



CITIZENS COMMITTEE TO COMPLETE THE REFUGE

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Benjamin Martin

San Francisco Bay Regional Water Quality Control Board

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June 16, 2016

Re: Comments on the Notice of Pending Enforcement Action, John D. Sweeney and Point Buckler Club, LLC

Dear Mr. Martin,

This responds to the Tentative Order Adoption of Cleanup and Abatement Order for: Point Buckler Island Solano County, California. The Citizens Committee to Complete the Refuge has a long and ongoing history of interest in wetlands protection, wetlands restoration, and wetlands acquisition. We have taken an active interest in Clean Water Act (CWA), California Environmental Quality Act (CEQA), and Endangered Species Act (ESA) regulations, policies, implementation, and enforcement. We have established a record of providing information regarding possible CWA and ESA violations to the Corps, EPA, and FWS.

Upon review of the extensive documents available on the San Francisco Bay Regional Water Quality Control Board's (RWQCB) website, it is obvious there are numerous and compelling reasons the RWQCB must issue a Tentative Order, Cleanup and Abatement Order for the unauthorized activities that have occurred on Point Buckler Island.

According to the Tentative Order, Adoption of Cleanup and Abatement Order for Point Buckler Island (Tentative CAO) and the Administrative Civil Liability, Complaint No. R2-2016-1008 ("Complaint"), the Discharger's actions caused the loss of almost 30 acres of tidal marsh. Point Buckler Island provided potential habitat for special status species "including Ridgway's rail (*Rallus obsoletus*), black rail (*Laterallus jamaicensis coturniculus*), salt marsh yellowthroat (*Geothlypis trichas sinuosa*), Suisun song sparrow (*Melospiza melodia samuelisis*), and salt marsh harvest mouse (*Reithrodontomys raviventris*) (USFWS Biological Opinion (BO) 2013; Expert Report, 2016)." Additionally, Suisun Bay, within which Point Buckler Island is located, is designated critical habitat for State and Federally listed species including the Delta smelt (*Hypomesus transpacificus*), the Central California Coast population segment of steelhead (*Oncorhynchus mykiss*), and the southern population segment of the green sturgeon (*Acipenser medirostris*). The significant and adverse ramifications of the unauthorized activities have been detailed in the technical document dated May 12, 2016¹.

The technical report states that the levee system was last maintained in 1985. The oldest image available for the site on Google Earth (1988) shows a breach in the levee system. By 2002, several large breaches are visible and it is clear that tidal flows have been restored to the interior portions of the island. A document released in 2011² identified habitat

¹ Siegel Environmental. 2016. Point Buckler Technical Assessment of Current Conditions and Historic Reconstruction since 1985. Prepared for: San Francisco Bay Regional Water Quality Control Board, In the Matter of Point Buckler Island.

² Suisun Marsh Habitat Management, Preservation, and Restoration Plan Final Environmental Impact Statement/Environmental Impact Report. 2011. California Department of Fish and Game, U.S. Fish and Wildlife Service, and Bureau of Reclamation

restoration that had been accomplished or was underway within Suisun Marsh. That document reported that (prior to 2011) Point Buckler had been restored to tidal action as a result of unrepaired levee failures.

An email chain between the Discharger and staff from the Suisun Resource Conservation District (SRCD) and staff of the U.S. Army Corps of Engineers (Corps), in June 2011, reveals the Discharger was well aware of the need for permit authorization for “old breached levees.” The email chain refers to a property identified as “Property 910,” and a levee breach that had been in place since 1995. The Discharger was informed that the “old breached levee” was not covered by the Regional General Permit (RGP) 3 and “would require an individual permit.” The multiple levee breaches present on Point Buckler Island, predate the “old breached levee” on Property 910. Therefore, the Discharger was aware the new and massive levee construction and associated excavation and destruction of wetlands were not covered by RGP 3.

The Oxford Dictionary defines “maintenance” as “The process of keeping something in good condition.” The levee on Point Buckler Island was breached in seven locations and clearly was not in good or serviceable condition. As stated previously, the baseline condition of Point Buckler Island, when the unauthorized activities occurred was restored tidal marsh. The adverse impacts of the unauthorized activities to waters of the U.S. and waters of the State, nearly 30 acres, is one of the largest unauthorized activities in Bay Area wetlands in recent history.

We are extremely concerned that it has been at least two years since the wetlands on Point Buckler Island have been cut off from natural tidal flows. Therefore we urge the RWQCB to require the Discharger to act diligently and expeditiously in pursuing restoration of the site to avoid further environmental harm.

Under the wording of H. Prohibitions, we are concerned the current wording of Prohibition #1 could be too open to interpretation and suggest the language be amended to read “The discharge of fill material is prohibited unless authorized by the U.S. Army Corps of Engineers and San Francisco Bay Regional Water Quality Control Board.” Or that Prohibition #1 be deleted, as Prohibition #2 clearly states that the placement of fill is prohibited unless approved by the Water Board. We suggest that approval by the U.S. Army Corps of Engineers should also be required.

We concur with San Francisco Baykeeper (Baykeeper), that the Tentative CAO should be amended to require the Discharger “apply for all necessary permits within three months of the Regional Water Board’s acceptance of the Restoration Plan” and require restoration work is completed within one year of receiving all necessary permits.

In addition to a Mitigation and Monitoring Plan for restoration of tidal marsh, the Discharger should be required to compensate for temporal losses (assuming all unauthorized fill is required to be removed and all impacted habitat restored) of habitat at a ratio of no less than 2:1 mitigation. This mitigation ratio is warranted due to the magnitude of the adverse impacts, the loss of special status species habitat, and the fact that the Discharger was aware that an individual Clean Water Act permit would be required prior to undertaking the unauthorized activities.

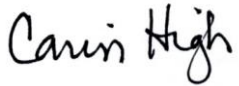
We echo Baykeeper’s concerns regarding the proposed reduction in civil liability of \$39 million and base fee of \$11 million to \$4.6 million. The evidence strongly suggests this was a knowing violation. The environmental harm of nearly 30 acres is one of the largest violations in the Bay Area in recent history. The unauthorized placement of fill and removal of natural tidal action impacted potential and known special status species habitat (Mason’s lilaepsis is known to occur on the site).

In light of the delays that have occurred since the July 28, 2015 Notice of Violation, we support the June 6, 2016 recommendation of the Sierra Club that the RWQCB “instigate a strong incentive for prompt restoration of the damaged wetlands by additionally assessing and obtaining a \$10,000 per day penalty against the Discharger for each and every day after August 10, 2016 that the damaged wetlands remain unrestored.”

In conclusion, CCCR strongly supports the Regional Water Board’s enforcement action in this case. It is imperative that regulatory agencies, such as the Regional Water Board, enforce the law to protect wetlands, beneficial uses of waters of

the State, and sensitive species habitats. We encourage the Regional Water Board to enforce the terms of the Tentative CAO and Complaint to ensure the timely remediation of the violations occurring on Point Buckler Island. Thank you for your work on this matter. We request that we be kept informed of any future opportunities to provide comment on this matter.

Sincerely,

A handwritten signature in black ink that reads "Carin High". The signature is written in a cursive, flowing style.

Carin High
CCCR Co-Chair