

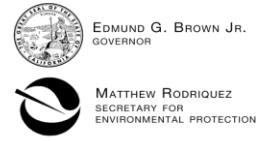
*STATE OF CALIFORNIA*

**REGIONAL WATER QUALITY CONTROL BOARD  
SAN FRANCISCO BAY REGION**

MEETING DATE: February 8, 2017

ITEM: **3**

SUBJECT: **MINUTES OF THE DECEMBER 14, 2016 AND JANUARY 11, 2017 BOARD MEETINGS**



**San Francisco Bay Regional Water Quality Control Board**

**December 14, 2016 Board Meeting  
Draft Minutes for Board Consideration**

Note: Copies of orders, resolutions, and minutes are posted on the Regional Water Board’s website ([www.waterboards.ca.gov/sanfranciscobay](http://www.waterboards.ca.gov/sanfranciscobay)). Information about obtaining copies of audio recordings of Board meetings may be obtained by calling the Board’s file review coordinator at (510) 622-2430. Written transcripts of Board meetings may be obtained by calling California Reporting, LLC, at (415) 457-4417.

**Item 1 - Roll Call and Introductions**

Meeting called to order at 9:07 a.m. in the Elihu M. Harris Building, First Floor Auditorium.

<u>Board Members Present</u>	<u>Board Members Absent</u>	<u>Status</u>
Cecilia Ogbu	Steve Lefkovits	QUORUM
Jane Battey (left at 10:50)		
Newsha Ajami		
William Kissinger		
Vice-Chair James McGrath (left at 10:50)		
Chair Terry Young		

Executive Officer Bruce Wolfe recognized Senior Environmental Scientist Karen Taberski’s contribution to the Board and wished her well in her retirement.

Chair Young introduced new Board Member Battey.

Division Chief Bill Johnson introduced new Senior Engineer Robert Schlipf. Division Chief Keith Lichten introduced new Senior Environmental Scientist Xavier Fernandez. Senior Engineer Cheryl Prowell introduced new Scientific Aid Darin Chun.

State Water Board Member Steve Moore updated the Board about the statewide mercury water quality objectives and beneficial uses and the toxicity policy project. He noted that the State Board is planning to release revised draft dredge and fill procedures in February. State Board Member Moore also discussed emerging drought, water supply, and agriculture issues.

**Item 2 – Public Forum**

No parties requested to speak.

**Item 3 - Minutes of the Board Meeting for November 9, 2016**

Mr. Wolfe recommended adoption of the Minutes from the November 9, 2016 Board Meeting.

Vice Chair McGrath moved for adoption of the Minutes; Board Member Ogbu seconded the motion.

Ayes: Ogbu, Ajami, Kissinger, McGrath, Young, Battey

Nos: none

ITEM ADOPTED

**Item 4 - Chairman's, Board Members', and Executive Officer's Reports**

Vice Chair McGrath recognized Phyllis Faber's contribution to wetlands preservation.

Mr. Wolfe gave an overview of this month's Executive Officer's Report. He gave an update about cleanup efforts at the Prosperity Cleaners site in Marinwood. He also noted that earlier in the month, the Alameda County Superior Court denied Baykeeper's Petition concerning the Board's CEQA finding for the Army Corps of Engineers maintenance dredging permit.

**Consideration of Uncontested Item**

**Item 5A – Chevron Products Company, a division of Chevron USA Inc., Chevron Environmental Management Company, and Chem Trade West US LLC, Chevron Richmond Refinery, Richmond, Contra Costa County – Reissuance of NPDES Permit**

Mr. Wolfe recommended adoption of Item 5A.

Board Member Ogbu moved for adoption of Item 5A; Board Member Ajami seconded the motion.

