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ENDORSED FILED
Clerk of the Superior Court

MAR 28 2016

G. Ureta

By _____
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SOLANO

POINT BUCKLER CLUB, LLC,
Petitioner and Plaintiff,
v.

BRUCE H. WOLFE, Executive Officer of the
California Regional Water Quality Control Board,
San Francisco Bay Region; CALIFORNIA
REGIONAL WATER QUALITY CONTROL
BOARD, SAN FRANCISCO BAY REGION; and
DOES 1 through 20;

Respondents and Defendants.

No. FCS046410

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION

Date: June 28, 2016
Time: 9:30 am
Dept. 3
Hon. Harry S. Kinnicutt

Trial date: None set
Action filed: December 23, 2015

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I. INTRODUCTION

Respondents Bruce H. Wolfe and the San Francisco Bay Regional Water Quality Control Board (jointly the “Regional Board”) have issued, and then rescinded, a “cleanup and abatement order” against Point Buckler Club, LLC (the “Club”) for repair and maintenance of a duck-club levee (the “Work”). The Regional Board is now preparing to issue another cleanup and abatement order for the Work. But the Regional Board lacks authority to issue another order. The relevant statute gives the Regional Board authority *only* if the Work creates or threatens to create a “condition of pollution or nuisance”. The Work, as a matter of law, does neither. The Court should determine that the Regional Board acted in excess of jurisdiction, and issue an injunction prohibiting the Regional Board from re-issuing the cleanup and abatement order.

The Club owns Point Buckler, a small island of about 50 acres or less in Suisun Marsh. The Club would like to rejuvenate the duck club that has operated at the island for decades. Duck clubs need levees around them to control water levels in duck ponds. At Point Buckler, a levee around the edge of the island was in place by the early 1940s. That levee has, historically, been breached and repaired. In 2014, John Sweeney, the Club’s manager, personally did the Work to repair the levee. He understood from the previous owner that the levee maintenance was supposed to be done, and was not aware of the need for additional approvals. The Work stopped in September 2014, when the Club became aware of agency objections. A year later, the Regional Board issued its initial cleanup and abatement order. In December 2015, the Club filed this suit, applied for a stay, and argued that the order had been issued in violation of due process. The Court stayed the order. In January 2016, the Regional Board rescinded the initial order, but is proceeding to re-issue the order after a hearing.

The Club is likely to prevail on the merits of this motion for four reasons. First, the Work cannot be a “condition of pollution or nuisance” because the Club is *required* by the Suisun Marsh Preservation Act (the “Preservation Act”) to repair and maintain the levee. A project cannot be a nuisance when it is required by the Legislature.

Second, a court is required to harmonize statutes to the extent possible. The Regional Board is required to protect and promote duck clubs—not destroy them—by the Preservation Act and by the Porter-Cologne Act, which is the same statute that authorizes the Regional Board to issue

1 cleanup and abatement orders. The Work is also needed for mitigation required under the California
2 Environmental Policy Act (“CEQA”). These statutes can be harmonized only if the repair and
3 maintenance of a duck-club levee *is not* a condition of pollution or nuisance.

4 Third, the Work does not fit within the statutory definitions of “pollution” and “nuisance”.
5 “Pollution” is defined as harm to “beneficial uses”, whereas the Work *promotes* the beneficial uses
6 of wildlife habitat and recreation. To be a nuisance, an activity must be injurious to health, indecent
7 or offensive to the senses, or an obstruction to the free use of property. Here the Work meets none
8 of these criteria. Because the Work does not fit within either of the statutory definitions, it cannot be
9 a condition of pollution and nuisance.

10 Fourth, the Regional Board has “certified” that levee repair and maintenance do not create a
11 condition of pollution and nuisance. The U.S. Army Corps of Engineers has issued two general
12 permits, in accordance with the federal Clean Water Act, that authorize levee repairs and other
13 maintenance activities at duck clubs in Suisun Marsh. These permits allow for the placement of
14 more than 1.4 million cubic yards of material. The Regional Board has certified that the activities
15 authorized by these permits do not violate California law—which means that they will not cause a
16 condition of pollution or nuisance. Because the vast amounts of levee repair and earthmoving
17 authorized by the two permits will not create a condition of pollution or nuisance, the small amount
18 at Point Buckler Island cannot either.

