the tide gate? None ever has. (Sweeney Decl., ¶ 10.) Nor has any of the agencies expressed any interest in flooding part of the island to create a duck pond, as the Club would like to do. (*Id*.)

I. When Staff Refused To Extend Time, The Club Had To File Suit

The September 2015 cleanup and abatement order had two deadlines: the first called for the submittal of information, and the second (although vague) called for a plan to destroy at least part of

the levee repair. (Bazel Decl., ex. 6 at 4-5.) In October 2015, the Club met the first deadline and submitted a technical report and additional information. (*Id*., exs. 5 and 8.) The Club also filed a petition with the State Water Resources Control Board. ("State Board") and requested a stay. (*Id*., ¶ 10 and ex. 9) The State Board did not issue a stay. (*Id*., ¶ 10.) In January 2016, the State Board denied the petition. (*Id*.)

The second deadline was postponed until January 1, 2016. (*Id*., ¶ 11.) During meetings with staff in October and November 2015, the Club requested that the deadline be postponed again, and explained that if the deadline were not postponed it would have to go to court to obtain a stay. (*Id*.) On December 1, 2015, the Club submitted a letter offering to do additional investigations in return for a postponement of the January 1 deadline. (*Id*., ex. 10.) Among the work to be done was a topographic study and a wetlands delineation. (*Id*. at 1-2.) Staff nevertheless refused to extend the January 1 deadline. (*Id*., ex. 11.)

On December 23, the Club filed suit against Bruce Wolfe and the Regional Board in Solano Superior Court, and on December 28 it moved ex parte for a stay. (*Id*., exs. 12 and 13.)

J. After The Court Granted A Stay, And Staff Rescinded The Order, Staff Conducted A Site Inspection

The court granted the stay. (*Id*., ex. 14.) On January 4, staff asked Mr. Wolfe to rescind the order, with the understanding that the order would be re-issued after a hearing. (*Id*., ex. 15.) Mr. Wolfe then rescinded the order. (*Id*., ex. 16.)

Following that rescission, the Club tried to meet with staff. (*Id*., ex. 17 at 2-3.) Staff refused to meet, however, until they had inspected the island. (*Id*. at 1.) As a result, there was no discussion about whether the Club would proceed with the work it had outlined in its December 1 letter, and no request by staff that the Club perform the work in the letter notwithstanding the rescission of the September 201r order. (Bazel Decl., ¶ 18.)

After many e-mails, the Club agreed to an inspection in early March. (*Id*.) Staff wanted the inspection to be in later February, and obtained an inspection warrant. The Club objected to some of the statements made in the warrant affidavit, and to some of the statements made in an amendment to the warrant. (*Id*., exs. 19-21.) The inspection took place on March 2, 2016.

K. The Club And Staff Are Now Negotiating A Permit

In April 2016, BCDC issued a cease and desist order, and the Club and Mr. Sweeney filed suit. (Bazel Decl., ¶ 23.) Among other things, BCDC's order called for the submission of a permit application. (*Id.*) BCDC followed with an administrative civil liability complaint. (*Id.*). In June, the parties reached agreement on a stipulation postponing several of the dates. (*Id.*)

In June, the Club met with staff, as well as with BCDC and the U.S. Environmental Protection Agency. (*Id.*, ¶ 24.) The Club outlined its intent to submit permit applications to the Corps of Engineers, to Regional Board staff, and to BCDC. (*Id.*) The Club explained that it wanted to use the island for kiteboarding and for a duck club, complete with a duck pond or duck ponds, but that it could restore tidal flow to the remainder of the island. (*Id.*) Staff, as well as EPA and BCDC, supported the Club's plan to submit applications, and had no objection to the use of the island for kiteboarding and as a duck club. (*Id.*) Although substantial issues remain to be resolved, the permitting process provides a method for achieving a resolution that can enhance the beneficial use of recreation on the island, while restoring tidal flows to the island. (*Id.*)

The prosecution team's Staff Summary Report acknowledges that "restoration of tidal marsh may be compatible with kiteboarding and duck hunting activities". (Summary Report at 3.) That compatibility is best developed through the permitting process, rather than through an order directed at destroying what is there. Before any order is issued, permitting should be given a chance.

III. THE TECHNICAL REPORT IS WRONG ABOUT THE KEY FACTUAL ISSUES

The prosecution team relies primarily on a report entitled ("Technical Report" or "Report"). This report makes serious errors about key factual questions affecting the jurisdiction of the Regional Board to issue a cleanup and abatement order. The most significant error relates to the "high tide line". The Report asserts that the Regional Board has jurisdiction (i.e. authority) to regulate the levee repair *below* the high tide line, but not *above* that line. But the Report does not accurately establish the location of that high tide line—it sets the line too high. In fact, the great majority of the levee repair took place *above* the high tide line, and the Regional Board has no jurisdiction over that repair.

The Technical Report is also wrong when it asserts that most of the island was tidal wetland. In fact, the interior of the island, except for a few small channels and ditches, was above tidal inflows and outflows.

The lead author of the technical report, Stuart Siegel, was not in a position to provide an objective review of the levee repair. He had been publicly accused of scientific fraud by John Sweeney. Staff was warned, but chose to use him anyway. The result was a report that focuses on information that could harm Mr. Sweeney, but omits important evidence in Mr. Sweeney's favor.

The Regional Board should neither accept nor condone bad science. It should send the matter back to staff for additional work on the basic facts.

A. The Report Is Wrong About The High Tide Line

According to the Report, all waters below the high tide line are "waters of the United States" subject to the jurisdiction of the U.S. Army Corps of Engineers (Technical Report at I-1) and also "waters of the state" subject to the jurisdiction of the Regional Board (*id*. at 16). Neither the Report nor staff contend that the Regional Board has jurisdiction over any land *above* the high tide line. As a result, the location of the high tide line must be correctly ascertained to establish whether the Regional Board has jurisdiction over the Club's levee repair.

The Technical Report gives the phrase "high tide line" the same meaning given to that phrase by the Corps of Engineers:

> The term "high tide line" means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(Technical Report at I-1, quoting 33 CFR § 328.3(d) *see* 33 CFR §328.3(c)(7) (substantively unchanged).) The key concepts here are (1) that the high tide line may be determined from a line of debris along the shore, and (2) the high tide line encompasses tides that occur with periodic frequency by not storm surges.

1. The real high tide line cannot be higher than the levee

According to the Technical Report, the high tide line for Point Buckler Island is 8.2 feet above NAVD88.[3] (Technical Report at I-3.) The lowest elevation along the crest of the levee is, however, only 6.7 ft. (*Id*. at F-3.) The lowest point along the top of the levee, therefore, is 1.5 feet below what the Technical Report identifies as the high water mark. The Technical Report illustrates this relationship in Figure F-8. The relevant part of that figure is attached as Bazel Decl., ex. 22. According to the figure, the high tide line is above the crest of the levee in about 14 places, or nearly 2000 feet along the top of the levee. (*Id*., ex. 23.)

If there had been a high tide of 8.2, large amounts of water would have flowed over the top of the repaired levee. At the lowest point along the top of the levee, which the Report asserts is at 6.7 foot elevation, there would have been 1.5 feet of water flowing over the top.

The top of the levee is made up of dirt and peat. (Sweeney Decl., ¶ 11.) The peat in the levee is especially fluffy and weak, and is easily eroded. (*Id*.) The levee has not been paved, graveled, or otherwise protected against erosion. (*Id*.) According to the Technical Report, the levee is about 1 to 4 feet high. (Technical Report at F-3.)

Any substantial flow across the top of the levee would have left erosion marks that would be readily observable. (Sweeney Decl. ¶ 11; Huffman Decl., ¶ 3.) Anyone who has seen even a few inches of water spill over the lip of a dam or a spillway knows that the flowing water moves quickly. Water flowing with substantial velocity is powerful, and readily erodes unstabilized dirt. (Huffman Decl., ¶ 3.) Water flowing over the levee at a depth of 1.5 feet would deeply erode the levee. (*Id*.)

These marks do not exist. The Technical Report does not report any sign of water flowing over the repaired levee, and does not argue that water has flowed over the repaired levee. There are no marks of water flowing over the levee. (Sweeney Decl., ¶ 12; Huffman Decl., ¶ 3.)

If high tides actually reached an elevation of 8.2, one would expect to see woody debris in the interior of the island, especially along the interior channels. (Huffman Decl., ¶ 6; see section III.A.1 below.) But the Technical Report does not identify any debris within the interior, and there is no evidence of "wrack line" of woody debris in aerial photographs. (*Id*.) The fact that no woody

[3] All elevations in this brief are above NAVD88.

debris or wrack line is present along the interior channels casts doubt on the credibility of the Technical Report's conclusion that the high tide line is at an elevation of 8.2 feet NAVD88. (*Id.*)

The only reasonable conclusion, from the data on the ground, is that the high tide has not reached 8.2 feet at any time since the levees were repaired.

This conclusion is confirmed by the tide data at Port Chicago (on which the Technical Report relied), which show no high tides anywhere near 8.2 since the levee was repaired. (Bazel Decl., ex. 24.) The highest water level since March 2014 is less than 7.3 feet, nearly a foot less than the 8.2 feet level identified by the Report as the high tide line. (*Id.*)

Because the high tide line should be based only on "spring high tides and other high tides that occur with periodic frequency", and there has been no high tide remotely close to 8.2 feet in the past two years, the high tide line identified by the Technical Report is wrong.

The Technical Report bases its determination of the high tide line on Port Chicago data, adjusted *upward* based on one data point. (Technical Report, I-1 to I-3.) This adjustment should not have been based on one data point. (Huffman Decl., ¶ 7.)

The Technical Report recognizes that the highest tides at Port Chicago are most likely attributable to storms, and should be omitted from the calculation, but the Technical Report drops out only a very few of the highest elevations: less than 0.1%. The Technical Report's own figure, however, shows that the highest tides during what the figure labels as "drought" are much lower than those before the drought: the highest water elevation recorded during the 5-year drought is 7.4 feet, whereas the highest before the drought was about 9.0 feet. (Technical Report. fig. I-2.) Because nothing during the 5-year drought approached the Technical Report's figure of 8.2 feet, that figure cannot be a fair assessment of "spring high tides and other high tides that occur with periodic frequency", as the Corps regulation specifies. Instead, the 8.2 figure must be based on storm surges, which the definition says should not be considered.

If the Technical Report had been serious about separating seasonal periodic tides from irregular high tides resulting from storms, it would have evaluated at least two additional sources of data: data on riverflows, and data on predicted lunar tides. It is common knowledge that stormwater from throughout the Central Valley flows through Suisun Bay, and past Port Chicago, on its way to

the Pacific Ocean. The Sacramento River, in particular, often produces high flood flows following rainstorms. Water levels in the Sacramento River get so high that large amounts of water flow over a weir into the Yolo Bypass. This bypassed water rejoins the flow from the main branch of the Sacramento River, and joins with the flow from the San Joaquin River, before reaching Suisun Bay. The Technical Report could have determined whether high flood flows from these rivers coincided with high tides at Port Chicago, identified those high tides attributable to storm flows, and removed those data from the analysis. But it did not. The Technical Report also could have considered tide heights predicted only from lunar effects. These data might be useful in separating "spring high tides and other high tides that occur with periodic frequency", which according to the Corps regulation should be included in the assessment, from flood flows, which should not. The Technical Report did not consider these data either. As a result, the Technical Report did not do an adequate job of differentiating seasonal lunar tides from storm tides at Port Chicago.

The Technical Report ignored evidence that the tide heights at Point Buckler may be *lower* than those at Port Chicago. Mean high tide for a location in Montezuma Slough, which is across Grizzly Bay from Point Buckler, was calculated to be 5.0 feet, which is *lower* that mean high tide at Port Chicago. (Bazel Decl., ex. 25.)