Ayes: Ogbu, Ajami, Kissinger, McGrath, Young, Battey

Nos: none

ITEM ADOPTED

**Enforcement**

**Item 6 – John D. Sweeney and Point Buckler Club, LLC, Point Buckler Island, Suisun Marsh, Solano County – Consideration of Imposition of Administrative Civil Liability**

Executive Officer Wolfe turned the item over to the Board's Advisory Team. Vice Chair McGrath recused himself. Board Member Battey stated that she would be abstaining.

Chair Young reviewed the hearing procedures. Advisory Team Legal Counsel Marnie Ajello noted that five documents were received after their relevant deadlines and recommended that the Chair use her discretion and exclude these submittals. Chair Young agreed and rejected the submittals. Ms. Ajello asked each of the Board members to individually confirm that they had not had any ex parte communications on this matter. All sitting Board members confirmed that this was the case.

Assistant Executive Officer Dyan Whyte introduced the item on behalf of the Prosecution Team.

Staff Environmental Scientist Ben Martin gave the presentation to the Board. Mr. Martin gave an overview of the site and summarized the key findings in the cleanup and abatement order adopted by the Board in August 2016. He then described how the Prosecution Team used the statewide Enforcement Policy's penalty methodology to compute the administrative liability for the unpermitted discharge of fill. He highlighted how the Prosecution Team evaluated harm, culpability, cleanup and cooperation, ability to pay, and economic benefit in support of the recommended \$4.6 million penalty.

Bryan Elder, Water Resource Control Engineer and financial expert with the State Water Board's Office of Enforcement, described the Prosecution Team's analyses of ability to pay and economic benefit. Mr. Martin described how the Prosecution Team considered other factors as justice may require. Office of Enforcement Legal Counsel Laura Drabrandt summarized the legal questions raised regarding jurisdiction and the Prosecution Team's recommendation.

Larry Bazel, legal counsel for the Dischargers, requested that he give his presentation first before conducting cross examination. Chair Young granted the request.

Board Member Kissinger asked clarifying questions about nearby islands and the potential cost of restoration. Board Member Ogbu asked about the ability to pay and continue in business analyses. Board Member Kissinger asked about staff's communication with the Dischargers regarding the documentation needed to support their inability to pay claim. Board Member Ajami asked about business licenses for the activities on the Island and who conducted work on the Island. Chair Young asked about the sale of Mr. Sweeney's company in 2001 and avoided permit costs.

*LUNCH BREAK at 12.30 p.m.; RECONVENED at 1:09 p.m.*

Mr. Bazel introduced John and Jennifer Sweeney. He discussed the nature of the proceedings and separation of agency functions issues. Mr. Bazel presented background information on the Island. He described historical uses of the Island, changes in its vegetation, the presence of a debris line, and reasons why the Dischargers assert that most of the interior of the Island is not a tidal marsh. Mr. Bazel described how there is no evidence that a mass die back of vegetation occurred on the Island or that there was harm to endangered fish by blocking the Island's channels. Board members asked clarifying questions. Mr. Bazel described the bases for the Dischargers' assertion that the Island's interior is above the high tide line. Mr. Bazel introduced Dr. David Mayer, a fisheries expert, and asked him a number of questions related to his background and experience. Dr. Mayer elaborated on the statements made in his declaration regarding the potential for predation on endangered fish. Board members asked Dr. Mayer clarifying questions. Mr. Bazel asked Dr. Terry Huffman to describe his educational background and experience. Dr. Huffman responded to questions put forth by Mr. Bazel regarding his observations of vegetation on the Island and methods for estimating tidal elevations. Board Member Kissinger asked Dr. Huffman about methods to delineate wetlands and the vegetation observed. Board Member Ajami asked Dr. Huffman a number of questions related to interpreting aerial imagery and Freeman and Snag Islands. Mr. Bazel asked Dr. Huffman a number of questions regarding groundwater. Mr. Bazel asked Mr. Sweeney a number of

questions about the history of the Island and his activities, observations, and intentions. Mr. Sweeney then responded to a number of questions Mr. Bazel asked regarding his assets. Board members asked clarifying questions. Mr. Sweeney described his understanding of the permitting process, and Board members Ajami and Kissinger asked a number of questions.

