JOHN BRISCOE (053223)
LAWRENCE S. BAZEL (114641)
MAX ROLLENS (308984)
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
Tel (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	CLUB'S OBJECTIONS AND REBUTTAL

INTRODUCTION

In accordance with the Second Revised Hearing Procedure, Point Buckler Club, LLC and John D. Sweeney (jointly the "Club") submits these objections and rebuttal.

THE CLUB'S OBJECTIONS TO THE LETTERS AND TESTIMONY

The Club objects to the statements made by San Francisco Baykeeper at the Regional Board meeting on 18 November 2015, and submitted by the prosecution team as Exhibit 20a. These were impermissible ex parte communications. (See the Club's Opposition (July 1, 2016) section VI.E; M. Lauffer (25 April 2013) Ex Parte Communications Questions And Answers Document (copy attached).) The Club requests that Baykeeper be prohibited from participating in these proceedings, and that the Regional Board members be advised that they cannot rely on the statements made by Baykeeper.

The Club also objects to the letters from Sierra Club, Save the Bay, San Francisco Baykeeper, Citizens Committee To Complete The Refuge, National Marine Fisheries Service, and Napa Solano Audubon Society (submitted by the prosecution team as Exhibits 20b through 20g) (jointly, with the Baykeeper testimony, the "Letters"). The Letters are not from percipient witnesses. None asserts that they have been to the island or anywhere near it. They provide no new information. Because they do not profess to have any percipient knowledge, they do not qualify as evidence, even under the relaxed standard used by the Regional Board.

Instead, the Letters repeat back incorrect information that was plainly given to them by the prosecution team, most notably that the Club has harmed 30 acres of tidal wetlands. The obvious purpose of the Letters is to encourage the members of the Regional Board to decide against the Club not because of the law and facts, but based on the Club's unpopularity with important political groups. As a result, these submissions violate due process and the Club's right to a fair hearing and an impartial decision-maker. Just as nonparties are not allowed to participate in court proceedings, nonparties should not participate in adjudicatory hearings like this one. We request that the Letters be removed from the materials going to the members of the Regional Board, that these organizations be prohibited from participating at the hearing, and that the prosecution team be admonished for taking action that would violate the Club's Constitutional rights.

THE LETTERS MAKE STATEMENTS ABOUT THE CLUB'S PLAN WITHOUT PROVIDING ANY LEGAL OR FACTUAL SUPPORT

The Letters make several points that bear rebuttal. They assert that the Club's individual management plan, which had been prepared and certified by the San Francisco Bay Conservation and Development Commission ('BCDC") in accordance with the Suisun Marsh Preservation Act, was no longer in effect. The Letters provide no legal analysis or factual information that might bear on the matter. They are also contrary to the law governing individual management plans. (*See e.g.* Opposition, section IV.G (explaining why the Club Plan remained in effect).)

THE TENTATIVE ORDER WOULD DEPRIVE THE CLUB OF A FUNDAMENTAL VESTED RIGHT

The Letters would, if followed, deprive the Club of its vested right to operate its business. The *Goat Hill* case bears a remarkable resemblance to this case. (*Goat Hill Tavern v. City of Costa*

Mesa (1992) 6 Cal.App.4th 1519.) In that case, the tavern had been in operation since 1955. (*Id*. at 1523.) The owner purchased it in 1984 and invested about $1.75 million in its refurbishment, without obtaining building permits or land use approvals. (*Id*.) The City held an initial hearing and denied the tavern a conditional use permit, but the City's procedures violated the tavern's due process rights. (*Id*. at 1523-1524) Another hearing was held, and the tavern's application for a conditional use permit was denied again. (*Id*. at 1524.)

The court held that full and independent judicial review applies to an administrative decision that affects a fundamental vested right:

> When an administrative decision affects a right which has been legitimately acquired or is otherwise vested, and when that right is of a fundamental nature from the standpoint of its economic aspect or its effect…in human terms and the importance…to the individual in the life situation, then a full and independent judicial review of that decision is indicated because the abrogation of the right is too important to the individual to relegate it to exclusive administrative extinction.

(*Id*. at 1526, quotation marks, citation, and emphasis omitted, ellipses in original.) The court concluded that continued operation of the business was a fundamental vested right. (*Id*. at 1529.) The court then upheld the trial court's determination that the city had improperly denied the permit. (*Id*. at 1531.)