The Technical Report's conclusion about the high tide line, therefore, results from the following errors: (1) the Technical Report ignored evidence that the high tide had never approached 8.2 feet during the past two years, (2) the Report does not seriously try to separate periodical high tides from the many irregular high tides resulting from high storm flows, (3) the Report adjusted the Port Chicago data upward based on only one data point, and (4) the Report ignored data suggesting that tides at Point Buckler are actually lower than they are at Port Chicago. The Report also relied on elevations that must be wrong, and misidentified or ignored the debris line at the island, as explained in the next two sections below.

The Technical Report is therefore wrong when it concludes that the high tide line is 8.2 feet. This figure is too high. Because the location of the high tide line is fundamental to the question whether the Regional Board has jurisdiction over the levee repairs, the Regional Board should send the matter back to staff to resolve this key factual question.

2. The report's elevations must be wrong

On March 2, 2016, staff and their consultants conducted their site inspection of the island. (Technical Report at 1.) Two weeks earlier, on February 17, 2016, they conducted a boat tour around the island. (*Id*. at 1, I-1.) According to the Report, the water level at Point Buckler was 7.3 feet on February 17. (*Id*., figure I-1.)

A water elevation of 7.3 feet is 0.6 feet above 6.7 feet, which as noted above is the lowest elevation along the levee crest. According to the Technical Report, there is a least one other location along the top of the levee where the elevation is less than 7.0 feet. As a result, water should have been flowing over the top of the levee and into the center of the island in at least two places on February 17, when staff and their consultants took a boat tour around the island. Surely they would have noticed if there was water flowing over the top of the levee, and would have reported it. And surely they would have noticed, when they conducted their inspection two weeks later, that the top of the levee was eroded away and the island was flooded with water. But the Technical Report does not say that water flowed over the top of the levee on February 17; it does not say that there are any erosion marks on the top of the levee; and it does not say that it found ponded water inside the levee.

On July 3, the tide reached the same level it had on February 17. (Bazel Decl., ¶ 29.) Mr. Sweeney was on the island that day, and observed no erosion marks or any other sign that any water had flowed over the top of the levee. (Sweeney Decl., ¶ 13.) Nor, as discussed above, are there any other signs that water has flowed across the top of the levee.

Plainly, at least some of the elevations in the Technical Report are wrong. If the water level really were at 7.3 feet on February 17, and the levee elevations were as much as 0.6 feet lower than that in at least two locations, there would have been visual evidence of water flowing over the top of the levee, and evidence of water flow and erosion on the levee itself.

Because the elevations in the Technical Report cannot be correct, the Regional Board should return the matter to staff to resolve the fundamental issue of elevation.

3. The report ignored obvious evidence of the true high tide line

The Corps regulation relied on the Technical Report specifies that "the high tide line may be determined…by…a more or less continuous deposit of… debris". (Technical Report a I-1, quoting

33 CFR §328.3(d).) Aerial photographs show that there was a "more or less continuous" line of debris along the edge of the island *before* the levee was repaired. This type of line is sometimes called a "debris line"; the Technical Report calls it a "wrack line".

Figures D-10 and D-11 in the Technical Report, which are aerial photographs of the island taken in September and October 2013—well before the levee repair started in 2014—show a "more or less" continuous white line at the edge of the island. (Figures reproduced as Bazel Decl. exs. 26-27; enlargements of parts of these figures provided as ex. 27.) The line can plainly be seen along the southern edge of the island, and it continues along the northwestern side. (*Id.*) The eastern side is too steep and vegetated to have a clear debris line (Sweeney Decl., ¶ 14), and the Technical Report concedes that the eastern edge is too elevated to be within the jurisdiction of the Regional Board (Technical Report , fig. N-2).

The white line along the shore of the island consists of debris, including dead vegetation and whitened wood, along with some other detritus including styrofoam. (Sweeney Decl., ¶ 15 and ex. 2.) The Technical Report acknowledges that this line of vegetation is indeed the debris line. (Technical Report at I-5, photo I-2.) The Technical Report admits that "[d]ebris wrack lines represent vegetation washed ashore by the tides and wind waves, and are a primary indicator to establish the High Tide Line under the Clean Water Act". (*Id*. at I-2 to I-3.)

But the Technical Report ignored the white debris line running around the edge of the island, as its own figure makes clear. (*Id*., fig. I-3.) No elevations were taken of the white line along the edge of the island, except perhaps where that line intersected with the levee. At these points, the Technical Report appears to have surveyed the top of the levee, based on the rationale that there were bits of vegetation on top of the levee. (*Id*. photo I-1 ("[n]ote the vegetation litter atop the levee").) But these bits of lightweight vegetation could easily have been tossed on top of the levee by wind or waves. The Technical Report found no evidence that the wooden debris, which would float up on a rising tide but would be less likely to be tossed up by wind, on the top of the levee. And even if there were a place where wave-tossed lumber had been found at an elevated location, one location is not a "more or less continuous" line of debris.

The Technical Report concluded that the top of the debris line was at 8.3 feet. It obtained this figure by averaging the two highest readings. (*Id*. at I-3.) The lowest reading of the top of the debris line was 6.3 feet, a full two feet lower than the highest reading. (*Id*., fig. I-3.) Because the number 8.2 is not calculated from a "more or less continuous" line of debris, it is not the debris line called for by the Corps regulation.

Moreover, the white debris line seen in the aerial photographs is plainly at a much lower elevation than 6.3 feet. According to the Technical Report, remnants of the old levee (i.e. the levee before it was repaired in 2014) were measured at elevations as low as 5.45 feet. (*Id*., fig. F-6.) As can be seen from an enlargement of this figure, the white debris line was much closer to the water—and therefore at a lower elevation—than the old levee. (Bazel Decl., exs. 25-27.) If the elevations in the Technical Report could be trusted, they would establish that the white line running along the water's edge—the high tide line—was at an elevation of less than 5.45 feet.

If the Technical Report were correct, there would be no white debris line around the edge of the island. The high tides would have lifted that debris and carried it over the levee. The fact that the white debris line exists—and existed before the levee repairs—is strong on-the-ground evidence that the Technical Report has not fairly represented the true high tide line.

The fact that the Technical Report did not measure the elevation of the white line, and paid no attention to it, is strong evidence that the Technical Report did not fairly assess all the relevant evidence. For these reasons alone, the Regional Board should send the matter back to staff with directions to resolve the scientific issues.

4. Nearly all of the levee repair was done *above* the high tide line

Aerial photographs show that the levee repair was done inside the white debris line, and therefore above the high tide line except where it crossed a channel or ditch. (Technical Report, figs. D-16 through D-25.) The Club intentionally stayed above the debris line. (Sweeney Decl., ¶ 16.)

Along the northwest side of the island, much of the levee had eroded away. (*Id*., fig. D-18 (the old levee is between the old borrow ditch, which can readily be seen, and the water).) If the levee had been repaired at its former location, material would have had to be placed on the white

debris line, and in the water outside of that line. (*Id.*) Instead, the levee turned inland, so that it remained above the white debris line. (*Id.*)

5. The regional board lacks jurisdiction over almost all of the work

Because the levee repair was done above the white debris line, it was done above the high tide line. Neither staff nor the Technical Report claims that the Regional Board has any jurisdiction above the high tide line. Because the Technical Report does not legitimately establish a high tide line above the white debris line, there is nothing that would give the Regional Board jurisdiction over the levee repair except where it crossed a channel or ditch.

Moreover, it would be neither fair nor Constitutional to require the Club to destroy repairs that were done above the white debris line, and therefore outside the jurisdiction of the Corps. If the statute does not provide fair notice of what is required, it violates the Constitution. (See section VI below.) To avoid this violation, the statute must be interpreted so that work done above the high tide line, as determined from a more or less continuous line of debris along the water, is not subject to the jurisdiction of the Corps or the Regional Board.

B. The Report Is Wrong When It Says That The Island Was Tidal Marsh

Based on its determination of the elevations of the island and the heights of the tides, the Technical Report concludes that nearly all of the island was tidal marsh. This conclusion conflicts with overwhelming evidence that the island was mostly high and dry, and not affected by the tides.

1. The report incorrectly asserts that the interior was tidal marsh

The Technical Report asserts that "Point Buckler was subject to daily tidal inundation to the…island interior", and that almost the entire island was tidal marsh. (Technical Report at 5, fig. 4; *see* fig. 8 (nearly all of island subject to tidal action).) This conclusion follows from the Reports' conclusion that the interior of the island averaged 5.4 feet (*id*. at F-3), that mean high water at the island is 5.8 feet and that mean higher high water is 6.3 feet (*id*. at I-4, table I-1). That puts mean high water 0.4 feet above the average elevation of the interior of the island, and mean higher high water at 0.9 feet above the interior. Considering that high tide comes twice a day, and higher high tide once a day, it is not surprising that the Technical Report concludes that virtually the entire

island was tidal marsh. (*Id*., fig. 7) Tidal marshes "are exposed to the natural *daily* tidal rhythm". (Bazel Decl., ex. 2 (Suisun Marsh Protection Plan) at 11, emphasis added.)

In order to reach this conclusion, however, the Technical Report ignored powerful on-the-ground evidence leaving no doubt that the interior *was not* tidal marsh.

2. The interior was dry land before the levee was repaired

Several lines of evidence lead directly to the conclusion that the island and its interior were dry before the levee repairs were done.

First, there is the evidence of the white debris line, as discussed above. If mean high water were truly at 5.8 feet, and mean higher high water at 6.3 feet, then the water must have flowed over the top of the old levee—which the Technical Report says was only 5.6 feet or less for much of its length—most days (*See* Technical Report, fig. F-6 (elevations of old levee).) The rising tide would have lifted the debris that forms the white debris line and carried them up over the old levee into the center of the island. But the white debris line *was not* carried up and over the old levee into the interior of the island. No debris was found in the center of the island. Aerial photographs show that the white debris line was visible along the edge of the island *before* the levee repair was done. (See discussion above.) This fact alone provides powerful evidence that the Technical Report is wrong.

Second, there is the fact that Mr. Sweeney was present on the island for much of 2014. (Sweeney Decl., ¶ 17.) He often worked on the levee repairs five days per week. (*Id*.) The work extended over perhaps six months. (*Id*.) If the Technical Report is right, then Mr. Sweeney must have observed nearly the entire island being flooded nearly every day. At times, he must have worked in water more than a foot deep.

But, during all of the time he was repairing the levee, Mr. Sweeney never saw the island under water. (*Id*., ¶ 18.) Nor has he seen it under water before or since. (*Id*.) During the time he was working on the island, he did not see water rise up over the top of the interior channels and ditches and spread over the land. (*Id*.)

Before the levee was repaired, Mr. Sweeney cut vegetation on the island. (*Id*., ¶ 19 and ex. 3.) When he was cutting the vegetation, the island was dry. (*Id*.) He drove a bulldozer across the island to create several roads and paths. (*Id*., ex. 4.) When he drove the bulldozer across the

island, the island was dry. (*Id.*) To repair the levee, he used an excavator that weighs about 60,000 pounds. (*Id.*) If the island had been tidal marsh, the excavator would have gotten stuck in the muck, but the island was not tidal marsh and the excavator never got stuck. (*Id.*) This eyewitness testimony confirms that the Technical Report is wrong.

Third, Mr. Sweeney's testimony is perfectly corroborated by the aerial photographs, which show no sign that the interior of the island was subject to tidal action. Perhaps the clearest evidence comes from the Google Earth photo taken on May 19, 2012. (Technical Report, fig. D-1.) That photograph was taken shortly after cleared vegetation on the western tip of the island for kiteboarding. (Sweeney Decl., ¶ 20.) He also cleared the vegetation to create several roads, and excavated two duck ponds, one near the northern tip of the island and one near the southeastern tip. (*Id.*) The aerial photograph clearly shows water in the duck ponds. It also shows that the western side of the island and all the roads are *completely dry*.

If the Technical Report were right, there would be signs of water ponding on the roads and the western part of the island. Even assuming that the photograph were taken at the lowest low tide of the day, there would have been a high tide six hours earlier, and a higher high tide within the last eighteen hours. These tides should have covered the island with a half foot or more of water. When the tide retreated, it should have left ponds in the low areas of the island and large puddles or ponds on the cleared areas. The fact that there is no ponds, or even puddles, once again shows that the Technical Report is wrong.