Mr. Bazel cross examined the Prosecution Team's expert Dr. Peter Baye regarding his observations of the condition of vegetation on the Island. Ms. Drabrandt asked Dr. Stuart Siegel to give a quick overview of jurisdiction and how the Prosecution Team established the high tide line and determined that the majority of the Island is below the high tide. Ms. Drabrandt cross-examined Mr. Sweeney regarding his assets, the Club's assets, and the work performed on the Island. Ms. Drabrandt invited Steve Chappell, Executive Director of the Suisun Resource Conservation District, to discuss practices at managed wetlands, the local permitting process, and his knowledge of the Island.

Erica Maharg, an attorney representing San Francisco Baykeeper and the Citizen's Committee to Complete the Refuge, urged the Board to approve the \$4.6 million penalty. She noted that this is the most egregious violation the Board has considered in recent history. She stated that any uncertainties as to the harm caused or the condition of the Island before the unlawful acts is because the Dischargers did the work without permits.

Mr. Bazel presented his closing arguments. He highlighted that there was no mass die off, no direct evidence of harm to endangered fish, and the Island is high in elevation and therefore not jurisdictional. Mr. Bazel provided an overview of his legal arguments, discussed the Suisun Marsh Preservation Act, noted that, under the federal Clean Water Act, a discharge did not occur every day as calculated, and that the Club should not be named a discharger. He also reiterated that Mr. Sweeney cannot afford to pay the penalty, there was no economic benefit, and a penalty will force Mr. Sweeney to litigate.

Ms. Whyte presented closing remarks on behalf of the Prosecution Team. She stated that the Dischargers presented no new information and that the Prosecution Team has rebutted their arguments with scientific data. She noted that the Prosecution Team does not have to prove harm but, rather, support their recommendation that the potential for harm is major. She asserted that they have proven that a violation occurred and summarized how the final penalty was calculated. She noted that the Bay Conservation and Development Commission (BCDC) had rejected the Dischargers arguments about being permitted under the Suisun Marsh Conservation Act and the Army Corps Regional General Permit No. 3. She stated that none of the testimony refuted the Prosecution Team's demonstration that Mr. Sweeney should have been aware of the permitting process.

Board Member Kissinger asked about the possibility of opening the tide gate, what will be evaluated as part of the plan due in February, and the activities conducted by the Club. Board Member Ajami asked for more information about fish screens, and Dr. Bruce Herbold, fisheries expert for the Prosecution Team, responded. Board Member Ajami asked a number of clarifying questions about the permitting process and regulatory history. Board Member Ogbu asked about the penalty calculation. Board Member Ajami asked BCDC Staff Counsel John Bowers to

explain its regulatory process. Mr. Chappell described the local permitting process for Suisun Marsh. Board Member Ajami asked Mr. Sweeney about the timing of his activities. Board members Kissinger and Ajami asked Mr. Chappell a number of questions about permits for duck clubs.

Chair Young closed the session and noted that the Board would be going into closed session. Mr. Bazel objected.

*CLOSED SESSION at 6:01 p.m.; RECONVENED at 7:56*

Chair Young asked Ms. Ajello to read the changes the Board made to the Tentative Order into the record. These changes included reducing the penalty amount to \$2,828,000 from \$4,600,000 based on other factors as justice may require, as provided in the Enforcement Policy. Board Member Kissinger noted that he was persuaded by the Prosecution Team's case that there were tidal wetlands that were waters of the State and United States, and that there were discharges into those waters. He emphasized the seriousness of the violations and explained the rationale for reducing the penalty. Board Member Ogbu noted the need to get the restoration done and that the liability was appropriate given the serious violations. Board Member Ajami noted that the Dischargers had ample opportunity to change course and they did not. Chair Young discussed how the Board considered all the evidence and concluded with no doubt that the Board has jurisdiction in this matter. She noted that the Board disagreed with the proposition that the staff was vindictive. She noted that she agreed with the base liability calculation of \$11.2 million. She reiterated that Mr. Sweeney's actions caused serious damage to valuable and increasingly rare habitat and the importance of carrying out the restoration envisioned by the Board's cleanup and abatement order.