19 Any one of these four reasons is enough for the Club to prevail on the merits. The Work has
20 not created a condition of pollution or nuisance, and the Regional Board therefore does not have
21 authority to issue another cleanup and abatement order.

22 The balance of equities tips in favor of the Club because if the Regional Board issues another
23 cleanup and abatement order it will be violating fundamental rights by taking action that it has no
24 authority to take. An injunction would do no harm to the Regional Board, which would simply be
25 prohibited from acting illegally. An injunction is also in the public interest: If levee maintenance
26 and repair creates a condition of pollution or nuisance, every duck club in the Marsh is in trouble.

27 This motion is directed only at the re-issuance of the cleanup and abatement order. An
28 injunction would not prevent the Regional Board from taking action to impose penalties, or from

1 exercising any other authority it may have.

2 For reasons that remain unclear to the Club, the Regional Board has consistently been hostile.
3 The Work was done so that duck ponds could be restored and replanted with vegetation that provides
4 food and habitat for ducks. If the Regional Board truly believes that wetlands are environmentally
5 valuable, why is it preventing the Club from restoring and maintaining the wetlands on the island?

6 The Work, in short, did not create a “condition of pollution or nuisance” as a matter of law.
7 The Court should determine that the Regional Board acted in excess of its jurisdiction when it issued
8 a cleanup and abatement order for the Work in September 2015. The Court should also issue a
9 preliminary injunction prohibiting the Regional Board from issuing another order in excess of its
10 jurisdiction.

11 II. FACTS

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

13 Duck clubs use levees to maintain control over water levels in the duck ponds. (Declaration
14 of John D. Sweeney (“Sweeney Decl.”), ¶ 2; see sections II.D and II.F below.) A map, prepared by
15 the U.S. Geological Survey and dated 1942, shows that Point Buckler was ringed by a levee at that
16 time, as does an aerial photo from 1948. (*Id.*, ¶ 2 and ex. 1.) Conversations with previous owners of
17 the island confirm that it was used as a duck club going back to the 1920s. (*Id.*, ¶ 2.)

18 B. The Preservation Act And Protection Plan Recognize The Value Of Duck Clubs

19 The Preservation Act requires all California state agencies to “carry out their duties and
20 responsibilities in conformity with” that act and with the policies of the Suisun Marsh Protection
21 Plan (the “Protection Plan”) prepared by the San Francisco Bay Conservation and Development
22 Commission (“BCDC”). (Pub. Resources Code (“PRC”) §§ 29302(a), 29004.) The Protection Plan
23 acknowledges that “managed wetlands”—i.e. duck clubs—“are a vital component of the wintering
24 habitat for waterfowl migrating south”:

25 In the Suisun Marsh, about 50,700 acres of managed wetlands are currently
26 maintained as private waterfowl hunting clubs and on publicly-owned wildlife
27 management areas and refuges. Because of their extent, location and the use
28 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.

(Declaration of Lawrence S. Bazel (“Bazel Decl.”), ex. 1 at 12.) Duck clubs are especially valuable

1 to waterfowl because they provide food:

2 The managed wetlands are a unique resource for waterfowl and other Marsh
3 wildlife, and their value as such is increased substantially by the management
4 programs used by waterfowl hunting clubs and public agencies to enhance the
5 habitat through the encouragement of preferred food plant species.

6 (*Id.*, ex. 1 at 34.)

7 **C. Duck Clubs Are Required To Conduct Repairs And Maintenance**

8 The Suisun Resource Conservation District (“SRCD”) has “primary local responsibility for
9 regulating and improving water management practices” at duck clubs within Suisun Marsh. (PRC
10 § 9962(a).) The Preservation Act required SRCD to prepare a water management program for each
11 duck club. (PRC § 29412.5.) These documents have come to be known as “individual management
12 plans”. The plans were submitted to BCDC, which was required to certify them if they met
13 specified requirements. (*Id.*; PRC § 29415.) The Preservation Act required SRCD to “issue
14 regulations requiring compliance with any water management plan or program for privately owned
15 lands”. (PRC § 9962(a).) The Legislature, therefore, intended that an individual management plan
16 would be prepared for each duck club, and that each duck club would comply with its plan.¹

17 The compliance obligation of each duck club runs with the land. In the words of SRCD’s
18 The Suisun Marsh Management Program (the “Management Program”):

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

23 (Bazel Decl, ex. 2 at 18; *see* PRC § 29401(d) (requiring management program).)