The Technical Report itself provides strong evidence that the island was dry. It includes a series of aerial photographs of the island, beginning in 1948. (Technical Report, Appendix A.) The 1948 aerial photo shows clear evidence of ponds on the island. (*Id.*, fig. A-1.) The 1981 aerial photograph also appears to show a pond. (*Id.*, fig A-3.) Between 1988 and 2011 there do not appear to be any ponds on the island. (*Id.*, figs A-7 through A-25.) The first photo showing cut vegetation is the Google Earth photo dated May 19, 2012. (*Id.*, fig. D-1) This photograph, as discussed above, shows several roads or pathways across the island, all dry. The following thirteen aerial photographs show the same thing: no ponding or water on the island other than in the channels and ditches and the two small ponds dug by Mr. Sweeney. (*Id.*, figs D-2 to D-14.)

If the island were subject to *daily* inundation by the tides, there should be some evidence of this inundation in at least one of these photographs. After all, the odds of having a random aerial photograph taken within 1 hour of high tide is 1 in 6, and the Technical Report includes 33 photographs between 1988 and 2013. The absence of any visible ponding on the island in aerial photographs during this time is therefore powerful evidence that the island *was not* subject to daily tidal inundation.

Fourth, the white debris line, percipient-witness testimony, and aerial photographs are consistent with an infrared aerial photograph obtained from NOAA and submitted to staff in October 2015 on behalf of the Club. (Bazel Decl., ex. 5, next-to-last page (entitled "NOAA 2013 MHW").) This aerial photograph was taken at mean high water. (*Id.*) It shows water staying within the channels and ditches, and not spreading out over the interior of the island. (*Id.*)

The Technical Report ignored all four of these powerful sources of evidence.

3. Once again, the report's elevations must be wrong

Instead of considering on-the-ground evidence, the Technical Report relies entirely on its numbers, in particular its manipulations of the tide data from Port Chicago and its elevations. But something must be wrong with these numbers. They simply do not square with the reality. If the tidal elevations asserted by the report were true, there would be no white debris line around the edge of the island. The debris would have been carried over the levee into the interior of the island. John Sweeney would have noticed if he was standing in a foot of water, or if the island had become submerged. There are more than enough aerial photographs to expect at least one to be taken within an hour of high tide, and yet none of the photographs shows the island under water or even partly under water. In fact, they show no signs of ponding at all, and this absence of ponding cannot be squared with the assertion that the island was under water every day.

The Technical Report insists that its elevations are right, and that the island was almost entirely tidal marsh—it was subject to daily inundation by the tides. But the hard on-the-ground evidence shows nothing of the sort. The only reasonable conclusion is that there is something wrong with the numbers asserted by the Technical Report.

4. The report is wrong when it says that 3.2 acres of tidal marsh were filled

The Technical Report asserts that 3.2 acres of tidal marsh was filled. But because it is wrong about the extent of tidal marsh, it is wrong about the amount of fill.

The report submitted by Applied Water Resources, which carefully identified the channels and ditches that were actually wet at high tide, calculates the amount of fill at 500 cubic yards. (Bazel Decl., ex. 5 at 5.) Assuming a fill depth of two yards, the fill was about 0.05 acre. In other words, about 99% of what the Technical Report calls fill was placed above the high tide line, on dry land rather than in water.

5. The report is wrong when it asserts that tidal marsh was dried up

The cleanup and abatement order issued in September 2015 accused the Club of drying up tidal marsh. (Bazel Decl., ex. 6.) The Technical Report repeats this accusation. (Technical Report at 18 and fig. 8.) But it is not true.

As noted above, the great majority of the island was not tidal marsh.

The Technical Report used aerial photographs to evaluate vegetation, but the colors were not standardized, which made the interpretation significantly more subjective. (Huffman Decl., ¶ 8.)

The Technical Report attempts to relate past conditions and wet and dry periods to site conditions observed during March 2016 indicating that the island has been dried out. But the May 2016 photographs taken of the island (Sweeney Decl., ex. 5) contradict the report's conclusion. (Huffman Decl., ¶ 8.)

The Technical Report also asserts that the levee repair is "causally associated with mass dieback of obligate wetland plants". (Technical Report at 18.) But there were mass diebacks of vegetation *before* the levee repair. In May 2012, for example, Mr. Sweeney observed that the vegetation on the island was brown and brittle, and appeared dead. (Sweeney Decl., ¶ 20.) Photographs taken by Mr. Sweeney show what appears to be dead vegetation. (*Id.*, ex. 4.) An aerial photograph shows that the island appeared mostly brown in May 2012. (Technical Report, fig. D-1.) Aerial photographs show that the island appeared brown throughout most of 2013 and 2014. (*Id.*, figs. D-6 through D-25.) Because the vegetation on the island was brown and brittle and appeared

dead in 2012, two years before the levee repair, mass diebacks cannot be attributed only to levee repair.

To the extent that the Technical Report might be implying that the vegetation on the island has been brown and dead ever since the levee was repaired, that too is wrong. In May 2016 the island was very green, as photographs show. (Sweeney Decl., ¶ 21 and ex. 5.)

Moreover, the prosecution team knew that the island would turn green. They insisted on having their inspection done no later than early March because they expected the island to turn green:

> 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.

(Bazel Decl., ex. 20 at 5.)

What the evidence shows, therefore, is that there were periods of brown—mass diebacks of vegetation—both before and after the levee repair, and period of green both before and after.

There are, in short, times when the island is green, and times when it is brown—both before and after the levee repair.

6. The report is wrong about endangered species

The Technical Report implicitly concedes that there is no direct evidence of any harm to any endangered species. It refers to "likely impacts". (Technical Report at P-3.) But the Technical Report cannot establish that detrimental effects are even likely. They are speculation.

The Technical Report does not include an accurate assessment of the island's fish habitat, owing to a lack of scientific understanding of what is "good" marsh habitat and what is "bad". Scientists are at the very earliest stages of research for understanding the usefulness of the shallow-water channels. Scientists often assume that marsh habitat is good and more of it is better. (Declaration of David L. Mayer ("Mayer Decl.), ¶ 3.)

But arguing that all of the Delta's sloughs and channels are good for the listed species lacks scientific certainty, and in fact this argument is hardly more than a lightly researched theory. Each of the listed species has several life stages from egg to reproductive adult, and each of these life

stages has different prey and habitat requirements in order to maximize growth and minimize mortality. (*Id.*, ¶ 4.)

For salmon, there is no real conclusion about what is good or bad. Small shallow channels can be detrimental because of the dangers of predation, as well as stranding and temperature. Scientists do not want to draw salmon into small channels where they become someone's lunch. Scientists are at the very beginning of their thinking about whether these small channels are good or bad for salmon. Point Buckler was not a salmon spawning area. (*Id.*, ¶ 5.)

A similar discussion could be had about the life strategies of the listed species other than salmon, but unfortunately with much less scientific knowledge at scientists' finger tips and a lot more educated guesses than proven fact. (*Id.*, ¶ 6.)

It would be prudent to decide the site-specific goals of Point Buckler Island habitat restoration and maintenance planning with respect to each of the listed species and their unique life stages. In the process of assessing and developing these of goals and objectives, scientists can decide whether or not to open the island channels and habitat, and whether the openings should be screened to keep fish out of potentially bad habitat, but allow nutrients to flow in and out. There are many questions along this line that, if raised and discussed, might also serve to educate and illuminate scientists' assessment of fish impact, and identify design and construction steps to minimize potential impacts. (*Id.*, ¶ 7.)

Scientists should use caution about assessing the good and bad of site-specific fish habitat conditions based on their generalized and embarrassingly poor understanding of the listed species' habitat "requirements". (*Id.*, ¶ 8.)

7. The report does not establish three-factor wetland jurisdiction over any part of the island

The Technical Report asserts that "All areas on Point Buckler Island surfaces below the elevation of the High Tide Line (determined to be 8.2 feet NAVD 88; Appendix I) subject to the ebb and flow of the tide,…were under Clean Water Act Section 404 jurisdiction prior to the completion of the unpermitted construction activities." (Technical Report at N-3.) The Technical Report maps Corps jurisdiction as the entire island except for a strip of high ground along the eastern edge. (*Id.*, fig N-2.) This assertion of jurisdiction is wrong because the Technical Report is wrong about the

location of the high tide line. (See section III.A above.) It is also wrong because the great majority of the island was not subject to the ebb and flow of the tide. (See section III.B above.)

The Technical Report does not assert that the Corps now has jurisdiction over any part of the island based on the three-factor wetland test. (Technical Report at N-3 (evaluating section 404 jurisdiction). It does assert, however, that the three-factor test would have applied "through the mid-1980s", when water was ponded on the island. (*Id.*) But this point is irrelevant. Whether or not the pond seen in the 1981 was a wetland then, it has never been seen in the aerial photographs since. It must have silted up and become elevated above the high tide line, thereby moving beyond Corps jurisdiction.

In any case, the Technical Report has not done a three-factor wetlands delineation of the island. It does not and cannot claim jurisdiction on this ground.

C. The Report Has A Strong Bias Against The Club

John Sweeny has publicly accused Stuart Siegel, the principal author of the Technical Report, of scientific misconduct. As a result, Dr. Siegal was in no position to provide a dispassionate assessment of Mr. Sweeney and the Club.

1. Dr. Siegel tried to work for the Club, but was rejected

On May 14, 2015, Dr. Siegel e-mailed several people and asserted that "dealing with Sweeney" was a "HIGH RISK situation". (Sweeney Decl., ex. 6.) And yet a mere 16 minutes later Dr. Siegel e-mailed Mr. Sweeney and made a pitch to be hired by the Club. (*Id.*, ex. 7.) Dr. Siegel bragged that "BCDC will accept my work whatever its findings are." (*Id.*) Mr. Sweeney declined Dr. Siegel's solicitation. (*Id.*, ¶ 24.)

2. Mr. Sweeney accused Dr. Siegel of scientific fraud

In 2004, Dr. Siegel's firm produced a map entitled "Suisun Tidal Wetland Restoration Projects". (Sweeney Decl., ex. 8.) On that map, Point Buckler (identified as "Taylor #801") is identified as a "Completed Project", as are several other locations. (*Id.*) But there never was any "restoration project" at Point Buckler. No one now disputes that the map is wrong.

Many agencies relied on this map. For example, the San Francisco Estuary Institute incorporated the information into its EcoAtlas wetland map and database. (Sweeney Decl., ex. 9).

Surprisingly, the EcoAtlas asserts not only that the project status was "Construction completed", but it refers to a "Permit-USACE", i.e. a 404 permit from the U.S. Army Corps of Engineers. (*Id*. at 2.) But, as the aerial photographs in the Technical Report show, in the years preceding 2004 there never was a project, and there never was construction. And there never was any permit from the Corps of Engineers for a restoration project on Point Buckler.

When the Club brought these errors to the attention of the San Francisco Estuary Institute, the agency conducted an internal investigation and determined that there were no records to support the conclusions in Dr. Siegel's map, and it removed the incorrect information from its database. (Sweeney Decl., ex. 10). Even Dr. Siegel concedes that the 2004 map is wrong. The Technical Report includes a revised version of the map, in which Point Buckler and several of the other locations are identified as having had "natural" restoration when levee breaches were left unrepaired, rather than completed construction projects. (Technical Report, fig. 1.)

Mr. Sweeney believes that the errors in the 2004 map were intentional, and has made that belief known publicly. (Sweeney Decl., ¶ 28.)

3. The Club warned staff not to use Dr. Siegel because of his bias

In February 2016, the Club asked Regional Board staff not to use Dr. Siegel when they inspected the island. (Bazel Decl., ex. 29.) The Club reported on the 2004 map, on the rejection of Dr. Siegel as a consultant, and on Dr. Siegel's characterization of Mr. Sweeney as a "HIGH RISK situation".