Board Member Kissinger moved for adoption of Item 6 as amended; Board Member Ogbu seconded the motion.

Ayes: Ogbu, Ajami, Kissinger, Young

Nos: none

ITEM ADOPTED

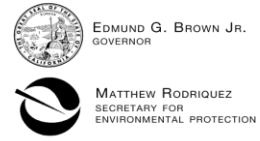
### **Item 9 – Closed Session – Litigation**

Chair Young announced that the Board will be meeting in closed session to determine whether to initiate litigation. She noted that none of today's action items will be discussed during this session. [Authority: Government Code sections 11126(e)(1) and 11126(2)(B)-(C)]

*CLOSED SESSION at 9:41 a.m.; RECONVENED at 10:42 p.m.*

### **Item 11 - Adjournment**

Meeting adjourned at 8:19 p.m. until the next Board Meeting – January 11, 2017



**San Francisco Bay Regional Water Quality Control Board**

**January 11, 2017 Board Meeting  
Draft Minutes for Board Consideration**

Note: Copies of orders, resolutions, and minutes are posted on the Regional Water Board’s website ([www.waterboards.ca.gov/sanfranciscobay](http://www.waterboards.ca.gov/sanfranciscobay)). Information about obtaining copies of audio recordings of Board meetings may be obtained by calling the Board’s file review coordinator at (510) 622-2430. Written transcripts of Board meetings may be obtained by calling California Reporting, LLC, at (415) 457-4417.

**Item 1 – Roll Call and Introductions**

Meeting called to order at 9:04 a.m. in the Elihu M. Harris Building, First Floor Auditorium.

<u>Board Members Present</u>	<u>Board Members Absent</u>	<u>Status</u>
Cecilia Ogbu		QUORUM
Steve Lefkovits		
Newsha Ajami (left at 2:38)		
William Kissinger (left at 6:05)		
Vice-Chair James McGrath		
Chair Terry Young		
Jayne Battey		

Senior Environmental Scientist Xavier Fernandez introduced Scientific Aide Nicole Fairley. Senior Engineer Dale Bowyer introduced Scientific Aide Lily Tieu. Engineering Geologist Ron Goulobow introduced Scientific Aide Skylar Valle. Senior Engineering Geologist Laurent Meillier introduced Scientific Aide Sunny Grunloh. Division Chief Bill Johnson introduced Scientific Aide Lena Germinario. Senior Engineer Robert Schlipf introduced Engineer Will Burrell and Engineering Assistant Jerry Xu.

State Board Member Tam Doduc updated the Board about the Governor’s proposed budget, new positions for the agency, and progress on the Bay Delta Water Quality Control Plan.

**Item 2 – Election of Chair and Vice-Chair**

Chair Young turned the floor over to Board Member Kissinger to conduct the Board Chair election. Board Legal Counsel Tamarin Austin described the election process. Vice Chair McGrath nominated the current Chair, Dr. Young. Board Member Ajami seconded the nomination. Board Member Kissinger nominated Board Member McGrath for Vice Chair and Chair Young seconded. She also noted how engaged and helpful Vice Chair McGrath has been and appreciation of the Board’s confidence in both of them.

Ayes: Ogbu, Lefkovits, Ajami, Kissinger, McGrath, Young, Battey

Nos: none

RESULT: Board Member Young elected Chair

Ayes: Ogbu, Lefkovits, Ajami, Kissinger, McGrath, Young, Battey

Nos: none

RESULT: Board Member McGrath elected Vice Chair

### **Item 3 – Public Forum**

Parties presented comments pertaining to the Marinwood Plaza cleanup. Bill McNicholas, Chairman of Cleanup Marinwood Plaza Now, raised the need for enforcement and concerns about the easement process. Robert Graham, member of Cleanup Marinwood Plaza Now, raised concern about slipping deadlines and the February 1 deadline. He also read a statement into the record from resident Marcie Williams urging the Board to levy fines.