Here there is no dispute that the island was legitimately operated as a duck club from at least the 1940s through the mid-1980s. During this time, there were levees in place, and an individual management plan specifying that the levees should be water-tight. (Opposition, sections II.A, II.B, II.F, II.G.) The Club purchased the island and conducted renovations worth about $1 million. The Regional Board is now attempting to shut down the duck-club business and thereby deprive the Club of a fundamental vested right.

THE CLUB INTENDED TO USE THE ISLAND AS A DUCK CLUB

The Letters also call into question the Club's intent to use the island as a duck club, and suggest that the intent has always been to use the island for kiteboarding. This assertion is untrue.

When Point Buckler was purchased in 2011, John Sweeney did not kiteboard. (Supplemental Declaration of John Sweeney ("Supp. Sweeney Decl.), ¶ 2.) The island was not purchased with any

intent to make it a kiteboarding club. Kiteboarding started at the island in 2012. At that time, kiteboarding was done on the western point of the island, outside of the old levee. (*Id.*)

Trailers were brought out onto the point, parked, and used for storage. These trailers weigh about 5 tons each. They are not something you could bring across a wet marsh without having them sink into the ground. (*Id.*, ¶ 3.)

The kites were laid out on the mowed lawn between the trailers and the water. That area was not filled, graded, or otherwise raised above its elevation when the island was purchased. Kites continued to be laid out in this area during the 2012, 2013, and 2014 kiteboarding seasons, which last from about May to September. Mr. Sweeney kiteboarded about once per week during these times, and never saw the kite lawn go under water. Other people kiteboarded from the point hundreds of times during these years. No one has ever reported seeing water on the kiteboard lawn. (*Id.*, ¶ 4.)

The levee repairs were not needed for kiteboarding. The levee was not repaired for kiteboarding. (*Id.*, ¶ 5.)

When the island was purchased, Mr. Sweeney wanted to use it for duck hunting during the winter. Cynthia Torres, the previous owner, told him that the California Department of Water Resources (DWR) told her that she had to fix the levee. As a result, he believed that he was supposed to fix the levee. (*Id.*, ¶ 6.)

Mr. Sweeney also understood that the levee needed to be repaired to hold water for duck ponds. If water were pumped onto the island without repairing the levee, the water would simply run off. (*Id.*, ¶ 7.)

Work on the levee stopped in October 2014 when Mr. Sweeney learned there were regulatory objections. The work on the levee was not finished. The intent was to adjust the slope of the levee and the ditch. A second tide gate was to be installed. (*Id.*, ¶ 8.)

In early 2015 four small semicircular ponds were dug. These have no connection with kiteboarding. They were intended to be duck ponds. They are far from complete. Trees were planted around the semicircular ponds to attack ducks. Work on these stopped when the San

Francisco Bay Conservation and Development Commission (BCDC) requested that the work stop. (*Id.*, ¶ 9.)

There has never been any intention of draining the island. The island was mostly dry, and did not need to be drained. On the contrary, it needs to be flooded to create duck ponds. (*Id.*, ¶ 10.)

THE ISLAND WAS BROWN BEFORE THE LEVEE REPAIR

The Letters assert that the levee repair caused a loss of tidal marsh. But the great majority of the island was not a tidal marsh at the time of the levee repair. (Opposition, section III.B.) A photograph taken in May 2012 shows how brown and dead the vegetation on the island was. (Supp. Sweeney Decl., ex. 1.)

THE LETTERS IMPERMISSIBLY DEMAND THAT THE CLUB BE PUNISHED FOR EXERCISING ITS CONSTITUTIONAL RIGHTS

The Letters demand that the Club be punished especially heavily for what is sometimes called "recalcitrance". But there has been no recalcitrance. The Club has been exercising its Constitutional right to have a hearing on a cleanup and abatement order. When the Regional Board impermissibly issued a cleanup and abatement order without a hearing, the Club petitioned the State Water Resources Control Board and then filed suit in Solano Superior Court for a writ of mandate. The Club prevailed on that litigation. It obtained a stay, which resulted in the rescission of the original order.

The Club cannot be penalized for exercising its Constitutional rights.

DATED: July 21, 2016

BRISCOE IVESTER & BAZEL LLP

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