Regional Board staff initially agreed not to bring Dr. Siegel when they inspected the island. Nevertheless, for whatever reason, staff brought him to the island and made him the lead consultant on this matter.

4. The report ignores the evidence that favors the Club

A scientist accused of scientific fraud is not in the best position to provide a cool-headed and impartial assessment of his accuser. Again and again, the Technical Report endeavors to reach conclusions that unfavorable to the Club, and ignores evidence that favors the Club. Particularly noteworthy are the efforts made to justify a high-tide line of 8.2 feet while ignoring the obvious

white high-tide line at roughly three feet lower elevation, and the efforts to conclude that the entire island was subject to daily inundation, when the aerial photographs show no sign of it.

D. The Regional Board Should Not Endorse Bad Science

The scientific quality of the Technical Report is simply not up to any standard that should be acceptable to the Regional Board. The matter back to staff for additional scientific investigation of the factual issues.

IV. THE TENTATIVE ORDER VIOLATES THE SUISUN MARSH PRESERVATION ACT

The Suisun Marsh Preservation Act imposes on the Regional Board a judicially enforceable duty to act in conformity with that act. The Preservation Act requires duck clubs to implement their individual management plans. The Club Plan for Point Buckler requires tight levees. But the Tentative Order would require the Club to destroy at least parts of its levee and install breaches. As a result, the Tentative Order is inconsistent with, and in violation of, the Preservation Act.

A. The Preservation Act Requires The Regional Board To Act In Confirmity With The Provisions Of That 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 Regional Board, therefore, must carry out its duties and responsibilities "in conformity with" the Preservation Act and with the policies of the Suisun Marsh Protection Plan.[4]

B. The Preservation Act Requires That An Individual Management Plan Be Prepared For Each Duck Club, And That Each Club Comply With Its Plan

The Suisun Resource Conservation District ("SRCD") has "primary local responsibility for regulating and improving water management practices" at duck clubs within Suisun Marsh. (PRC § 9962(a).) The Preservation Act requires SRCD to prepare a water management program for

[4]

each duck club. (PRC § 29412.5.) These documents have come to be known as "individual management plans". The plans were submitted to BCDC, which was required to certify them if they met specified requirements. (*Id.*; PRC § 29415.) The Preservation Act requires SRCD to "issue regulations requiring compliance with any water management plan or program for privately owned lands". (PRC § 9962(a).) The Legislature, therefore, intended that an individual management plan would be prepared for each duck club, and that each duck club would comply with its plan.

The compliance obligation of each duck club runs with the land. In the words of SRCD's Suisun Marsh Management Program (the "Management Program"):

> Each private managed wetland ownership…shall be managed in conformity with the provisions and recommendations of the individual management program…. If there is a change in land ownership, the new landowner assumes this responsibility.

(Bazel Decl., ex. 3 at 18; *see* PRC § 29401(d) (requiring management program).)

C. The Club Plan Called For Tight Levees

The Club Plan here (1) specifies that "tight levees" are "necessary for proper water management", (2) calls for "maintenance of levees", and (3) refers to specifications for the "restoration" and "repair" of levees.

The Club Plan includes a map showing a levee around the outside of the island. (Bazel Decl., ex. 4 at 16.) The map is marked "levee repair" in several locations. (*Id.*) The Club Plan notes that levee problems from the 1970s had been resolved: "the situation has greatly improved and the club reports that it now has the water control structures and tight levees necessary for proper water management." (*Id.* at 4.) "Proper water control", according to the plan, "necessitates inspection and maintenance of levees, ditches, and water control structures." (*Id.* at 5.) The plan also refers to a standard list of recommendations "for more information on the maintenance and repair of water control facilities." (*Id.*) This reference appears to be to the Management Program, which includes "Suisun Marsh Levee Specifications". (*Id.*, ex. 3 at C-11 through C-17.) The Management Program requires that "renovation, restoration, repair and maintenance of existing levees" must conform with these specifications. (*Id.* at C-6.)

Individual management plans must be reviewed every 5 years and may be modified. (PRC § 29422(a).) The Club plan has never been modified. (Bazel Decl., ¶ 5.)

D. The Levee Repair Implemented The Club Plan

The levee repairs conducted in 2014 implemented the Club Plan. They restored a levee around the island. Where the existing levee was intact, the levee was maintained by placing material on top of it. (Sweeney Decl., ¶ 29.) On the northern side of the island, where the old levee had been eroded away, the repaired levee turn inland, and stayed inside the debris line. (*Id.*)

The levee repair work was stopped before it was complete because of regulatory objections. (*Id.*, ¶ 30.) The Club intended to install another tide gate, and to make the slopes of the levee consistent with the Management Program. (*Id.*) The Club also intended to disc the soil, to plant vegetation preferred by waterfowl, and otherwise to create duck ponds. (*Id.*) The Club would like to proceed to complete the work and install duck ponds. (*Id.*)

E. Because The Tentative Order Would Destroy What The Preservation Act Requires, It Would Violate The Preservation Act

The Tentative Order would require the Club to "restore tidal flow into all seven breaches that existed prior" to the levee repair. (Tentative Order at 15.) It would therefore require that the levee be breached. But the Club Plan calls for tight levees. The Tentative Order is therefore not consistent with the Club Plan. It is also not consistent with the Preservation Act, which requires clubs to implement their club plans. More generally, it is not consistent with the Legislature's intent that duck clubs be protected, and that duck clubs be maintained in perpetuity so that they can provide food for waterfowl—food that is not available naturally. (See section II.C above.)

The Tentative Order would thereby violate the Preservation Act.

F. The Tentative Order Would Also Violate The Presevation Act By Destroying A Duck Club, When The Protection Plan Calls For Their Perpetuation

The Preservation Act also requires the Regional Board to act in accordance with the policies of the Protection Plan. The "policies of the protection plan" call for "[c]ontinued recreational use of privately-owned managed wetlands", i.e. duck clubs, and for the empowerment of SRCD "to improve and maintain exterior levee systems as well as other water control facilities on the privately-owned managed wetlands within the primary management area." (Bazel Decl., ex. 2 at 29, 36.)

The Tentative Order would prevent the "[c]ontinued recreational use of privately-owned managed wetlands" by requiring the Club to destroy its levee. A levee is required for managed

wetlands—duck ponds—because duck ponds maintain a continuous water level even as the tide rises and falls. (Sweeney Decl., ¶ 31; see section II.F above (Club plan calls for tight levels for "proper water management").)

The Tentative Order is also contrary to the improvement and maintenance of "exterior levee systems as well as other water control facilities on the privately-owned managed wetlands".

In these ways as well, the Tentative Order violates the Preservation Act.

G. The Technical Report Is Wrong When It Says That The Club Plan Is No Longer In Effect

Staff have not provided any analysis or argument on this key legal issues. Instead, they have left that task to Dr. Siegel, who is not a lawyer. Dr. Siegel's legal analysis is misleading and incomplete.

The process established by the Suisun Marsh Preservation Act is simple, straightforward, and consistent with its goal of maintaining duck clubs in perpetuity:

- First, individual management plans must be prepared for all "managed wetlands" (i.e. duck clubs).
- Second, those plans must be submitted to BCDC for certification.
- Third, once those plans are certified, the duck clubs must implement them, and must continue to implement them.
- Fourth, the individual management plans must be reviewed every five years, and if changes are necessary the plans can be modified.

(See section II.D above.)

Dr. Siegel quotes the definition of "managed wetlands" in the Preservation Act. (Technical Report at 6.) He does not dispute (and therefore concedes) that Point Buckler was a managed wetland, that an individual management plan was prepared for it—they were prepared, he says, for "all of the roughly 150 privately owned duck clubs (diked managed wetlands) in Suisun Marsh"and that all were certified. (*Id.*) As a result, there is no dispute that the first two bullet point above have been met.

Dr. Siegel proceeds to argue that (1) when the levee was breached, the island was no longer a managed wetland, and (2) therefore, the "regulatory benefits of its [individual management plan] no longer apply". (*Id*. at 6-7.) But this is wishful thinking, not statutory analysis. \

The key benefit provided by the Preservation Act is the ability to perform "development" without a permit from BCDC. (PRC § 29501.5.) This section says nothing whatever about "managed wetlands". It says that if the work is specified in an individual management plan, no BCDC permit is required. As far as the statute is concerned, the exemption applies even if the club has not been a managed wetland for 100 years—work specified in the plan can be done without a permit. Period. Dr. Siegel is therefore wrong when he says the benefit depends on the continued maintenance of a "management wetland".

Moreover, he misunderstands the logic behind the Preservation Act, which imposes burdens as well as benefits. Duck clubs are *required* to comply with their plans. The Preservation Act required SRCD to "issue regulations requiring compliance with any water management plan or program for privately owned lands". (PRC § 9962(a).) The Preservation Act also provides authority for SRCD to obtain a warrant to "enter onto privately owned lands…for the purpose of determining whether or not the landowner is complying with the regulations of the district", to refer noncompliance to the District Attorney's office for enforcement, and to obtain civil penalties. (PRC § 9962(c)-(d).) If, therefore, a duck club is not maintaining itself as a managed wetland, the remedy is to inspect the club, and to take enforcement action requiring that club to implement its plan and, if appropriate, to pay penalties for not implementing its plan.

Owners of managed wetlands, therefore, cannot simply abandon their managed wetlands. A BCDC regulation specifically prohibits anyone from abandoning a managed wetland without a BCDC permit. (PRC § 29500 (no development without permit), PRC § 29114 (development includes "change in the density or intensity of use of land"), 14 CCR § 10125 (defining "substantial change in use" to include "abandonment" of a "managed wetland").) Nor can the owner's obligation to implement an individual management plan be avoided by selling the property. The obligation "runs with the land"—in other words, it automatically passes on to any new owner. (See section II.D above.) Here none of the previous owners applied for a permit to abandon the managed wetland

at Point Buckler, and no permit was issued authorizing its abandonment. Point Buckler is, therefore, still a "managed wetland" as a matter of law, regardless of whether it is a managed wetland as a matter of fact.

Dr. Siegel proceeds to invent his own provisions of the Preservation Act. He asserts that "landowners clearly have a reasonable amount of time to carry out repairs", but that the lapse at Point Buckler "clearly extends well beyond 'a reasonable amount of time'" because it is more than the five-year duration of a Clean Water Act permit. (Technical Report at 7.) In fact, however, there is nothing the Preservation Act providing for a "reasonable amount of time", or anything like what Dr. Siegel supposes. And the duration of a Clean Water Act permit is wholly irrelevant to the Preservation Act, which says nothing about Clean Water Act permits.

Ultimately, Dr. Siegel is putting his own preferences ahead of the Legislature's. He prefers natural tidal marsh over managed wetlands. But the Protection Plan concluded that duck clubs were "vital" because they provide food for waterfowl that natural vegetation does not. (See section II.C above.) The Legislature therefore proceeded, when it enacted the Preservation Act, to protect duck clubs and require them to tend to their duck ponds in perpetuity. That is what the Legislature wanted, and the Regional Board must act in conformity with the Legislature's direction.

To be sure, after nearly two years BCDC is also asserting that the Club Plan is no longer in effect. BCDC provides no legal analysis in support of this position, and it undoubtedly is acting out of a desire to move the Club into the permitting process (which the Club is amenable to) rather than a belief in the correctness of its assertions.

The simple fact is that an individual management plan was prepared for Point Buckler and certified. No one disputes that. No one disputes that the Preservation Act does not set any duration on individual management plans. Nor does anyone dispute that the management plans must be reviewed every five years in perpetuity. (See section II.D above) BCDC does not deny that the Club Plan has never been modified. Because the Preservation Act specifies that the plans must be reviewed and can be modified every five years in perpetuity, it implies that they continue in effect until they are modified. The Club Plan has never been modified. Therefore, it is still in effect. It's as simple as that.

