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26 August 2016

By E-Mail

San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612
Attn: Marnie Ajello
marnie.ajello@waterboards.ca.gov

Subject: Cleanup and Abatement Order R2-2016-0038

Dear Ms. Ajello:

On behalf of Point Buckler Club, LLC and John D. Sweeney (jointly the “Club”), I am responding to provision 10 of Cleanup and Abatement Order R2-2016-0038 (the “Order”), which reads as follows:

No later than 14 days from the date of this Order, the Discharger is required to acknowledge in writing its intent to reimburse the State for cleanup oversight work as described in the Reimbursement Process for Regulatory Oversight fact sheet provided to the Discharger with this Order, by filling out and returning the Acknowledgement of Receipt of Oversight Cost Reimbursement Account Letter or its equivalent, also provided with this Order.

This exact language was included in Cleanup and Abatement Order R2-2015-0038, which Bruce Wolfe issued on 11 September 2015 (the “Initial Order”). In response to the Initial Order, I sent a letter to Mr. Wolfe dated 25 September 2015. That letter, without its exhibits, is attached as Exhibit 1 to this letter.

In my letter of 25 September 2015, I noted that the Regional Board has no authority to require reimbursement in a cleanup and abatement order. Water Code § 13304 specifies that the costs are “recoverable in a civil action”, and a cleanup and abatement order is not a civil action. We therefore interpreted the provision as requesting a voluntary agreement to reimburse, and

indeed the use of a consent form should leave no doubt that reimbursement is voluntary. Since then, no one has said anything to us that might suggest otherwise.

The Club recognizes that the Regional Board has incurred costs related to Point Buckler Island, and notes that the Regional Board's administrative civil liability complaint specifically includes costs incurred by the Regional Board. The Club does not want to pay the Regional Board's recoverable costs twice, and it does not understand the Regional Board to be asking for double payment. Before consenting to pay costs that appear to be much more uncertain than in a reimbursement plan for a typical site, the Club would like to discuss what will be included in the future reimbursement bills, and how the Regional Board's past costs should be reimbursed. The Club also expects to challenge the Order, with the goal of having it set aside. Under the circumstances, therefore, the Club believes that the best course is not to consent to reimbursement, but rather to discuss reimbursement when the Club and the Regional Board discuss penalties and resolution of other pending issues.

A signed copy of what is identified as "Attachment 3" is attached as Exhibit 2 to this letter. In accordance with the form, Mr. Sweeney, on behalf of the Club, is acknowledging receipt of the information provided, but is not agreeing to the reimbursement process at this time.

I am sending this letter to you because the prohibition on ex-parte communications and the requirement for separation of functions should still be in place. As you know, we have asserted that the Regional Board has violated these due-process rules by giving Mr. Wolfe decision-making authority over submissions required by the Order. Nevertheless, we are copying him with this letter, and if you direct us to we can make future submissions to him, as long as it is clear that we are not waiving our due-process objections.

Please e-mail me with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Bazel", written in a cursive style.

Lawrence S. Bazel

cc: See transmittal e-mail

EXHIBIT 1

BRISCOE IVESTER & BAZEL LLP

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25 September 2015

By E-Mail and Mail

Bruce H. Wolfe
Executive Officer
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Subject: Cleanup and Abatement Order R2-2015-0038
Point Buckler LLC

Dear Mr. Wolfe:

On behalf of Point Buckler LLC, we are responding to paragraph 8 of Cleanup and Abatement Order R2-2015-0038 (the "Order"), which reads as follows:

No later than 14 days from the date of this Order, the Discharger is required to acknowledge in writing its intent to reimburse the State for cleanup oversight work as described in the Reimbursement Process for Regulatory Oversight fact sheet provided to the Discharger with this Order, by filling out and returning the Acknowledgement of Receipt of Oversight Cost Reimbursement Account Letter or its equivalent, also provided with this Order.

It is not clear to us what this provision means. Water Code § 13304 provides that the Regional Board may recover "reasonable costs actually incurred" *after* waste is cleaned up or its effects abated:

If the waste is cleaned up or the effects of the waste are abated, or, in the case of threatened pollution or nuisance, other necessary remedial action is taken by a governmental agency, the person or persons who discharged the waste, discharges the waste, or threatened to cause or permit the discharge of the waste within the meaning of subdivision (a), are liable to that governmental agency

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to the extent of the reasonable costs actually incurred in cleaning up the waste, abating the effects of the waste, supervising cleanup or abatement activities, or taking other remedial action. The amount of the costs is recoverable in a civil action by, and paid to, the governmental agency and the state board to the extent of the latter's contribution to the cleanup costs from the State Water Pollution Cleanup and Abatement Account or other available funds.

(Water Code § 13304(c)(1).) The Regional Board, therefore, does not appear to have authority to require a discharger to reimburse it for costs incurred *before* “the waste is cleaned up or the effects of the waste are abated”. Please correct us if our interpretation is wrong, or if there is other authority we have not considered.

When paragraph 8 of the Order says that “the Discharger is required to acknowledge in writing its intent to reimburse the State”, the Order could be interpreted as requiring that Point Buckler LLC *must* agree *now* to reimburse the Regional Board. This interpretation would invalidate at least part of the Order as an act in excess of the Regional Board's authority.

We believe the better interpretation is that paragraph 8 of the Order includes a voluntary request. In response, Point Buckler LLC acknowledges that it may, as part of an appropriate legal process (as discussed in more detail below), be found liable and required to reimburse the Regional Board for oversight costs. Point Buckler LLC would like to discuss the reimbursement issue with you and your staff. Please let us know if you agree that paragraph 8 should be interpreted as a voluntary request.