24 **D. An Individual Management Plan Was Prepared For Point Buckler**

25 By 1984, SRCD had prepared an individual management plan for Point Buckler, which was
26 then called “Annie Mason Point Club” or Club 801. (*Id.*, ¶ 4 and ex. 3.) BCDC staff reported that
27 the plan was certified. (Sweeney Decl., ¶ 3.) The plan includes a map identifying “levee repair” in
28 several locations, but also notes that levee problems in the 1970s had been resolved: “the situation
29 has greatly improved and the club reports that it now has the water control structures and tight levees

30 _____
31 ¹ Although the Preservation Act generally requires a permit for “development” in Suisun Marsh
32 (PRC § 29500), no permit is required for work specified in an individual management plan (PRC
33 § 29501.5).

1 necessary for proper water management.” (Bazel Decl., ex. 3 at 16 (map), 4 (text).) “Proper water
2 control”, according to the plan, “necessitates inspection and maintenance of levees, ditches, and
3 water control structures.” (*Id.*, ex. 3 at 5.) The plan also refers to a standard list of recommendations
4 “for more information on the maintenance and repair of water control facilities.” (*Id.*) This
5 reference appears to be to the Management Program, which includes “Suisun Marsh Levee
6 Specifications”. (*Id.*, ex. 2 at C-11 through C-17.) The Management Program requires that
7 “renovation, restoration, repair and maintenance of existing levees” must conform with these
8 specifications. (*Id.*, ex. 2 at C-6.) The plan thereby provides for restoration of repair of the levee.

9 **E. The Work Was Consistent With The Individual Management Plan**

10 In 2014, Mr. Sweeney personally did the Work. (Sweeney Decl., ¶ 4.) He understood from
11 the previous owner that the levee maintenance was supposed to be done, and was not aware of the
12 need for additional approvals. (*Id.*) He dug out material from an artificial ditch inside the levee and
13 placed the material on the existing levee. (*Id.*) Some material was placed where the levee had been
14 breached, and (where part of the levee had eroded away) on solid ground inside the former levee
15 location. (*Id.*) He repaired one of two tide gates. (*Id.*) Details were provided to the Regional Board
16 in a technical report in September 2015. (Bazel Decl., ex. 4.)

17 The great majority of Point Buckler is dry at high tide, and was before the Work. (Sweeney
18 Decl, ¶ 5.) In the 1980s, the California Department of Water Resources (“DWR”) agreed to provide
19 a pump for flooding the inside of the levee, but only after the levee was repaired. (Bazel Decl., ex. 5
20 at 103; ex. 6.) According to the owner of the island at the time, the levee was repaired, and the
21 pump provided in the early 1990s. (Sweeney Decl., ¶ 6.) An old pump and its accompanying
22 generator can still be seen at the island. (*Id.*) The levee was repaired again in 2014 so that the duck
23 ponds could be restored. (*Id.*, ¶ 7.) The Club would like to finish the levee repair, install a second
24 tide gate, and do the additional work necessary for a fully functioning duck club, including discing
25 the ponds, planting the vegetation that would provide food for ducks and other waterfowl, and
26 otherwise restoring the duck ponds and waterfowl habitat. (*Id.*) However, the Club does not intend
27 to proceed with this work unless the issues raised by the agencies have been resolved. (*Id.*)

28 The Work was consistent with the “tight levees” called for by the individual management

1 plan, with levee “restoration” referred to in the Management Program, and with the overarching
2 concept in both: levees and other water control structures should be maintained and repaired in
3 perpetuity so that duck ponds could provide food and habitat for waterfowl.