V. THE TENTATIVE ORDER VIOLATES THE PORTER-COLOGNE ACT

The relevant portion of Porter-Cologne Act authorizes a regional board to issue a cleanup and abatement order when there has been (1) a discharge of waste (2) to waters of the state that (3) creates or threatens to create a "condition of pollution or nuisance". Here the Tentative Order fails all three tests. Much or all of what staff complain of is not a "discharge of waste". The great majority of the fill was not placed in "waters of the state". And none of it creates a "condition of pollution or nuisance".

The second of these three elements—whether there has been a discharge to "waters of the state"—is covered in section A below. The third element—condition of pollution or nuisance—is covered in section B, and the first—discharge of waste—is covered in section C below.

A. Cleanup And Abatement Orders Are Limited To Waters Of The State, And Almost None Of The Material Was Placed In Waters Of The State

The Tentative Order asserts that a cleanup and abatement order is appropriate because:

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

(Tentative Order at 13, ¶ 75.) This language generally follows Water Code § 13304, which is the section that authorizes a Regional Board to issue cleanup and abatement orders:

> A person 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….

(Water Code § 13304(a).)

Although § 13304 is plainly limited to *waters of the state*, the Tentative Order asserts that a cleanup and abatement order can also be used for discharges into *waters of the United States*. But there is nothing in § 13304 that refers to "waters of the United States". Cleanup and abatement orders are limited to waters of the state. The Tentative Order thereby asserts authority the Regional Board does not have.

The Technical Report devotes its attention to the high tide line, which it describes as the limit of Corps jurisdiction in tidal waters. It assumes, without any argument or proof, that the jurisdiction

of the Regional Board also extends up to the high tide line. In any case, it does not assert any jurisdiction above the high tide line.

As explained above, the Technical Report does not accurately identify the high-tide line. (See section III.A above.) The real high-tide line is at a much lower elevation—an elevation below the great majority of the levee repairs. (See section III.A.4 above.) Because the great majority of the work is above the real high-tide line, and because the Regional Board does not have jurisdiction above the high-tide line, then the great majority of the work is not within the jurisdiction of the Regional Board.[5]

For this reason alone, the Tentative Order should be sent back to staff for review and revision.

B. The Levee Repair Is Not A Condition Of Pollution Or Nuisance, And Is Therefore Not Subject To A Cleanup And Abatement Order

1. The levee repair is not a nuisance because it is required by the Suisun Marsh Preservation Act

Civil Code § 3482 specifies that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." The Legislature has authorized the duck clubs to do the work identified in their individual management plans. As the Protection Plan explains:

> 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.

(Bazel Decl., ex. 2 at 34.) The Legislature has also *required* the duck clubs to comply with their plans. The Preservation Act required SRCD to "issue regulations requiring compliance with any water management plan or program for privately owned lands". (PRC § 9962(a).) The Preservation Act also provides authority for SRCD to obtain a warrant to "enter onto privately owned lands…for the purpose of determining whether or not the landowner is complying with the regulations of the district", to refer noncompliance to the District Attorney's office for enforcement, and to obtain civil

[5] The Technical Report does not assert that there are now any areas that would qualify as three-factor wetlands on the island. (See section III.B.7 above.) As a result, the question of whether the Regional Board has jurisdiction over three-factor wetlands does not arise.

penalties. (PRC § 9962(c)-(d).) Here the Club's individual management plan calls for "tight levees" and for "maintenance of levees", and refers to specifications for the "restoration" and "repair" of levees. (See section II.D above.) Because the Work is both authorized and required by the Preservation Act, it cannot be a nuisance.

To be sure, § 3482 has been construed narrowly, and applies when:

> the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury.

(*Friends of H Street v. City of Sacramento* (1993) 20 Cal.App.4th 152, 160, quoting *Hassell v. San Francisco* (1938) 11 Cal.2d 168, 171, italics and quotation marks removed.) Here, it "can fairly be stated that the legislature contemplated the doing of the very act which occasions the injury". The Legislature not only contemplated the act—levee repair—it *required* that the act be done.

"The California courts have consistently held alleged nuisances arising from the construction, operation and maintenance of streets and highways to be within the protection of section 3482." (*Friends of H Street* at 162.) A levee repair is similar to street construction, although much less disruptive. A levee repair, like street construction, should receive the protection of § 3482.

2. The levee repair is not a condition of pollution or nuisance because the Suisun Marsh Preservation Act and Porter-Cologne Act require the Regional Board to protect duck clubs

The Preservation Act imposes a "judicially enforceable" duty on state agencies to act in conformity with the act:

> 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(a).) The "policies of the protection plan" call for "[c]ontinued recreational use of privately-owned managed wetlands", i.e. duck clubs, and for the empowerment of SRCD "to improve and maintain exterior levee systems as well as other water control facilities on the privately-owned managed wetlands within the primary management area." (Bazel Decl., ex. 2 at 29, 36.) By ordering the destruction of the Club's levee, the Regional Board is not acting in conformity with these policies, and is therefore violating the Preservation Act.

The Regional Board is also violating the Porter-Cologne Act by refusing to protect "beneficial uses", which must be protected from pollution and nuisance:

> The beneficial uses…define the resources, services, and qualities of these aquatic systems that are the ultimate goals of protecting and achieving high water quality. The Water Board is charged with protecting all these uses from pollution and nuisance that may occur as a result of waste discharges in the region.

(Bazel Decl., ex. 30 at 14; *see* Water Code § 13263 (Regional Board shall prescribe waste-discharge requirements that take into consideration "the beneficial uses to be protected".) For Grizzly Bay, where Point Buckler is located, the Regional Board has specifically identified "wildlife habitat" and "noncontact water recreation" as beneficial uses. (Bazel Decl., ex. 30 at 2-5 to 2.7, last page.) Duck clubs provide recreation and wildlife habitat, and must therefore be protected.

The Tentative Order asserts that that the levee repair harms beneficial uses:

> Unauthorized activities adversely impacted beneficial uses at the Site including estuarine habitat, fish migration, preservation of rare and endangered species, fish spawning, wildlife habitat, and commercial and sport fishing.

(Tentative Order at 11, ¶ 60.) But there is no direct evidence of any harm to any of these beneficial uses. (Technical Report, Appendix P.) The Technical Report asserts only that some adverse effects were "likely". (*Id*. at P-3.) But, as the Club's expert explains, the science is not advanced enough to determine whether the levee repair was bad for fish by blocking access to food, or good for fish by keeping them away from locations where predation was likely. (See section III.B.6 above.) In other words, the Technical Report's assertion of harm to fish-related beneficial uses is highly speculative.

There is absolutely no doubt, however, that the Tentative Order will harm or destroy the beneficial uses of recreation and wildlife habitat on the island. The Tentative Order would appear to prohibit the restoration of duck ponds on the island, and that would prevent the Club from growing plants that provide food to ducks and other waterfowl—food that is not provided by native plants. (See section II.C above.) Preventing the Club from restoring duck ponds would also interfere directly with hunting and other recreation related to the duck ponds. And because the Tentative Order takes aim at everything associated with kiteboarding on the island, the Tentative Order would interfere directly with the beneficial use of kiteboarding.

The Regional Board is supposed to protect all beneficial uses. When faced with a situation in which there is possible, highly speculative harm to some beneficial uses, compared with serious and incontrovertible harm to other beneficial uses, the Regional Board should act primarily to protect those beneficial uses that would otherwise indisputably be harmed.

Issuance of the Tentative Order, in short, would indisputably harm or destroy the beneficial uses of recreation and wildlife habitat at the island. The Regional Board is supposed to protect beneficial uses, not harm or destroy them. The Regional Board, therefore, should not issue the Tentative Order.

"[S]tatutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Gomez v. Superior Court* (2012) 54 Cal.4th 293, 303.) Here the only way to harmonize the Suisun Marsh Preservation Act and the Porter-Cologne Act is to conclude that the repair of a duck-club levee is not a condition of pollution or nuisance, and therefore not subject to a cleanup and abatement order.

3. The levee repair is not a nuisance because it is required for a CEQA mitigation project

CEQA mitigation measures must be "fully enforceable". (PRC § 21081.6(b).) The levee repair, and more generally the maintenance of the island as a duck club, is a CEQA mitigation measure proposed by the California Department of Water Resources ("DWR") and approved by the State Board. Because the levee repair is required under CEQA, it cannot be a condition of pollution or nuisance.

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….

(Bazel, ex. 2 (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).)

DWR, which operates the State Water Project, published a Plan Of Protection For The Suisun Marsh Including Environmental Impact Report in 1984 (the "DWR EIR"). (Bazel, ex. 1 at 1.) The purpose of the DWR EIR was "to mitigate the effects of the Federal Central Valley Project (CVP) and the State Water Project (SWP) on the Suisun Marsh." (*Id*. at 1.) The DWR EIR was required by State Board Water Right Decision 1485. (*Id*. at 7.) Because it 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*. 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.) Point Buckler was called Annie Mason Island at the time. (See section II.F above.) A letter from DWR dated 1988 asserts that the pump has not yet been installed because the levees need to be repaired.

There is only one reason that a pump would have been installed at Point Bucker, and that DWR would have wanted the levees repaired: The pump was needed to flood part of the island, which was above high tide, and a tight levee was needed so that the water stayed on the island and did not drain back into the surrounding waters. (See section II.B above.)

According to the owner of the island at the time, DWR installed a pump and generator in the early 1990s. An old pump and a generator are still on the island. (Sweeney Decl., ¶ 2.) The pump is designed to float in the open water, and to draw water a few feet below the surface. (*Id*.) A hose carried the pumped water over the levee and onto the island, where it would have flooded an area that could be used as a duck pond. (*Id*.) This equipment appears to be the pump and generator that DWR installed. (*Id*.) Their purpose is obviously to pump water onto the island from the adjacent channel. (*Id*.)

Although DWR did not specifically explain how the pump would provide mitigation, the reason can readily be discerned: it helped preserve the island's duck habitat and the vegetation preferred by ducks. Without the pump and the flooding of the ponds, the vegetation would revert to its natural state, which would eliminate the duck-pond plants that provide food for waterfowl. The

mitigation required by the EIR, therefore, was not just the pump, but rather the maintenance of the island 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. (Bazel Decl. ex. 31.) That agreement reiterated DWR's obligation to build the facilities it had agreed to build in the 1980s. (*Id*. at 14, ¶ VI.A.) That obligation included the pump at the Annie Mason Island Unit. (*Id*. at A-4.)

DWR, therefore, proposed a CEQA mitigation project for the island in 1984, and continued to make commitments to the project through at least 2005. 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.

It does not matter whether DWR is still committed to the project. Project proponents often lose interest, after the project is built, to the mitigation they have committed to. That is why CEQA mitigation measures must be "fully enforceable". (PRC § 21081.6(b).) The relevant point is that DWR is still legally required to maintain a pump at the island, and more generally to assist in the maintenance of duck ponds on the island. Because duck ponds on the island are required mitigation, they are not a condition of pollution or nuisance, and there is nothing to "abate" with a cleanup and abatement order.

4. The levee repair is not a condition of pollution or nuisance because the Regional Board has certified that levee repair is neither

The Corps has issued two permits under the federal Clean Water Act that authorize levee repairs in Suisun Marsh, and the Regional Board has certified that both are in compliance with California law—which means that these levee repairs do not create a condition of pollution or nuisance. These permits allow for the excavation and placement of more than 1.4 million cubic yards of material. If that much material does not create a nuisance, then the levee repair at the island does not either.

Regional General Permit 3 ("RGP3") authorizes, among other things, repairing levees, installing bulkheads, grading to improve water management capability, discing, installing pumps,

and replacement of water control structures. (Bazel Decl., ex. 32; *see* ex. 33 at 5 (Regional Board certifies that permit is in compliance with California law).) RGP3 authorizes the placement of "443,000 cubic yards of earthen material". (*Id*., ex. 33 at 3.)

