
San Francisco Bay Regional Water Quality Control Board

October 17, 2016
CIWQS Place ID 816826

Marnie Ajello, Advisory Team
San Francisco Bay Regional Water Board
1515 Clay Street, Suite 1400
Oakland, California 94612
Marnie.Ajello@waterboards.ca.gov

Subject: Response to Comments on Administrative Civil Liability Complaint No. R2-2016-1008 for Point Buckler Island, Solano County

Dear Ms. Ajello:

We received six comment letters on the Administrative Civil Liability Complaint (ACLc) No. R2-2016-1008 and Tentative Cleanup and Abatement Order issued on May 17, 2016, for Unauthorized Discharge of Fill and Failure to Obtain a Water Quality Certification, Point Buckler Island, Suisun Marsh, Solano County. This letter provides responses to comments on the ACLc. As you are aware, the hearing for the ACLc has been postponed until December 14, 2016, and the public comment period was set for September 2, 2016, with a response date of October 17, 2016.

Individual comments are sometimes directly quoted from the comment letter or summarized for clarity and brevity. Every effort was made to preserve the original meaning and context. Where comments are repeated, we refer back to the earlier responses.

If you have any questions, please contact Benjamin Marin at (510) 622-2116 or by e-mail to Benjamin.Martin@waterboards.ca.gov.

Sincerely,



Dyan Whyte
Assistant Executive Officer

Attachment: Response to Public Comments on Administrative Civil Liability Complaint R2-2016-1008 Point Buckler Island, Solano County

Response to Public Comments on Administrative Civil Liability Complaint R2-2016-1008
Point Buckler Island, Solano County

Comment Letter	Comment	Response to Comment
<p>1. Sierra Club</p>	<p>1 “Sierra Club also supports the Regional Water Board’s administrative penalty assessment of \$4.6 million, as long as the Regional Water Board promptly secures the assessed sum from the Discharger. We also request that the Regional Water Board 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.”</p>	<p>Liabilities assessed by the Water Board are effective and final upon issuance and must be paid within 30 days pursuant to Water Code section 13323(d).</p> <p>The Dischargers are required to restore damaged wetlands in accordance with Cleanup and Abatement Order No. R2- 2016-0038 (CAO), adopted by the Water Board at its August 10, 2016, hearing. Any violation of the CAO may subject the Dischargers to liability of up to \$5,000 a day, or referral to the Office of the Attorney General for prosecution.</p> <p>The Water Board granted the Dischargers’ request to continue the hearing, which is now scheduled for December 14, 2016. The Water Board has the option to consider imposing liability for any additional days of violation that have occurred between May 17, 2016, and the December 14, 2016, hearing. Any violation occurring after December 14, 2016, may be brought before the Water Board in a separate administrative civil liability action.</p>

Response to Public Comments on Administrative Civil Liability Complaint R2-2016-1008
Point Buckler Island, Solano County

<p>2. Save the Bay</p>	<p>2 “[T]he documented severity of these violations warrants the imposition of \$4.6 million in fines – this amount is reasonable and should not be reduced. Not only was Mr. Sweeney aware of the legal requirements for the work on the island, he failed to take any steps to remediate the violations, and has actively sought to interfere with the Board’s investigation of violations. In light of Mr. Sweeneys’ intransigence, the Board’s applied factor for Cleanup and Cooperation is inadequate and should be increased to 1.5. In fact, the Board’s decision to decrease the maximum administrative civil liability of \$39 million and the base fine of \$11.3 million was premature. Mr. Sweeney should have to show economic hardship or inability to pay before any reduction by the Board.”</p>	<p>The Prosecution Team assessed the cleanup and cooperation factor at 1.1 (a ten percent increase) as discussed in Complaint No. R2-2016-1008 (the Complaint). Delays associated with the Dischargers exercising their legal rights were not considered in the penalty assessment.</p> <p>The Prosecution Team did not recommend the base fine of \$11.3 million in the Complaint because a preliminary asset search of publically available financial data indicated the Dischargers could be unable to pay the full base amount, but the Dischargers likely have the ability to pay the recommended \$4.6 million penalty. The Dischargers will need to submit a complete financial record should they claim an inability to pay the proposed liability amount.</p>
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Response to Public Comments on Administrative Civil Liability Complaint R2-2016-1008
Point Buckler Island, Solano County