4 The Work stopped in September 2014, when the Club learned that there were regulatory
5 objections to the Work. (*Id.*, ¶ 8.) Since then, the Club has been discussing the situation with
6 several regulatory agencies. Among those whom the Club has invited to tour the island, and who
7 have toured, are the Regional Board, BCDC, the California Department of Fish and Wildlife, the
8 U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency. (*Id.*)

9 **F. The Regional Board’s Hostility**

10 In September 2015, the Regional Board issued a cleanup and abatement order requiring a
11 “corrective action workplan”. (Bazel Decl., ex. 7 at 5.) The Regional Board refused to provide a
12 hearing on the order. (Ex Parte Application For A Stay [Etc.] and accompanying papers filed
13 December 28, 2015.) When the Regional Board refused to extend the deadline for the corrective-
14 action workplan, the Club filed this suit and applied for a stay on the ground that the Regional Board
15 violated due process by refusing to hold a hearing. (*Id.*) This Court granted the application. In
16 January 2016, the Regional Board decided to proceed with a revised and re-issued cleanup and
17 abatement order “in the April or May timeframe.” (Bazel Decl., ex. 8.) The September 2015 order
18 was then rescinded “to address the procedural due process claims”. (*Id.*, ex 9.) In February 2016,
19 the Regional Board applied to this Court for a warrant to inspect the island and gather data for that
20 followup order. (*See id.*, ex. 10 (affidavit for inspection warrant).) The inspection took place in
21 March. (*Id.*, ex. 11 at 5.) The hearing on another order has not yet been scheduled.

22 Because the September 2015 order was issued before the Regional Board toured the site in
23 October 2015, and before it collected data in March 2016, that order mis-stated some of the facts. In
24 particular, the order incorrectly asserted that the Work “cut off crucial tidal flow to the interior of the
25 Site, thereby drying out the Site’s former tidal marsh areas”. (Bazel Decl., ex. 7 at 2, ¶ 8.) In fact,
26 with the exception of a few small channels, the interior of the island was dry even at high tide. (*Id.*,
27 ex. 4 at 4-5 (describing extent of water at high and low tides), figs. 2-3 (illustrating extent), *see* fig. 4
28 (identifying wet locations into which material was placed).) That’s why a pump was used to flood

1 the interior, and why DWR insisted on the levee repairs: there was no point in pumping water onto
2 the island if the water would simply run out through the breaks in the levee.

3 The affidavit filed by the Regional Board continues its unrelenting hostility toward the levee
4 repair. The Regional Board insists that “[f]ill was placed directly into waters of the United States”,
5 and concedes only that “some portions” of the Work were done on an existing levee. (*Id.*, ex. 10 at
6 3.) In fact, the majority of the material was placed onto the existing levee, as the Club explained in
7 its technical report. (*Id.*, ex. 4 at 4-5, figs. 1 (showing repaired levee and ditch), 2 (old levee and
8 ditch), 3 (wetted areas at mean high water and mean lower low water), 4 (locations where material
9 was placed into what the consultant identified as “waters of the state”).) Where a large section of the
10 levee had eroded away, the material was placed inland, on either dry land or at the location of the old
11 borrow ditch, which was moved farther inland and expanded. (*Id.*, ex. 4 at figs, 1-2.) A few small
12 channels had breached the levee, and material was placed directly into water to repair these
13 breaches. (*Id.*, ex. 4 at fig. 4.)

14 The Regional Board has avoided the phrase “levee repair”. Instead, it insists that the Work
15 consisted of “deleterious bottom deposits” that “can...smother non-motile life forms”; that the Work
16 “could have potentially caused clogging in the gill structures of fish” and “eliminated light
17 penetration that is needed for primary production”. (*Id.*, ex. 10 at 4.) Some common sense is called
18 for here. When a levee breach is repaired, dirt is placed into the breach. The dirt prevents “primary
19 production” in the covered areas because plants cannot grow in the dark. Anything that cannot swim
20 away may indeed be smothered. But why should the Regional Board care so much about a few
21 square feet in a few small channels? Why should the Regional Board insist on “restoring the
22 Island”? (*Id.*, ex. 10 at 5, *see id.*, ex. 10 at 8.)