### **Item 4 – Minutes of the December 14, 2016 Board Meetings**

Assistant Executive Officer Dyan Whyte informed the Board that the minutes of the December 14, 2016, Board Meeting would be presented for adoption at the February 8, 2017, Board Meeting.

### **Item 5 – Chair’s, Board Members’, and Executive Officer’s Reports**

Board Member Battey reported that she attended training on Board Member roles and responsibilities. Board Member Ajami attended a meeting at the Brookings Institute on public investment and gave a presentation on water infrastructure needs.

### **Consideration of Uncontested Item**

#### **Item 6A – Cleanup Programs – Status Report Including Case Closure**

Ms. Whyte noted that no action is required. Vice Chair McGrath noted appreciation for the report. Board Member Battey asked about trends and Board Member Kissinger asked about the total number of cases. Division Chief Stephen Hill provided background information and agreed to provide more comprehensive trend information to the Board in his next report.

### **Waste Discharge Requirements**

#### **Item 7 – Santa Clara Valley Water District and U.S. Army Corps of Engineers, Upper Berryessa Creek Flood Risk Management Project, Santa Clara County – Adoption of Waste Discharge Requirements and Water Quality Certification**

Ms. Whyte noted that staff received a comment letter the night before and Legal Counsel Tamarin Austin added that two other comment letters came in after the comment period closed. Ms. Whyte recommended that the Board exclude all late comments, and Chair Young agreed. Chair Young announced that she has had conversations with staff at the Governor’s office on this matter but that these conversations were strictly procedural and not substantive.



Staff Scientist Susan Glendening gave the presentation to the Board. Ms. Glendening described the project purpose and how the two-phase permitting approach developed by Board, Army Corps, and District staff allows the construction to be completed on time. She discussed the resources being impacted by the project, the need for mitigation, requirements in the proposed Order, significant comments received, and staff's responses to these comments.

Board members asked a number of clarifying questions about the photos presented and the quality of habitat. Board Members Kissinger and Ajami asked about flows in the reconstructed channel and Vice Chair McGrath asked about flow velocities. Vice Chair McGrath asked about required vegetation management practices and stream condition assessments. Chair Young described her experience with habitat condition assessments. Division Chief Keith Lichten described the limitations associated with Army Corps single-purpose flood control channel designs. Board Member Battey asked for clarification regarding wetland delineations and definitions. Senior Environmental Scientist Xavier Fernandez showed a slide illustrating jurisdictional boundaries and riparian wetlands. Board Member Battey asked about staff's involvement in commenting on the EIR. Chair Young asked for staff to confirm their rationale for developing a two-phase permitting approach. Ms. Whyte provided background on the history of dialogue with the Water District on mitigation options. Vice Chair McGrath noted that he wanted to move the discussion to focus on the appropriate amount of mitigation for the impacts. Chair Young asked for clarification on sediment removal needs and mitigation and the operations and maintenance manual.

Chair Young allowed Joseph Sanchez, labor government relations representative for the Santa Clara and San Benito Counties Building and Construction Trades Council, to provide public comments early because he had to leave. Mr. Sanchez urged the Board to not adopt the Order because it would delay the project, deprive the community of critical jobs, and increase vulnerability to flood damage.

Tom Kendall, Chief of Planning with the San Francisco District of the Army Corps of Engineers, addressed the Board. He noted appreciation for the Board's timeliness in issuing the certification but objected to the Corps being included on the Order. Mr. Kendall stated that they were supportive of exploring environmental restoration opportunities consistent with collective goals. He also highlighted all the benefits of the project and described the Corps approval process. Board Members Ajami and Kissinger asked for more detail on the history of the project. District Counsel for the Corps, Mary Goodenough, summarized the Corps' legal opinions and noted that the mitigation requirement is very problematic. Board members asked Mr. Kendall and Ms. Goodenough a number of questions pertaining to their comment letter. Chair Young asked for clarification as to how adopting the Order today would stop the project. Vice Chair McGrath asked a number of questions about NEPA and mitigation for State-listed species. Mr. Kendall described ways of calculating cost benefits ratios.

