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## San Francisco Bay Regional Water Quality Control Board

August 8, 2016

VIA EMAIL ONLY

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### **Subject: Advisory Team Response to Dischargers' and Prosecution Team's Objections**

Dear Mr. Bazel and Ms. Drabandt:

The Advisory Team has received the Dischargers' evidentiary objections, sent July 21, 2016; the Prosecution Team's response and objections, sent July 25, 2016; the Dischargers' supplementary evidentiary submittal, sent August 3, 2016; and the Prosecution Team's objections to the submittal, sent August 4, 2016. Below, please find the Board Chair's rulings, made in consultation with the Advisory Team.

#### **I. DISCHARGERS' OBJECTIONS**

The Dischargers object in their July 21, 2016 rebuttal brief to the reference to testimony by Baykeeper at the November 2015 Regional Board meeting in the Prosecution Team's brief and to the content and admissibility of public comments on the tentative Cleanup and Abatement Order (tentative CAO) made by several environmental groups. These objections lack merit.

##### **A. Public Comments by Baykeeper Are Not Ex Parte Communications.**

The Prosecution Team's rebuttal repeated Baykeeper's comments, made at the November 2015 Regional Board meeting, characterizing the Dischargers' activities on Point Buckler Island as "the most egregious illegal fill of tidal marshland in the Bay's recent history." (Prosecution Team Rebuttal Br., p. 2 [citing Ex. 21(a), Nov. 18, 2015 Bd. Tr., p. 33].) Contrary to the Dischargers' assertions, this quotation is not an ex parte communication. Prohibited ex parte communications include, *inter alia*, communications made between an interested person and a presiding officer about a matter pending before the officer, without an opportunity for all parties to comment. (See Gov. Code § 11430.10, subd. (a).) Here, Baykeeper, an interested person, made its comments to the Regional Board in November 2015, some six months before the Prosecution Team issued the tentative CAO. Accordingly, this matter was not pending at the time that Baykeeper commented. (See Gov. Code § 11430.10, subd. (c).)

In light of the foregoing, the Board Chair **OVERRULES** the Dischargers' objections to inclusion of Baykeeper's comments in the Prosecution Team's rebuttal brief and **DENIES** the Dischargers' request to prohibit Baykeeper from commenting at the August 10, 2016 hearing.

DR. TERRY F. YOUNG, CHAIR | BRUCE H. WOLFE, EXECUTIVE OFFICER

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### B. Public Comment Letters Are Not Impermissible Evidentiary Submissions.

Several environmental organizations and agencies submitted comment letters within the comment period set forth in the Hearing Procedure.<sup>1</sup> The Dischargers mischaracterize these letters as inadmissible evidentiary submissions. None of the commenters requested “designated party” status, which would have enabled them to submit evidence at the hearing. (See May 17 Hearing Procedure, pp. 2-3.) To the contrary, the commenters qualify as “interested persons,” who are allowed to submit oral or written non-evidentiary policy statements pursuant to Regional Board regulations and the Hearing Procedure applicable to this matter. (See Cal. Code Regs. tit. 23, § 648.1, subd. (d); 2d Rev. Hr’g Proc., p. 2.) While the Dischargers may be correct that “the purpose of the Letters is to encourage the members of the Regional Board to decide against the Club,” they are mistaken that the commenters are prohibited from furthering this purpose by presenting policy statements. (See Dischargers’ Rebuttal Br., p. 2.)

Accordingly, the Board Chair and Advisory Team disagree that the letters must be removed from the materials Regional Board members will review, or that commenters should be prohibited from participating in the hearing. Therefore, the Board Chair **OVERRULES** the Dischargers’ objections to the written comments on the tentative CAO and anticipates public testimony at the hearing on August 10, 2016.

## II. PROSECUTION TEAM’S OBJECTIONS

In its July 25 and August 4, 2016, responses, the Prosecution Team objects to admitting into evidence: (1) the fundamental right argument raised in the Dischargers’ rebuttal brief; (2) Dr. Terry Huffman’s declaration given Dr. Huffman’s unavailability to testify in person; and (3) the Dischargers’ August 3, 2016, letter, supplementary declaration, and exhibits. The Board Chair and Advisory Team address these objections below.

### A. The Dischargers’ Fundamental Right Argument Is Admissible.

The Dischargers’ July 21, 2016, rebuttal brief includes a cursory argument that the requirements of the tentative CAO will deprive Mr. Sweeney of a fundamental vested right to use his property as a duck club. (See Dischargers’ Rebuttal Br., p. 2-3.) The Dischargers have also submitted a declaration from Mr. Sweeney containing some statements in support of this claim. The Prosecution Team alleges that the Dischargers have impermissibly raised this issue for the first time in their rebuttal and requests that Dischargers be barred from making regulatory takings arguments at the hearing unless the Prosecution Team is allowed additional time to brief the issue.

Although the Dischargers did not make a regulatory takings or fundamental rights claim in their opposition, the argument is within “the scope of the information previously submitted by the other designated parties.” (2d Rev. Hr’g Proc., p. 4.) In their initial evidentiary submittal, the Dischargers made conclusory statements suggesting that adoption of the tentative CAO would preclude use of the island for kiteboarding or duck hunting. (See Dischargers’ Opp’n Br., p. 32 [“The Tentative Order would prevent the ‘continued recreational use of privately owned

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<sup>1</sup> These comment letters may be found at the following electronic location:  
[http://www.waterboards.ca.gov/sanfranciscobay/public\\_notices/enforcement\\_db.shtml#JDS](http://www.waterboards.ca.gov/sanfranciscobay/public_notices/enforcement_db.shtml#JDS).

managed wetlands' by requiring the Club to destroy its levee."]; p. 39 [tentative order would interfere with recreational use of the island]; p. 63 ["Before the suit was filed, the Club did not hear any willingness to allow a duck club or anything else on the island."] The Dischargers' rebuttal brief elaborates minimally on the tentative CAO's alleged effects on the Club's activities, devoting less than a page to the fundamental rights argument, and including the declaration as the only evidence in support of the claim.