23 The Regional Board asserts that the levee repairs “cut off tidal channels to the island’s
24 interior for use by aquatic organisms such as Delta Smelt...” (*Id.*) But the three agencies who are
25 directly responsible for endangered species have all visited the island and decided to take no action.
26 (Bazel Decl., ex. 12 (e-mail saying the U.S. Fish & Wildlife Service will take no enforcement
27 action); Sweeney Decl., ¶ 9 (California Department of Fish and Wildlife and U.S. National Marine
28 Fisheries Service have informed him they will take no action).) More generally, the cutting off of

1 tidal flow is a consequence of the water management needed for duck ponds. (*See id.*, ex.3 at 5
2 (“[p]roper water control necessitates inspection and maintenance of levees, ditches, and water
3 control structures”), 7 (“[l]evees and tidegates are necessary for water control”).)

4 Regulatory agencies often take action against people who want to convert wetlands into dry
5 land. Here the club wants to convert dry land into valuable wetlands. It wants to replace
6 insignificant vegetation on the island with plants that provide food and habitat for waterfowl. The
7 Regional Board should not be so hostile to the creation of valuable wetlands and waterfowl habitat.
8 If the Regional Board is gunning for duck clubs, no duck club is safe.

9 **III. THE COURT SHOULD DETERMINE THAT THE REGIONAL BOARD ACTED IN**
10 **EXCESS OF JURISDICTION, AND ISSUE A PRELIMINARY INJUNCTION**

11 “The inquiry in such a case [i.e. a petition filed under CCP § 1094.5] shall extend to the
12 questions whether the respondent has proceeded without, or in excess of, jurisdiction...” (CCP
13 § 1094.5(b).) Here the Regional Board has proceeded in excess of jurisdiction.

14 A court has authority to issue an injunction when an agency acts in excess of jurisdiction:

15 Courts of equity do interfere, and are justified in their interference, in cases
16 where municipal corporations or inferior boards or tribunals are acting, or
17 proposing to act, in excess of their jurisdiction and without authority.

18 (*San Ysidro Irrigation Dist. v. Superior Court of San Diego County* (1961) 56 Cal.2d 708, 720; *see*
19 *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 526 (holding
20 that before a court issues a final judgment under § 1094.5 it can use “all means necessary” and “any
21 suitable process” in support of its jurisdiction).)²

22 The issuance of a preliminary injunction is guided by two “interrelated” factors: (1) “the
23 likelihood that the plaintiff will prevail on the merits at trial”, and (2) “the interim harm that the
24 plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant
25 is likely to suffer if the preliminary injunction were issued.” (*Cohen v. Board of Supervisors* (1985)
26 40 Cal.3d 277, 286.) “[T]he greater the plaintiff’s showing on one [factor], the less must be shown
27 on the other.” (*Butt v. State of California* (1992) 4 Cal.4th 668, 678.) Here the Club is likely to

28 ² CCP § 526 and Civil Code § 3423, which preclude issuance of an injunction “[t]o prevent the
execution of a public statute by officers of the law for the public benefit”, “do not apply when the
activity sought to be enjoined is an attempt to apply a statute or ordinance to conduct not within its
terms.” (*City of San Jose v. Dep’t of Health Services* (1998) 66 Cal.App.4th 35, 47.)

1 prevail on the merits, and will suffer the much greater harm.

2 **A. The Club Is Likely To Prevail On The Merits**

3 The Porter-Cologne Act authorizes a regional board to issue a cleanup and abatement order
4 when there has been (1) a discharge of waste (2) to waters of the state that (3) creates or threatens to
5 create a “condition of pollution or nuisance”:

6 A person who has...caused or permitted, causes or permits, or threatens to
7 cause or permit any waste to be discharged or deposited where it is, or
8 probably will be, discharged into the waters of the state *and creates*, or
9 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....

9 (Water Code § 13304(a), emphasis added.)³ This motion is directed only at the third requirement.

10 The Work did not create (or threaten to create) a “condition of pollution or nuisance”.

11 **1. The Work Is Not A Nuisance Because It Is Required By The Suisun
12 Marsh Preservation Act**

13 Civil Code § 3482 specifies that “[n]othing which is done or maintained under the express
14 authority of a statute can be deemed a nuisance.” The Preservation Act *authorizes* the duck clubs to
15 do the work identified in their individual management plans. As the Protection Plan explains:

16 Individual management plans were developed for each waterfowl hunting club
17 in the 1980s, and were reviewed by the California Department of Fish and
18 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.