Santa Clara Valley Water District Chair Richard Santos expressed concern that adoption of the Order would endanger the project and deny the community flood protection. Santa Clara Valley Water District Interim Chief Operating Officer Melanie Richardson described the District's

funding situation and why conducting mitigation is problematic. She noted that the District fundamentally disagrees with the Order and has proposed mitigation that adequately addresses impacts. Ms. Richardson described her understanding of the two-phase permitting process. Board Member Kissinger asked Ms. Richardson about her understanding of the wording in the Certification. Santa Clara Valley Water District Environmental Planner Jim Manidakos discussed why the mitigation could cost \$20 million. He presented a number of photos and described the condition of the channel. He described how the channel banks would be laid back creating grassland habitat and the replanting plan. He stated that a low flow channel will form and the hydrology will not change, therefore open water habitat will not change. Board Member Kissinger asked about comparisons drawn between the project and Lower Silver Creek. Vice Chair McGrath asked clarifying questions about the channel design. Board Member Ajami asked for clarification about the removal and replacement of concrete in the channel.

*LUNCH BREAK at 1:45 p.m.; Reconvene at 2:38.*

Upon request, Chair Young agreed to let members of the Public testify before the District finished its presentations. Linda Locke, president of the Berryessa Citizens Advisory Council expressed concern about flooding and the need to get the project done in a timely manner. Frank Cancilla, president of the Berryessa Business Association, discussed the impact on local businesses due to flooding. Reverend Jeff Moore, president of the San Jose - Silicon Valley NAACP, expressed that the Board does not have concern for the people who would be affected by flooding. Chair Young thanked the speakers for attending the meeting and assured them that the Board has no intention of delaying the project and that is why the agencies agreed to implement a two-phase permitting approach.

Jack Xu, with the Hydrology, Hydraulics, and Geomorphology Unit at the Water District, presented photos and described why he believes the channel is erosional as opposed to aggradational. Vice Chair McGrath asked a number of questions about the engineering design of the project. Ms. Whyte described staff's concern about the lack of a low flow channel in the design and uncertainty about dry season flows due to the bottom riprap.

Rita Chan, Santa Clara Valley Water District legal counsel, described the NEPA/CEQA process, summarized the District's legal arguments, and reiterated that the District fundamentally disagrees with Water Board staff's analysis of impacts and mitigation requirements. Peter Prows, outside counsel for the Water District, highlighted areas in which the District disagrees with staff's legal interpretation of Water Board authorities and procedures. Board Member Kissinger asked a number of questions regarding the legal arguments presented. Ms. Austin summarized the Water Board's responses to the legal issues raised by the District. Chair Young asked Board staff for closing remarks. Vice Chair McGrath asked about annual sediment removal rates. Board Member Battey asked about comments from the resource agencies.

Chair Young convened a closed session to allow the Board to deliberate.

*CLOSED SESSION AT APPROXIMATELY 5:00 p.m.; RECONVENE at 6:05 p.m.*

Chair Young re-opened the meeting. She stated that the Board agreed that mitigation is required but was not able to put together language to describe the mitigation requirement it feels is appropriate. She continued the hearing to March.

**Other Business**

**Item 8 – Estuary Blueprint** – The 2016 Comprehensive Conservation and Management Plan – Presentation on the 2016 CCMP Update by Caitlin Sweeney, Director of the San Francisco Estuary Partnership

This informational item was postponed till February.

**Item 13 - Adjournment**

Meeting adjourned at 6:11 p.m. until the next Board Meeting – February 8, 2017