The Board Chair therefore OVERRULES the Prosecution Team's objection to the Dischargers' introduction of a fundamental rights argument. Attempts by the Dischargers to introduce additional evidence in support of this claim at the hearing, however, will be evaluated in light of the Regional Board's policy against the introduction of surprise testimony and exhibits. (Cal. Code Regs., tit. 23, § 648.4, subds. (a) and (e).)

B. The Declaration of Dr. Huffman Is Admissible.

The Prosecution Team objects to the introduction of a declaration from Dr. Terry Huffman, which the Dischargers included with their initial evidentiary submission, because Dr. Huffman will not be present at the August 10, 2016 hearing. Although applicable regulations generally require "any witness providing written testimony [to] appear at the hearing and affirm that the written testimony is true and correct" (Cal. Code Regs., tit. 23, § 648.4, subd. (d)), the rules of evidence applicable to Regional Board hearings are flexible, and permit the introduction of "[a]ny relevant evidence... if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs...." (Cal. Gov. Code § 11513, subd. (c).)

Dr. Huffman's declaration is timely filed and relevant, and appears to be the kind of evidence on which the statute anticipates responsible Board Members will rely. Accordingly, the Board Chair OVERRULES the Prosecution Team's objection to Dr. Huffman's declaration.

C. Dischargers' August 3, 2016 Submissions Are Inadmissible.

On August 3, 2016, two weeks after the rebuttal deadline set forth in the Hearing Procedure, the Dischargers submitted a letter, a supplemental declaration, and eight exhibits. The Prosecution Team responded in an email dated August 4, 2016 that the admission of this evidence or its inclusion in the administrative record would be prejudicial because it was submitted only a week before the hearing and does not allow the Prosecution Team adequate opportunity to review or analyze the late-filed evidence.

The Board Chair finds the Prosecution Team's arguments persuasive. The initial Hearing Procedure was issued in May 2016, and its deadlines have not changed. (Compare May 17 Hr'g Proc., p. 5, with 2d Rev. Hr'g Proc., p. 4.) Absent a showing of good cause, the Regional Board may exclude evidence and testimony that is not submitted in accordance with the Hearing Procedure. (See Cal. Code Regs., tit. 23, § 648.4, subds. (a), (b), and (e); see also 2d Rev. Hr'g Proc., p. 5.)

Here, the Dischargers have not made a showing of good cause for admitting the August 3, 2016 filings. Both parties have already made voluminous evidentiary filings. The Dischargers have not explained why they did not include the eight exhibits along with their initial evidentiary filing or with their rebuttal. Although Mr. Bazel's August 3, 2016 letter indicates that he recently became aware of Exhibit 1, that exhibit is a photograph from March 2016. The letter does not indicate that this photograph was not available before July 21, 2016, or otherwise explain why this photograph was not submitted with earlier filings. Mr. Bazel similarly fails to explain why the

other exhibits, which are dated even earlier, were not included in previous submittals. Accordingly, the Board Chair and Advisory Team find that there is no good cause for admitting the August 3, 2016 filings.

Furthermore, less than a week remains before the hearing, and the Prosecution Team has stated that its expert will be unavailable to review the evidence prior to the hearing. Given the Dischargers' failure to explain why they could not have submitted this evidence earlier, the Board Chair finds that admitting the August 3, 2016 submissions at this late date would unfairly prejudice the Prosecution Team.

In keeping with the Regional Board policy of discouraging introduction of surprise evidence, codified in section 648.4, subdivision (a), as well as the Board Chair's obligation to exclude late-filed evidence where there is a showing of prejudice under subdivision (e), the Board Chair SUSTAINS the Prosecution Team's objection to the Dischargers' August 3, 2016 filings and DENIES the Dischargers' request to admit evidence submitted after the deadline set forth in the Hearing Procedure.

### III. CONCLUSION

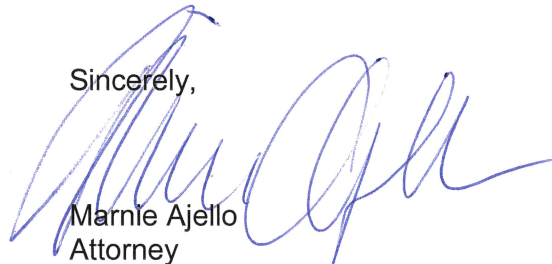
As stated above, the Board Chair OVERRULES:

- 1) The Dischargers' objections to admission of written and oral comments by Baykeeper and other groups;
- 2) The Prosecution Team's objection to admission of the Dischargers' fundamental right argument; and
- 3) The Prosecution Team's objection to admission of a signed declaration from Dr. Terry Huffman.

The Board Chair SUSTAINS:

- 1) The Prosecution Team's objections to admission of the Dischargers' letter, declaration, and exhibits filed August 3, 2016.

Sincerely,



Marnie Ajello  
Attorney

cc:

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