19 (Bazel Decl., ex. 1 at 34.) The Preservation Act also *requires* the duck clubs to comply with their
20 plans. (See section II.C above.) The Club’s individual management plan calls for the maintenance
21 of tight levees, and the associated Management Program calls for the “renovation, restoration, repair
22 and maintenance of existing levees”. (*Id.*) Because the Work is both authorized and required by the
23 Preservation Act, it cannot be a nuisance.

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

25
26 _____
27 ³ A regional board may also issue a cleanup and abatement order against someone who “discharges
28 waste into the waters of this state in violation of any waste discharge requirement or other order or
prohibition issued by a regional board”. (Water Code § 13304(a).) This portion of § 13304 does not
apply here because the Regional Board did not issue any “waste discharge requirement or other
order or prohibition” to the Club related to the Work.

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

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

10 **2. The Work Is Not A Condition Of Pollution Or Nuisance Because The** 11 **Preservation Act And Porter-Cologne Act Require The Regional Board** 12 **To Protect Duck Clubs**

13 “[S]tatutes or statutory sections relating to the same subject must be harmonized, both
14 internally and with each other, to the extent possible.” (*Gomez v. Superior Court* (2012) 54 Cal.4th
15 293, 303.) The Regional Board must therefore exercise its authority under § 13304 in harmony with
16 the other provisions of the Porter-Cologne Act, in particular those relating to “beneficial uses”. As
17 the Regional Board explains, beneficial uses must be protected from pollution and nuisance:

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

23 (Bazel Decl., ex. 13 at 14; *see* Water Code § 13263 (Regional Board shall prescribe waste-discharge
24 requirements that take into consideration “the beneficial uses to be protected”.) For Grizzly Bay,
25 where Point Buckler is located, the Regional Board has specifically identified “wildlife habitat” and
26 “noncontact water recreation” as beneficial uses. (Bazel Decl., ex. 13 at 2-5 to 2.7, last page.) The
27 Regional Board must, therefore, protect the recreation and wildlife habitat provided by duck clubs.

28 Moreover, the Suisun Marsh 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.

⁴ “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.) (*Id.*
at 162.) Levee repairs create similar (but smaller) issues, and should receive the same protection.

1 (PRC § 29302(a).) As explained above, the Preservation Act requires duck clubs to comply with
2 their individual management plans, and more generally to maintain tight levees and duck ponds that
3 provide food and habitat for waterfowl. (See sections II.C and II.D above.)⁵

4 The levee repair is also required to comply with the California Environmental Quality Act
5 (“CEQA”). As part of the mitigation for diverting water from the Delta, DWR decided to provide
6 and maintain a pump on Point Buckler Island, but only if the levee was tight. (Bazel Decl., ex. 5 at
7 1, 103; ex. 6.) A tight levee is needed to hold in the water pumped onto the island, which is mostly
8 dry at high tide. (See section II.E above.) CEQA mitigation measures must be “fully enforceable”.
9 (PRC § 21081.6(b).) To enforce DWR’s mitigation obligation, therefore, the levee must be tight.

10 If the Regional Board could order the Club to restore the entire island (for example, by
11 putting all the dirt back where it came from), or to rip out even part of the levee, it would be
12 violating its judicially enforceable duty under the Preservation Act; it would be violating its duty to
13 protect recreation and wildlife habitat under the Porter-Cologne Act, and it would be violating the
14 CEQA requirement that mitigation must be implemented. There is only one way to reconcile these
15 statutes with § 13304: The repair of duck-club levees in accordance with an individual management
16 plan cannot, as a matter of law, be a condition of pollution or nuisance.

17 3. The Work Does Not Fit Within The Statutory Definition Of Pollution Or 18 Nuisance

19 The Work is not “pollution” because pollution *harms* “beneficial uses”, whereas the Work
20 *protects and promotes* beneficial uses. The statute defines “pollution” as an unreasonable effect on
21 beneficial uses or their associated facilities:

22 “Pollution” means an alteration of the quality of the waters of the state by
23 waste to a degree which unreasonably affects either of the following:

24 (A) The waters for beneficial uses.

25 (B) Facilities which serve these beneficial uses.