RGP3 covers work by "158 privately owned duck clubs represented by SRCD". (*Id*., ex. 16 at 2.) Point Buckler is one of those clubs. (*Id*., ¶ 39 and ex. 34.) The permit calls for the submission of a work request form, which is to be approved within 30 or 45 days. (*Id*., ex. 32 at 7.) Although the Club did not file the paperwork before conducting the Work, it has been in discussions with the Corps and Regional Board about regulatory approval through an "after the fact" permit.

The Corps has also issued, and the Regional Board has certified, a permit authorizing external dredging in ambient waters and placement of that dredged material on levees. (*Id*., ex. 35 at 1-2.) This certification applies to 133 miles of levees, and authorizes the placement of one million cubic yards of dredged material. (*Id*. at 2.)

These permits give duck clubs broad authority to repair their levees and manage their duck ponds. The duck clubs can excavate dirt, remove vegetation by discing (or burning), and install and repair water-management structures. If duck clubs can do these things without creating a condition of pollution or nuisance—and the Regional Board says they can—then the Club could repair its levee without creating a condition of pollution or nuisance.

5. The purpose of the levee repair was to restore duck ponds, and duck ponds are not a condition of pollution or nuisance

Staff have argued that RGP3 does not apply to the levee repair work at Point Bucker. But the question at this point is not whether RGP3 applies directly to the levee repair, but rather whether staff's assertion here (that the levee work here created a condition of pollution or nuisance) can be squared with its determination that the activities covered by the general permits *do not* create a condition of pollution or nuisance. The two cannot be squared.

The essence of staff's objection appears not to be that the Club repaired its levee, and certainly not that material was dug out of the borrow ditch. Instead, the essence of staff's objection is that the levee repair here had the effect, they say, of converting tidal marsh to dry land. It does not matter to them that the Club wanted to establish duck ponds; the conversion to duck ponds would have been just as bad.

But the two general permits allow duck clubs to maintain their levees and water-management facilities for the purpose of maintaining their duck ponds. (Bazel Decl., exs. 32, 33, and 35.) Implicit in the Regional Board's certification of the two general permits is the concept that *a duck pond is not a condition of pollution or nuisance*. Nor would we expect staff to assert that duck ponds *are* a condition of pollution or nuisance.

Because duck ponds are not a condition of pollution or nuisance, § 13304 cannot legitimately be used to "abate" them. For purposes of a cleanup and abatement order, the question is not what was there before the "discharge of waste" at issue too place. The question is whether that discharge "creates, or threatens to create, a condition of pollution or nuisance". (Water Code § 13304.) The levee repair here created, or threatened to create, a duck pond or series of duck ponds. That was it purpose. (Sweeney Decl., ¶ 32.) Because the "discharge" at issue here would have created a duck pond if it had been allowed to proceed to completion, and because a duck ponds is not a condition of pollution or nuisance, the "discharge" here *did not* create a condition of pollution or nuisance.

6. The levee repair does not fit within the definition of pollution or nuisance

The statute defines "pollution" as an unreasonable effect on beneficial uses or their associated facilities:

> "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.

(Water Code § 13050(l)(1).) "Beneficial uses" include "recreation" and "preservation and enhancement of…wildlife". (Water Code § 13050(f).) Here the Work was done to restore and maintain duck ponds, which provide both recreation and wildlife habitat. Because the Work was done to promote beneficial uses, and to repair facilities that serve those beneficial uses, it did not "unreasonably affect[]" beneficial uses or their associated facilities. The Work therefore did not create a condition of pollution.

A "nuisance", under the Porter-Cologne Act:

> (1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.

(Water Code § 13050(m); *see* Civil Code § 3479 (similar definition of nuisance).) Under the statute, a nuisance must also meet two additional requirements: it must affect "at the same time an entire community or neighborhood", and it must result from "the treatment or disposal of wastes". (*Id*., *see* Civil Code 3480 (definition of public nuisance); *see also City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, 37 (Water Code § 13304 is construed in light of common law principles of nuisance).)

Here, the levee repair is not injurious to health. Nor is it indecent or offensive to the senses. Nor is it an obstruction to the free use of property; on the contrary, it is needed to support the free use of property. The levee repair, therefore, is neither pollution nor a nuisance.

7. For these six reasons, the levee repair is not a condition of pollution or nuisance and therefore not subject to a cleanup and abatement order

The levee repair cannot be a "condition of pollution or nuisance" for any of the six reasons given above: (1) levee repair at the island has been authorized and required by the Legislature as part of the Suisun Marsh Preservation Act, and therefore cannot be a nuisance, (2) the Preservation Act and the Porter-Cologne Act require the Regional Board to protect duck clubs, (3) CEQA requires that the duck ponds be maintained as maintenance for DWR's pumping of water south from the Delta; (4) the Regional Board has certified that more than 1.4 million cubic yards of material can be used for levee repair in Suisun Marsh without causing a nuisance, (5) the purpose of the levee repair was to restore duck ponds, and duck ponds are not a condition of pollution or nuisance, and (g) the levee repair does not come within the statutory definitions of "pollution" or "nuisance" applicable to § 13304.

C. The Tentative Order Attempts To Regulate Activities That Are Not A "Discharge Of Waste" And Are Therefore Not Subject To A Cleanup And Abatement Order

Water Code § 13304 authorizes the issuance of a cleanup and abatement order only when there has been a "discharge of waste". (See section V above.) The Tentative Order attempts many activities, but none is a "discharge of waste".

The Porter-Cologne Act, which was enacted in 1969, follows from the federal Water Quality Act of 1965. (Bazel Decl., ex. 36.) The federal act 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 Act provided for the development of "water quality control plans" that include "water quality objectives". (Water Code §§ 13050(j), 13164, 13170.) The federal act provided for the regulation of the "discharge of matter… which reduces the quality of such waters below the water quality standards". (Bazel Decl., ex. 36 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 not only from 1965 act, but also from the current 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.

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.)

The question, here, therefore, is whether any of the alleged "discharges" at issue were of something that was thrown away.

1. Repairing A Levee Is Not A "Discharge Of Waste"

The Tentative Order includes a section on allegedly "Unauthorized Activities". (Tentative Order at 4-6.) Among these is the levee repair, which is referred to as "constructing…new levee", and "levee construction activities". (*Id*. at 4-5, ¶¶ 22-25.) Whether the work is consider to be repair or new construction, the result is the same. Neither repairs nor new construction is a "waste".

Surely no one would contend that the construction of a new house is a "waste". The house is not being discarded or thrown away. The new concrete foundation of the house is not a "waste"—it is not being discarded or thrown away—and neither is a cinderblock wall build to provide the residents of that house with some privacy. All are being built to improve the owner's use and enjoyment of the property. They are all improvements, not wastes.

Nor would repairs to that house and its cinderblock wall be considered a "waste". They are often costly efforts being undertaken to maintain the valuable improvements to that property, not as part of an effort to discard or throw away the house or other improvements to the property.

In the same way, the levee here is a valuable improvement to the property. The Club did not place excavated material on the levee—at substantial effort and expense—because it wanted to throw the that excavated material away, but because it wanted to repair the levee so that a duck pond could be restored, with the goal of improving the island.

It is important to remember, at this point, that the Legislature chose not to use the word "material" in the Porter-Cologne Act, as the 1965 federal act did, but instead chose the much narrower term "waste", and then defined "waste" in a way that limits the term to discards. The Legislature limited cleanup and abatement orders to the discharge of "waste", and the Regional Board should not use them for any other purpose.

Because the placement of material on the levee was for the purpose of repairing valuable improvements, it is not a waste, and is not subject to a cleanup and abatement order.

2. Cutting Vegetation Is Not A "Discharge Of Waste"

The first of the Tentative Order's "unauthorized activities" is "mowing tidal marsh vegetation". (*Id*. at 4, ¶ 20.) Mowing is mentioned again in paragraphs 26 and 27. (*Id*. at 5.) There is no reference to any waste from the cutting. Photographs show that this cutting was of brown, dead

vegetation. (Sweeney Decl., ex. 4.) Aerial photographs of the island show that it has been brown during much of the last three years. (Technical Report, figs. D-6 through D-36.)

The cutting of vegetation, even tidal marsh vegetation, is not a discharge. And no matter how offensive staff may find the cutting of vegetation, it is not the proper subject of a cleanup and abatement order.

References to cutting vegetation should be removed from the order.

3. Keeping Pet Goats Is Not A Discharge Of Waste

At one time, the Club kept a few pet goats on the island. (Sweeney Decl., ¶ 33.) The Tentative Order lists, as an "unauthorized activity", "goats in a pen", and also gates that "could potentially be used to…allow the goats to graze the Site's interior marsh". (Technical Report at 5-6, ¶ 28.)

The keeping of pets is not a "discharge of waste". Nor are gates that could "potentially" be used to allow goats to graze vegetation. Once again, these are not proper subjects for a cleanup and abatement order.

References to goats and pens should be removed from the order.

4. Parking Valuable Equipment Is Not A "Discharge Of Waste"

The Club has parked several pieces of movable equipment on the island. Several shipping containers and trailers are being used for temporary storage, for a temporary lounging area, for wind-break platforms, and as helicopter landing pads. (Sweeney Decl., ¶ 34.) The Tentative Order identifies the parking of these containers and trailers as "unauthorized activities". (Tentative Order at 5, ¶¶ 26, 27.) There is no assertion that any are waste.

The temporary parking of valuable equipment is not a "discharge", nor is any piece of equipment "waste". As a result, these activities are not subject to a cleanup and abatement order.

References to these containers and trailers should be removed.

5. Removing Material Is Not A "Discharge Of Waste"

Among the "unauthorized activities" are references to excavating trenches and the borrow ditch. (Tentative Order at 4-5, ¶¶ 20, 22-25.) Excavation is not a "discharge". It is therefore not subject to a cleanup and abatement order.

Even under the more expansive federal Clean Water Act, excavation is not regulated. (*See e.g*. National Mining Association v. United States Army Corps of Engineers (1998) 145 F.3d 1399, 1404 ("the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back"); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians* (2004) 541 U.S. 95, 110 ("[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot").)

References to excavation should be removed from the Tentative Order.

D. The Regional Board Does Not Have Authority To Issue The Order

Water Code § 13304, in short, authorizes the issuance of a cleanup and abatement order only if there has been a "discharge of waste" into "waters of the state" that creates a "condition of pollution or nuisance". Here there has been no discharge of waste. The great majority of the levee repair was above the high-tide line, as can plainly be seen in the aerial photographs. Because staff claim that wasters of the state, in this case, extend only up to the high tide line, the great majority of the levee repair was not done in waters of the state. Finally, the levee repair cannot be a condition of pollution or nuisance for a host of reasons.

The Tentative Order should not be issued.

VI. THE TENTATIVE ORDER VIOLATES DUE PROCESS

A. Due Process Applies To The Issuance Of A Cleanup And Abatement Order

The advisory team asserts that "due process does not require a hearing on a CAO at all". (Bazel Decl., ex. 37 at 4, 6.) The advisory team is wrong.

All administrative agencies, regardless of the method of their creation, are subject to the due process provisions of both the California and U.S. Constitutions. (*Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 366–367; *Smith v. Bd. of Med. Qual. Assurance* (1988) 202 Cal.App.3d 316, 326–329.) Due process applies to agency "adjudicative" actions. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.) Here, the issuance of a cleanup and abatement order is an adjudicatory action because it requires consideration of "facts peculiar to the individual case" and involves the "application of general standards to specific parcels of real property". (*Id*. at 613.)

The Solano Superior Court implicitly agreed that due process applies to the issuance of a cleanup and abatement order. The Club moved for a stay of the September 2015 cleanup and abatement order on the ground that due process required a hearing. (Bazel Decl., ex. 13.) The court granted the stay. (*Id*., ex. 14.) Mr. Wolfe apparently recognized that due process applies when he rescinded the September 2015 order "[i]n order to address the procedural due process claims". (*Id*., ex. 16.)

The State Board has agreed that due process applies to the issuance of a cleanup and abatement order, although it believes that the hearing can be held after issuance:

> 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.