Paragraph 8 specifically requires that a form be returned, and we are attaching a signed copy of the form. Because Mr. Sweeney is not available to sign the form, I have signed it for him. As you may have noticed, the language of the form does not conform to the language of the Order. We are returning the form, attached as Exhibit 1, because it is our intent to comply with the Order as we proceed through the legal process. Please let us know if you believe our actions do not constitute compliance, and then give us an opportunity to come into compliance. Please do not send us any bills pending resolution of the legal issues.

We have reviewed the letter dated 18 September 2015 from Wilson Wendt of Miller Starr Regalia (whom we are replacing on this matter) to you. That letter respectfully requests a hearing on the Order. We have also reviewed the e-mail dated 23 September 2015 from Agnes

Farres of your staff responding to Mr. Wendt concluding that “there is no action to take before the Board at this time” and that “it would be more appropriate to schedule a meeting with staff”.

We do not understand why a hearing has not been held and is not being held for the Order. “Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest.” (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 621.) Here there cannot be any doubt that the Order deprives Point Buckler LLC of a significant property interest. In July 2015, in the *West Side Irrigation District* case (copy attached as Exhibit 2), the Sacramento Superior Court invalidated letters sent out by the State Board—letters that commanded far less than the Order—on the grounds they were issued “without any sort of pre-deprivation hearing”. (Exhibit 2 at 5.) The court distinguished between letters that are “coercive in nature” (*id.* at 2), which require a hearing, and purely informational letters, which do not. Here the Order is indisputably coercive in nature. The court concluded that “[e]very day the Letter remains in its current form constitutes a violation of those constitutional rights.” (*Id.*)

State Board Order No. WQ 86-13, *In the Matter of the Petition of BKK Corporation*, acknowledges the need for a post-order hearing:

The Porter-Cologne Water Quality Control Act...does not require notice and an opportunity to be heard before issuance of a cleanup and abatement order. Due process is provided by an opportunity for a hearing after the order is issued.

(*Id.* at 4.)

Where a state’s interest is sufficient compelling, the requirements of procedural due process may be satisfied by a hearing provided after issuance of an administrative order....

(*Id.* at 6.)

We therefore once again request a hearing. If that request is denied, please let us know why the Regional Board believes that no hearing is required.

We also do not understand how the due-process requirements for a fair tribunal, including the requirements for separation of functions and the prohibition on ex-parte communications, have been implemented for the Order. (See *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 736-739.) *Morongo* describes the extensive

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procedures used by the State Board to satisfy these requirements. (*Id.* at 735-736.) Please let us know how these requirements are being satisfied here. Who is on the prosecution team, and who is on the advisory team? Have any procedures been put in place to prohibit ex parte communications between them?

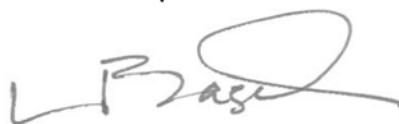
We also note that the Order invokes the Regional Board's authority under Water Code § 13267, which requires that the Regional Board "shall identify the evidence that supports requiring that person to provide the reports." (Water Code § 13267(b)(1).) Although the Order includes findings, there is no reference whatsoever to the evidence on which these findings is based. We would like to understand what evidence your staff relied on in preparing the Order, and will be submitting a Public Records Act request. Nevertheless, we would like a hearing so that your staff can present the Regional Board's evidence to an impartial fact finder, and we can rebut it.

We are sorry to have to proceed this way, but must protect our legal rights. The deadlines in the Order are much too short to resolve all the issues that need to be resolved. We therefore request that all deadline in the Order be postponed for 60 days, so that we can focus our efforts on responding to the Regional Board's needs rather than on legal proceedings to obtain a stay.

The e-mail from Ms. Farres proposes a meeting with Keith Lichten, Tamarin Austin, and Bill Hurley, and we agree that a meeting is a good idea. We will be following up on that proposal.

Thank you very much for your consideration of these questions, comments, and requests, and please call with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Bazel", written in a cursive style.

Lawrence S. Bazel

cc: A. Farres (by e-mail)
K. Lichten (by e-mail)
A. Tamarin (by e-mail)
B. Hurley (by e-mail)

EXHIBIT 2

ATTACHMENT 3

ACKNOWLEDGMENT OF RECEIPT OF OVERSIGHT COST REIMBURSEMENT ACCOUNT LETTER

I, John Sweeney, acting within the authority vested in me as an authorized representative of the property located at Point Buckler Island in Solano County, acknowledge that I have received and read a copy of the attached *REIMBURSEMENT PROCESS FOR REGULATORY OVERSIGHT* and the transmittal letter, dated August 12, 2016, concerning cost reimbursement for Regional Water Board staff costs involved with oversight of cleanup and abatement efforts at Point Buckler Island in Solano County.

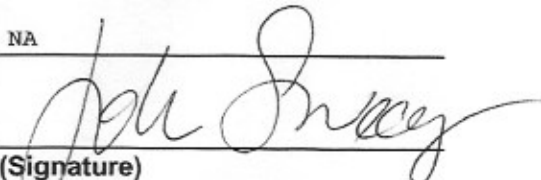
I understand the reimbursement process and billing procedures as explained in the letter. I also understand that signing this form does not constitute any admission of liability. ~~Billings for payment of oversight costs should be mailed to the following individual and address:~~

BILLING CONTACT NA

BILLING ADDRESS NA

TELEPHONE NO. NA

RESPONSIBLE PARTY'S SIGNATURE


(Signature)

Manager, Point Buckler Club, LLC
(Title)

DATE: August 26, 2016