26 (Water Code § 13050(l)(1).) “Beneficial uses” include “recreation” and “preservation and
27 enhancement of...wildlife”. (Water Code § 13050(f).) Here, the Work was done to restore and

28 ⁵ The policies of the Protection Plan call for the “[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. 1 at 29, 36.)

1 maintain duck ponds, which provide both recreation and wildlife habitat. (See section II.E above.)
2 Because the Work was done to promote beneficial uses, and to repair facilities that serve those
3 beneficial uses, it did not “unreasonably affect[]” beneficial uses or their associated facilities. The
4 Work therefore did not create a condition of pollution.

5 A “nuisance”, under the Porter-Cologne Act:

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

9 (Water Code § 13050(m); *see* Civil Code § 3479 (similar definition of nuisance).) Under the statute,
10 a nuisance must also meet two additional requirements: it must affect “at the same time an entire
11 community or neighborhood”, and it must result from “the treatment or disposal of wastes”. (*Id.*, *see*
12 Civil Code 3480 (definition of public nuisance).)

13 Here, the Work is not injurious to health. Nor is it indecent or offensive to the senses. Nor is
14 it an obstruction to the free use of property; on the contrary, it is needed to support the free use of
15 property. (See section II.E above.) And the placement of material to construct a levee is not a
16 disposal of waste.⁶ The Work, therefore, is neither pollution nor a nuisance.

17 **4. The Work Is Not A Condition Of Pollution Or Nuisance Because The
18 Regional Board Has Certified That Levee Repair And Maintenance Are
19 Neither**

20 The Corps has issued two permits authorizing levee repairs under the federal Clean Water
21 Act, and the Regional Board has certified that both are in compliance with California law—which
22 means that these levee repairs do not create a condition of pollution or nuisance. These permits
23 allow for the excavation and placement of more than 1.4 million cubic yards of material. If the
24 placement of 1.4 million cubic yards of material does not create a nuisance, then the placement of a
25 small amount of material at Point Buckler cannot create a nuisance either.

26 Regional General Permit 3 (“RGP3”) authorizes, among other things, repairing levees,
27 installing bulkheads, grading to improve water management capability, discing, installing pumps,
28 and replacement of water control structures. (Bazel Decl., ex. 14; *see* ex. 15 at 5 (Regional Board

⁶ The Club acknowledges that wastes generated by levee construction (as opposed to the levee construction itself) could create a nuisance, at least theoretically. But the Regional Board’s real objection here is to the levees themselves, not to any waste generated by that construction.

1 certifies that permit is in compliance with California law).) RGP3 authorizes the placement of
2 “443,000 cubic yards of earthen material”. (*Id.*, ex. 15 at 3.)

3 RGP3 covers work by “158 privately owned duck clubs represented by SRCD”. (*Id.*, ex. 15
4 at 2.) Point Buckler is one of those clubs. (*Id.*, ¶ 17 and ex. 16.) The permit calls for the submission
5 of a work request form, which is to be approved within 30 or 45 days. (*Id.*, ex. 14 at 7.) Although
6 the Club did not file the paperwork before conducting the Work, it has been in discussions with the
7 Corps and Regional Board about regulatory approval through an “after the fact” permit.

8 The Corps has also issued, and the Regional Board has certified, a permit authorizing
9 external dredging in ambient waters and placement of that material on levees. (*Id.*, ex 17 at 1-2.)
10 This certification applies to 133 miles of levees, and authorizes the placement of one million cubic
11 yards of dredged material. (*Id.*, ex. 17 at 2.)

12 The Regional Board has quibbled about whether RGP3 applies to levee repairs that are not
13 exactly in the footprint of the previous levee, but it has not answered the relevant question: If more
14 than 1.4 million cubic yards of excavated materials can be excavated and used to repair duck-club
15 levees without causing a nuisance, how can the small amount of material placed at Point Buckler
16 Island be a nuisance? The answer is that it cannot be a nuisance.