(*In the Matter of the Petition of BKK Corporation*, State Board Order No. WQ 86-13 at 4.)

Although there may be differences on the question of when the hearing must be held, everyone—the Solano Superior Court, the State Board, Mr. Wolfe, and the Club—appears to agree that due process applies to the issuance of a cleanup and abatement order, and that a hearing is required.[6]

B. The *Machado* Case Leads To The Same Conclusion

In support of its assertion that "due process does not require a hearing on a CAO at all", the advisory team cites to the *Machado* case. (Bazel Decl., ex. 37 at 4, 6, citing *Machado v. State Water Resources Control Bd*. (2001) 90 Cal.App.4th 720, 725.) Nothing in *Machado* supports this proposition.

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[6] In some "extraordinary" situations, a "prompt" post-deprivation hearing can pass Constitutional muster. "[Courts] tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. (*People v. Litmon* at 395, quoting *Gilbert v. Homar* (1997) 520 U.S. 924, 930–931.) "When summary action is justified, due process is satisfied as long as there is a prompt postdeprivation hearing to review the agency's determination." (*Tyler v. County of Alameda* (1995) 34 Cal.App.4th 777, 783-784, citing *Ewing v. Mytinger & Casselberry* (1950) 339 U.S. 594.) "'[A]t some point, a delay in the post-termination hearing would become a constitutional violation.'" (*Id*. quoting *Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 547.) Here there was no need for immediate action, as staff implicitly acknowledged by waiting nearly a full year after the levee repair was done before issuing the September 2015 order.

The petitioner in that case was a dairy discharging manure to the Delta. (*Id*. at 723.) The "[superior] court ordered that the Dairy, at its request, was entitled to a hearing before the RWQCB". (*Id*. at 725.) A hearing was held, and no appeal from that hearing was taken. (*Id*.) The only issue, therefore, was whether the dairy was entitled to a hearing *before* the order was issued.

The *Machado* court applied *to the dairy* the three factors in *Mathews v. Eldridge*

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

(*Id*. at 725-726, quoting *Mathews v. Eldridge*, 424 U.S. at 334-335.)

For the first factor, the court found that the order at issue had only a limited effect. It did not shut down the dairy or "affect the fundamental nature of its business", and did not impose civil or criminal penalties. (*Id*. at 726.) For the second factor, the court concluded that "the risk of erroneous observation or deliberate misrepresentation of the facts by the reporting officer in the ordinary case seems insubstantial". (*Id*. at 727.) For the third factor, the *Machado* court thought that the need for immediate action was "obvious", and that "[u]nlawful discharges threaten public health and safety". (*Id*.)

The *Machado* case, therefore, did not hold that a hearing can *always* be held after the issuance of the cleanup and abatement order. Whether a hearing must be held before a cleanup and abatement order is issued depends on the facts of each case. But *Machado* leaves no doubt that due-process considerations apply to the issuance of a cleanup and abatement order.

C. The Hearing Does Not Comply With Due Process

The advisory team has given the Club only a half hour in total to make its opening statement, cross-examine the prosecution team's witnesses, present its own witnesses, and make its closing argument. One half hour is not enough to accomplish these tasks. A total of one hour for both sides is not enough time for the Regional Board to understand all the issues, evaluate them, and reach a considered decision. The hearing that is now scheduled for August 10, 2016, therefore, does not comply with due process.

"'The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.'" (*People v. Litmon* (2008) 162 Cal.App.4th 383, 395, quoting *Mathews v. Eldridge*, 424 U.S. at 333, citations and quotation marks omitted.) To ensure that the opportunity is meaningful, the United States Supreme Court has identified some aspects of due process as irreducible minimums. When a party challenges actions as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases, due process requires an opportunity to be heard in person, to present witnesses and documentary evidence, and to confront and cross-examine available adverse witnesses. (*Goldberg v. Kelly* (1970) 397 U.S. 254, 267-70; *Morrissey v. Brewer* (1972) 408 U.S. 471, 488-489.)

When the prosecution team scheduled this matter, and its complaint for administrative civil liability ("ACL") for the Regional Board's monthly meeting for August 2016, the Club objected. It asked the advisory team to give this matter a special hearing similar to the hearing used in the consolidated Byron-Bethany Irrigation District and West Side Irrigation District cases (jointly "Byron-Bethany"). (Bazel Decl., ex. 38 at 2.) Although the advisory team granted the request with respect to the ACL complaint, it denied the request for the cleanup and abatement order. It asserted that "Byron-Bethany enforcement action is not comparable to the CAO hearing scheduled for August", that "the August hearing should be fairly straightforward"; that "Regional Water Board and its presiding officer need not weigh the evidence" to issue the cleanup and abatement order, and that a cleanup and abatement order "does not impose liability". (Bazel Decl., ex. 37 at 3.) These assertions are incorrect.

This case is not "fairly straightforward", as demonstrated by this brief. Even the most basic factual issues, such as where the high tide line is, are hotly disputed by the parties. The Regional Board will indeed have to weigh the evidence on this point, and on many others. The most basic legal issues, such as whether the Regional Board has authority to issue a cleanup and abatement order, are also in dispute. This order would indeed "impose liability". The word "liability" means "the state of being responsible for something, especially by law". (Google.) Here the Club would be responsible for conducting a longer series of tasks, including the submission and implementation of a plan that would "restore tidal flow into all seven breaches". (Tentative Order at 15.) If the

advisory team is thinking of "liability" in the sense of paying money, the tasks required by the Tentative Order, which among other things calls for expert assistance, construction, and permitting, would cost large amounts of money. The prosecution team estimates the permitting costs alone at $1.1 million. (ACL Complaint, Appendix A at A-12.)

As a result, this case at least as complex and substantial as Byron-Bethany. In that set of cases, the West Side Irrigation District faced only a cease and desist order, which is less intrusive and imposes less liability than a cleanup and abatement order. Any element of due process afforded to the West Side Irrigation District should be afforded here. The Club is requesting that the advisory team reconsider its decision. (Bazel Decl., ex. 39.)

The hearing scheduled for August 10 should be taken off calendar and set for a special hearing at the same time as the prosecution team's ACL complaint.

D. The Tentative Order Is Unconstitutionally Vague

The 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.) The Tentative Order relies on penal statutes and specifically threatens penal liability. (Tentative Order at 18.) To avoid the threatened penal liability, the Tentative Order requires the Club to submit a "Corrective Action Workplan" that is "acceptable to the Water Board Executive Officer". (*Id*. at 15.)

To the extent these 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 Regional Board representative, does not have authority to issue the Order.

E. The Order Cannot Be Issued By The Executive Officer, Who Is Disqualified

The Tentative Order is drafted so that it will be issued by Bruce Wolfe, the Executive Officer, and that Mr. Wolfe will decide on whether submissions made by the Club are "acceptable" to him. (Tentative Order at 15, 18.) But, in response to an objection by the Club, Mr. Wolfe has been removed from his role on the advisory team. (Bazel Decl., ex. 37 at 8.) Mr. Wolfe therefore

cannot issue the order or decide whether submissions are acceptable.

Due process requires agencies to separate advocates from decision makers, and prohibits ex parte communications between them:

> While the state's administrative agencies have considerable leeway in how they structure their adjudicatory functions, they may not disregard certain basic precepts. One fairness principle directs that in adjudicative matters, one adversary should not be permitted to bend the ear of the ultimate decision maker or the decision maker's advisers in private. Another directs that the functions of prosecution and adjudication be kept separate, carried out by distinct individuals.

(*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2006) 40 Cal.4th 1, 5.)

The State Board imposes a strict separation between the members of the prosecution and advisory teams:

> The hearing officer and the other [State] Board members treat the enforcement team "like any other party." Agency employees assigned to the enforcement team are screened from inappropriate contact with Board members and other agency staff through strict application of the state Administrative Procedure Act's rules governing ex parte communications. (Gov. Code, § 11430.10 et seq.) "In addition, there is a physical separation of offices, support staff, computers, printers, telephones, facsimile machines, copying machines, and rest rooms between the hearing officer and the enforcement team (as well as the hearing team)," according to the Whitney declaration.

(*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 735-736.)

Here, Mr. Wolfe issued the September 2015 order (cease and desist order no. R2-2015-0038) against the Club. He has therefore prosecuted a claim against the Club in this matter. If he was acting as the decision-maker or part of the advisory team when he issued the September 2015 order, he should be disqualified on the ground that he was communicating ex parte with the prosecution team before he issued the order—the order was issued without any hearing or other proceeding in which the prosecution team spoke to Mr. Wolfe in the presence of the Club.

Despite his role in the issuance of the order, Mr. Wolfe was identified as part of the advisory team in the initial hearing notice. The Club objected to his participation on the grounds that separation of functions must be maintained, and that ex parte communications are prohibited. (Bazel Decl., ex. 38 at 6, ex. 40.) The advisory team granted this request. (*Id*., ex. 37.)

Because he has been disqualified, Mr. Wolfe can no longer issue the order or decide on whether submissions are acceptable. Doing so would violate the requirement for separation of functions, and the prohibition on ex parte communications.

The advisory team argues that "advisory and prosecutorial functions [are not] necessarily separated at this point [i.e. when a cleanup and abatement order is issued] because CAOs are not always contested." (Bazel Decl., ex. 37 at 8.) But, as explained above, the separation requirement applies whenever the Regional Board acts in an adjudicatory proceeding, regardless of whether or not the matter is contested. There obviously was no separation when the September 2015 order was issued, and that absence of separation violated due process.

The advisory team cites *Morongo* for the proposition that "separation of functions [is] required on a case-by-case basis". (*Id.*) But *Morongo* does not stand for this proposition. It makes clear that separation of functions is required in *every* adjudicatory matter. What it actually holds is that a person can be a member of the advisory team in one case, and a member of the prosecution team in another case—as long as there is full separation in each case.

Because there was no separation at the time of the September 2015 order, no one who participated in that decision can now be part of the advisory team or a decision-maker in this matter.

F. The Tentative Order Would Compel Speech In Violation Of The Constitution

The Tentative Order would require the Club to "acknowledge" that it will pay for staff time. It specifies that that within 14 days the Club:

> is required to acknowledge in writing its intent to reimburse the State for cleanup oversight work as described in the Reimbursement Process for Regulatory Oversight fact sheet provided to the Dischargers with this Order, by filling out and returning the Acknowledgement of Receipt of Oversight Cost Reimbursement Account Letter or its equivalent".

(Tentative Order at 17.) This provision would require "compelled speech" in violation violates article I of the California Constitution and the First Amendment of the U.S. Constitution.

The freedom of speech protected by the First Amendment and article I "includes both the right to speak freely and the right to refrain from speaking at all". (*Wooley v. Maynard* (1977) 430 U.S. 705, 714; *Beeman v. Anthem Prescription Management, LLC* (2013) 58 Cal.4th 329, 341.) The California Constitution also protects compelled speech:

> "Article I's right to freedom of speech, like the First Amendment's, is implicated in speaking itself. Because speech results from what a speaker chooses to say and what he chooses not to say, the right in question comprises both a right to speak freely and also a right to refrain from doing so at all, and is therefore put at risk both by prohibiting a speaker from saying what he otherwise would say and also by compelling him to say what he otherwise would not say.'"

(*Beeman*, 58 Cal.4th at 341, quoting *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 491.) The Tentative Order would violate the U.S. and California Constitutions "by compelling [the Club] to say what [it] otherwise would not say.'" (*Beeman*, 58 Cal.4th at 341; *W. Va. State Bd. of Educ. v. Barnette* (1943) 319 U.S. 624, 625; *Wooley,* 430 U.S. 705; *Agency for Int'l. Development v. Alliance for Open Society Int'l, Inc.* (2013) 133 S. Ct. 2321.)