<p>3. San Francisco Baykeeper</p>	<p>3.1 “[T]he \$4.6 million fine imposed on the Dischargers for the violations at Point Buckler Island is reasonable and should not be reduced. The Regional Water Board has carefully documented the harm and other factors warranting this fine. The Dischargers were aware of the legal requirements and appeared to understand that they needed permits for the work they undertook on the island. It also appears that the Dischargers have not taken any steps to remediate the violations, but have, in fact, attempted to thwart the Regional Water Board’s investigation of the violations. The Regional Water Board applied a factor of 1.1 for the Cleanup and Cooperation Factor. Baykeeper would encourage the Regional Water Board to apply a factor of 1.5 in light of the Dischargers’ recalcitrance.”</p>	<p>Please see response to comment 2.</p>
	<p>3.2 “The Regional Water Board decreased the maximum administrative civil liability of \$39 million and the base fine of \$11.3 million ... to \$4.6 million. This reduction was proposed in consideration of the Dischargers’ ability to pay and the amount of money likely required to mitigate the violations. However, the Regional Water Board noted the Dischargers’ financial assets, and before a fine is reduced for ability to pay, the Dischargers should have to show economic hardship to the Regional Water Board. Therefore, at this time, the base fine should not be reduced for ability to pay. In addition, the duty to mitigate a violation should be a separate requirement from a fine imposed for a past violation. As such, Baykeeper questions whether it is appropriate for the Regional Water Board to reduce the Dischargers’ fine because of the cost of mitigating the harm caused by the violation. At the very least, the Regional Water Board should not reduce the fine from its current level in response to arguments from the Dischargers.”</p>	<p>Please see response to comment 2.</p> <p>The Dischargers’ responsibility for mitigation is separate from a potential penalty action. Though mitigation is typically addressed in the permitting process, the CAO in this matter addresses mitigation for the unauthorized activities. For the penalty portion, the Prosecution Team proposed a penalty with the goals of being fair, eliminating any economic and competitive advantage gained, bearing a reasonable relationship to the harm caused, and deterring future violations, while considering the factors in the Enforcement Policy penalty methodology, including ability to pay, economic benefit, and other circumstances. A circumstance the Dischargers’ face is paying for cleanup, as required by the CAO.</p>

Response to Public Comments on Administrative Civil Liability Complaint R2-2016-1008
Point Buckler Island, Solano County

<p>4. Citizens Committee to Complete the Refuge</p>	<p>4.1 “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....”</p>	<p>Please see responses to comments 2 and 3.2.</p>
	<p>4.2 “In light of the delays that have occurred ... we support the June 6, 2016 recommendation by 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.’”</p>	<p>Please see response to comment 1.</p>
<p>5. National Marine Fisheries Service</p>	<p>5.1 “NOAA’s National Marine Fisheries Service (NMFS) wishes to express our support for the enforcement actions of the San Francisco Bay Regional Water Quality Control Board regarding violations of the Federal Water Pollution Control Act (Clean Water Act) and the California Water Code for unauthorized discharges at Point Buckler Island located in the Suisun Marsh, Solano County, California.”</p>	<p>Comment noted.</p>

Response to Public Comments on Administrative Civil Liability Complaint R2-2016-1008
Point Buckler Island, Solano County

<p>5. National Marine Fisheries Service</p>	<p>5.2 Available information indicates Federal Endangered Species Act listed species Distinct Population Segments and Evolutionarily Significant Units and critical habitat under the jurisdiction of NMFS may have been negatively impacted by the unpermitted project, including: Sacramento River winter-run Chinook salmon; Central Valley spring-run Chinook salmon; Central California Coast steelhead; California Central Valley steelhead; and North American green sturgeon.</p>	<p>Comment noted.</p>
	<p>5.3 “The area affected by the unpermitted project is also located within an area identified as essential fish habitat (EFH) under the Magnuson-Stevens Fishery Conservation Act for various life stages of fish species managed through the following Fisheries Management Plans (FMP) by the Pacific Fisheries Management Council: Pacific Coast Salmon FMP; Pacific Groundfish FMP; and Coastal Pelagic FMP.”</p>	<p>Comment noted.</p>
	<p>5.4 “Point Buckler Island is also within an area designated as a Habitat Area of Particular Concern (HAPC) for various federally managed fish species within the Pacific Groundfish FMP. HAPC are subsets of EFH that are rare, particularly susceptible to human-induced degradation, especially ecologically important, or located in an environmentally stressed area. As defined in the Pacific Groundfish FMP, San Francisco Bay, including Point Buckler, is identified as estuary HAPC.”</p>	<p>Comment noted.</p>

Response to Public Comments on Administrative Civil Liability Complaint R2-2016-1008
Point Buckler Island, Solano County

<p>5. National Marine Fisheries Service</p>	<p>5.5 “Construction activities associated with the unpermitted action likely resulted in effects on ESA listed species, critical habitat, and EFH in the form of degradation of water quality; and the in-water excavations and filling of tidal channels for levee construction may have directly injured or killed fish by crushing or causing other physical injuries.”</p>	<p>Comment noted.</p>
	<p>5.6 “However, the larger impact of the unauthorized activities on listed fish and EFH is associated with the loss of tidal marsh habitat. Cutting off tidal flow and the burying of vegetation in the former tidal channels of Point Buckler Island has reduced the amount and diminished the value of critical habitat and EFH in the Suisun Marsh, Solano County. Tidal marsh habitat in Suisun Bay supports ESA listed fish and EFH by providing habitat for prey species, foraging areas, and cover/shelter for protection from predators during the physiological transition of juveniles from fresh to saltwater osmoregulation (smolting).”</p>	<p>Comment noted.</p>
	<p>5.7 “Based on the impacts to tidal marsh habitat in Suisun Marsh resulting from unauthorized discharges at Point Buckler Island, NMFS supports the San Francisco Bay Regional Water Quality Control Board’s proposed enforcement action in the matter of John D. Sweeney and the Point Buckler Club, LLC.”</p>	<p>Comment noted.</p>
<p>6. Napa-Solano Audubon Society</p>	<p>6 This comment letter summarizes the mission of the Napa-Solano Audubon Society and the importance of Suisun Marsh wetlands, particularly to birds. The letter specifically expresses support for the CAO against John Sweeney and Point Buckler Club, LLC.</p>	<p>No response required.</p>