17 In short, the Work cannot be a “condition of pollution or nuisance”, as a matter of law, for
18 any of four reasons: (1) it has been authorized and required by the Legislature, and therefore cannot
19 be a nuisance, (2) treating the Work as a nuisance would create a conflict among the relevant
20 statutes, rather than harmonizing them, because the Regional Board has a judicially enforceable duty
21 to act in accordance with the Suisun Marsh Preservation Act and to protect duck clubs under that
22 statute; because the Regional Board must protect the beneficial uses of recreation and wildlife
23 habitat under the Porter-Cologne Act, and because the Regional Board must allow for the
24 implementation of required mitigation under CEQA, (3) the Work does not come within the
25 statutory definitions of “pollution” or “nuisance” applicable to § 13304, and (4) the Regional Board
26 has certified that more than 1.4 million cubic yards of material can be used for levee repair in the
27 marsh without causing a nuisance. The Club, therefore, is likely to prevail on the merits.
28

1 determining that the Regional Board acted in excess of its jurisdiction, and by issuing a preliminary
2 injunction. Because this Court indisputably has jurisdiction to hear this case, it should resolve the
3 important issues raised by this motion. (*See Eye Dog Foundation* at 541 (a court “must do complete
4 justice once jurisdiction has been assumed”).) This case, therefore, is not moot.

5 There are also three exceptions to the general mootness rule: “(1) when the case presents an
6 issue of broad public interest that is likely to recur; (2) when there may be a recurrence of the
7 controversy between the parties; and (3) when a material question remains for the court's
8 determination.” (*Cucamongans United* at 479-480, citations omitted.) This case fits within all three
9 exceptions. The Regional Board’s authority (or lack of authority) to require duck clubs to tear down
10 levees is of broad public interest. There will be a recurrence of the controversy, because the
11 Regional Board is in preparing for re-issuance of the order. A material question—the Board’s
12 authority to order duck clubs to rip out levee repairs—remains pending.

13 **V. CONCLUSION**

14 In accordance with CCP § 1094.5(b), the Court should determine that the Regional Board
15 acted in excess of its authority when in September 2015 it issued a cleanup and abatement order for
16 the Work. The Regional Board should be enjoined from re-issuing that order, and from issuing
17 another cleanup and abatement order requiring the Club to remove or destroy any part of the levee at
18 Point Buckler Island, or to take actions inconsistent with its individual management plan or the
19 Management Program.

20 DATED: March 28, 2016.

BRISCOE IVESTER & BAZEL LLP

21
22 By: 

Lawrence S. Bazel
Attorneys for Petitioner and Plaintiff
POINT BUCKLER CLUB, LLC

1 **PROOF OF SERVICE**

2 I declare that I am over the age of eighteen years and not a party to this action. I am
3 employed in the City and County of San Francisco, and my business address is 155 Sansome Street,
Suite 700, San Francisco, California 94104.

4 On March 28, 2016, at San Francisco, California, I served the attached document(s):

5 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CLUB'S**
6 **MOTION FOR PRELIMINARY INJUNCTION**

7 On the following parties:

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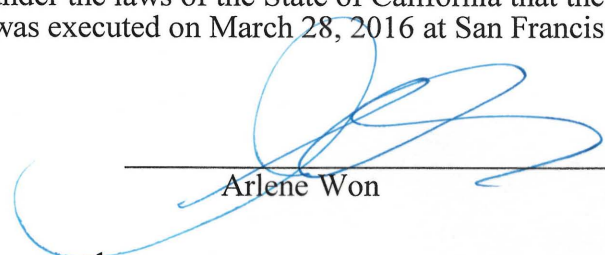
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17 *Attorneys for California Regional*
18 *Water Quality Control Board, San*
19 *Francisco Bay Region; Bruce H.*
Wolfe, Executive Officer Of The
Regional Board

20 **BY OVERNIGHT DELIVERY:** On the date written above, I delivered the Federal Express package to a location
21 authorized by Federal Express to receive documents for pickup. The package was placed in a sealed envelope or package
22 designated by Federal Express with delivery fees paid or provided for, addressed to the persons on whom it is to be
served at the addresses shown above.

23 **BY E-MAIL OR ELECTRONIC TRANSMISSION:** On the date written above, I e-mailed the documents to the
24 persons on the service list at the e-mail addresses listed above. I did not receive, within a reasonable time after
transmission, any electronic message or other indication that transmission was unsuccessful.

25 I declare under penalty of perjury under the laws of the State of California that the foregoing
26 is true and correct and that this document was executed on March 28, 2016 at San Francisco,
California.

27 
28 _____
Arlene Won