Here, the Tentative Order would require the Club to "acknowledge…its intent to reimburse the State". (Tentative Order at 17.) But Water Code § 13304 does not require the Club to reimburse the Regional Board, and it certainly does not say that the Club must express its "intent" to provide reimbursement. Instead, it authorizes the Regional Board to file a "civil action" for cost recovery. (Water Code § 13304(c)(1).) Although the Club may very well want to agree to reimbursement to avoid a civil action, it cannot be compelled to agree to do something that it is not legally required to do—that is, to say that it will provide reimbursement without a civil action.

This reimbursement provision should be removed from the order.

VII. THE TENTATIVE ORDER VIOLATES WATER CODE SECTION 13267

The Tentative Order would require the Club "to submit technical reports" in accordance with Water Code § 13267. (Tentative Order at 13.) But § 13267(b)(1) requires an assessment of the costs and benefits of the requested reports. Because this assessment has not been done, issuing the order would violate § 13267.

A. Section 13267 Requires Balancing Of Costs And Benefits

Water Code § 13267 requires a regional board to balance the costs and benefits of a report, and to provide a written explanation:

> The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.

(Water Code § 13267(b)(1).)

When the Legislature requires a cost-benefit balancing, a regional board must actually engage in that balancing. In *Voices of the Wetlands,* the California Supreme Court reviewed an administrative mandamus petition involving the cost-benefit analysis required by Clean Water Act § 316(b). (*Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 507.) The Central Coast Regional Board initially made a conclusory finding similar to the finding here. (*Id*. at 511.) The trial court rejected the regional board's finding and ordered the regional board "to conduct a thorough and comprehensive analysis". (*Id*. at 512, 513.) On remand, the regional board solicited and received written testimony on the alternatives, "the costs, feasibility, and environmental benefits" of the alternatives, and whether the costs of any alternative were wholly disproportionate to their environmental benefits. (*Id*. at 513.) It followed with a hearing in which the members of the regional board discussed the issues. (*Id*.) The trial court concluded that the regional board did "a sufficiently comprehensive analysis" on remand. (*Id*. at 514.) The California Supreme Court affirmed the decision and upheld procedure of the trial court. (*Id*. at 506-507.)

B. No Balancing Has Been Done

Staff have not engaged in the balancing required by § 132267, and have not provided the required written explanation. Instead, the Tentative Order presents only the most conclusory analysis:

> The burden of preparing technical reports required pursuant to section 13267, including costs, bears a reasonable relationship to the need for the reports and the benefits to be obtained from the reports, namely the restoration of beneficial uses at the Site.

(Tentative Order at 13.)

There Tentative Order says nothing about the costs of the providing the reports. For this reason alone, the order does not and cannot show that "[t]he burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports." (Water Code § 13267.)

Nor is there any attempt to bridge the analytic gap between evidence and conclusion by providing a reasoned explanation. "Mere conclusory findings without reference to the record are

inadequate." (*Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 517.) The conclusory § 13267 finding is therefore inadequate.

All references to Water Code § 13267 should be removed from the order.

VIII. THE TENTATIVE ORDER VIOLATES CEQA

The Tentative Order asserts that it is categorically except from CEQA, and that environmental review at this time would be premature and speculative. But the categorical exemption does not apply, and the "premature" argument is plainly wrong. Because there is a fair argument that the order will have a significant effect on the environment, CEQA applies. Because the Regional Board has not complied with the procedure required by CEQA, the order would violate CEQA.

A. The Cited Exemption Does Not Apply

The Tentative Order asserts that it is categorically exempt under 14 CCR 15321(a)(2). That section exempts:

> The adoption of an administrative decision or order enforcing or revoking the lease, permit, license, certificate, or entitlement for use or enforcing the general rule, standard, or objective.

Here the first part of the exemption plainly does not apply. Here there is no lease, permit, license, certificate, or entitlement for use that is being enforced or revoked. The second part of the exemption applies to not to "any" general rule, standard, or objective, but only to "the" general rule, standard, or objective—an apparent reference to "the" general rule, standard, or objective that applied to the lease, permit, license, certificate, or entitled for use. Because these things are not at issue here, the exemption does not apply.

Moreover, the exemption does not apply when the agency is undertaking construction activities:

> Construction activities undertaken by the public agency taking the enforcement or revocation action are not included in this exemption.

(14 CCR § 15321(c).) Here the order would require construction activities, and in that sense the Regional Board is undertaking construction activities. Once again, the exemption does not apply.

In fact, the exemption that would seem to be most applicable makes absolutely clear that it does not apply when there are construction activities:

> actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption.

(14 CCR § 15308.) When the two exemptions are read together, there should be no doubt that the exemption does not apply in this case because the order calls for construction activities.

In any case, § 15321 does not apply because of the unusual-circumstances exception:

> A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances."

(14 CCR § 15300.2 (c).) Categorical exemptions are applied for "classes of projects … do not have a significant effect on the environment". (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1092, citing 14 CCR § 15300.) Both § 15321 and § 15308 make clear that the usual circumstances to which they apply do not include construction. Here the order calls for construction. That makes the circumstances unusual.

Unusual circumstances can also be shown by evidence that the project will have a significant effect:

> [E]vidence that the project will have a significant effect does tend to prove that some circumstance of the project is unusual. An agency presented with such evidence must determine, based on the entire record before it—including contrary evidence regarding significant environmental effects—whether there is an unusual circumstance that justifies removing the project from the exempt class.

(*Berkeley Hillside*, 60 Cal.4th at 1105.) Here the prosecution team and the Technical Report contend that the closing of seven breaches at the island had a significant effect on the environment. If that is true, then the opening of the seven breaches must also have a significant effect on the environment. It should be obvious that the prosecution team wants the seven breaches opened precisely because it believes that the opening of the breaches will have a significant effect on the environment. The project may also have a significant effect on the environmental because opening up the breaches may subject endangered fish to predation and other harms. (See section III.B.6 above.) The Regional Board must therefore consider all the evidence and determine whether the order will have a significant effect owing to unusual circumstances.

The Tentative Order should not be issued.

B. CEQA Review Is Not Premature

The Tentative Order also asserts that "CEQA review at this tie would be premature and speculative, as there is not enough information concerned the [Club's] proposed remedial activities and possible associated environmental effects." (Tentative Order at 14.) The Tentative Order says that the Regional Board will conduct any CEQA review, after the plans are submitted, if it "determines that implementation of any plan required by this Order will have a significant effect on the environment." (*Id.*) Come now. The whole point of the order is to have a significant effect on the environment by destroying at least part of the levee.

An agency cannot postpone CEQA review when a decision "commits the public agency as a practical matter to the project":

> A CEQA compliance condition can be a legitimate ingredient in a preliminary public-private agreement for exploration of a proposed project, but if the agreement, viewed in light of all the surrounding circumstances, commits the public agency as a practical matter to the project, the simple insertion of a CEQA compliance condition will not save the agreement from being considered an approval requiring prior environmental review.

(*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 132.) Here the order indisputably commits the Regional Board to the project, which calls for restoring "tidal flow into all seven breaches [of the levee] that existed" before the levee repair. (Tentative Order at 15.)

CEQA review is therefore required.

IX. THE SUMMARY AND TENTATIVE ORDER CONTAIN MANY OTHER INCORRECT STATEMENTS

The four-page Staff Summary Report and Tentative Order contain many incorrect statements, so many that it would be tedious to identify them all here. For example, the very first sentence in the Background section of the Staff Summary Report asserts that "[t]he site is located in the Sacramento-San Joaquin Delta" and proceeds to talk about the Sacramento-San Joaquin Delta Reform Act of 2009. (Staff Summary Report at 1.) But Point Buckler Island is not in the Delta. (*Compare* Technical Report, fig. 2 (showing location of Point Buckler Island) *with* Bazel Decl., ex. 41 (showing Delta boundary).)

More significant errors are found in the Tentative Order, which makes incorrect legal statements about the Club's alleged violations. It asserts that the levee repair violated the basin plan and section 401 of the Clean Water Act, but the Water Code does not create liability for a standalone "violation" of the basin plan, and the Clean Water Act does not create liability for a violation of section 401.

A. The Water Code Does Not Create Liability For A "Violation" Of A Basin Plan

The Tentative Order asserts that "the [Club's] unauthorized activities at the Site are in violation of the Basin Plan." (Tentative Order at 12, ¶ 72.a.) But the Water Code does not create liability for an independent "violation" of a basin plan. (Water Code § 13350.) The Tentative Order should be modified accordingly.

B. The Clean Water Act Does Not Create Liability For A "Violation" Of Section 401

The Tentative Order also asserts that "the [Club is] in violation of Clean Water Act section 401." (Tentative Order at 13, ¶ 72.c.) Although a section 401 certification is needed to obtain a federal NPDES permit under the Clean Water Act, any failure to provide that certification is not a violation of the Clean Water Act. Section 301(a) specifies what a violation of the act is:

> 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 the Clean Water Act.

The reasoning of Congress is clear. If the applicant does not submit a section 401 certification, the applicant never gets an NPDES permit. There is no harm to the environment from not requesting a certification, and as a result there is no reason to penalize any failure to request a certification.

The Tentative Order should be modified accordingly.

X. THE TENTATIVE ORDER IS NEITHER NECESSARY NOR APPROPRIATE

A cleanup and abatement order is a crude tool. Because the Club and the prosecution team have now agreed to a permitting process, it would be far better to put any cleanup and abatement order on hold unless and until the permitting process fails.

A. The Process Started Badly But Is Getting Back On Track

In retrospect, there were many ways in which the parties misunderstood each other. The Club did not appreciate the prosecution team's commitment to the concept that the levee repair had dried out the island. The Club expected the prosecution team to accept the Club's eyewitness evidence that the island had been dry before the levee repair. The Club still does not understand why the prosecution team never asked the Club to restore tidal flow to the island by opening the tide gate.

The prosecution team, for its part, does not seem to trust the Club or believe what it says. For example, the Staff Summary Report asserts that "there is no evidence that the [Club] ever intended to manage water on the island to promote waterfowl habitat." (Staff Summary Report at 3.) But there is evidence of the Club's intent, not least of which is Mr. Sweeney's testimony that the Club repaired the levee for the purpose of restoring duck ponds. There are also the four small semi-circular duck ponds that were excavated, the trees planted next to those duck ponds, and the decoys place in the ponds. There is also a disc on the island, which was brought to the island to disc duck ponds. (Sweeney Decl., ¶ 35.)

The prosecution team appears to think that this is all a ruse. It may think that the Club's main purpose has always been to use the island for kiteboarding. But when the island was purchased Mr. Sweeney did not kiteboard. (*Id.*) He has met with the previous owners of the club and learned from them how they operated the duck ponds. (*Id.*) He began kiteboarding at the island before the levee repair, and could have continued kiteboarding at the island without the levee repair. (*Id.*)

The Club may also have misunderstood what the prosecution team meant when it demanded restoration of tidal marsh. Before suit was filed, the Club did not hear any willingness to allow a duck club or anything else on the island. Things have now changed substantially, and for the better.

B. The Club Will Be Submitting Permit Applications

At a meeting in June, the prosecution team and the Club met to discuss how the island could be used for recreation, including both a duck club and kiteboarding, while also opening up the levee in places to restore tidal flow. The prosecution team did not object to the future use of the island for both a duck club and for kiteboarding. The Club explained that it intended to submit permit applications to the Corps, the Regional Board, and BCDC. This agreement paved the way for a resolution of all issues.

C. The Parties Are Discussing The Content Of Those Applications

The parties will be meeting again in late July, and expect to continue meeting after that. At the next meeting, the Club intends to provide a conceptual plan that would allow most of the island to be restored to its condition before the levee repair.

XI. CONCLUSION

The Regional Board should not issue the Tentative Order. The matter should be taken off the calendar for August 10, 2016, and considered in a special hearing in December 2016 or later together with the issues raised by the prosecution team's administrative civil liability complaint. At the very least, the Tentative Order should be sent back to the prosecution team with directions to consider the factual and legal issues raised in this brief.

DATED: July 11, 2016

BRISCOE IVESTER & BAZEL LLP

By: _____
Lawrence Bazel
Attorneys for Point Buckler Club, LLC
and John D. Sweeney