JOHN BRISCOE (053223)
LAWRENCE S. BAZEL (114641)
MAX ROLLENS (308984)
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
(415) 402-2700
Fax (415) 398-5630
jbriscoe@briscoelaw.net
lbazel@briscoelaw.net
mrollens@briscoelaw.net

Attorneys for Petitioners John D. Sweeney and Point Buckler Club, LLC

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the matter of: ORDER NO. R2-2016-0048 IMPOSING ADMINISTRATIVE CIVIL LIABILITY ON JOHN D. SWEENEY AND POINT BUCKLER CLUB, LLC POINT BUCKLER ISLAND SUISUN MARSH, SOLANO COUNTY	No. PETITION FOR REVIEW

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I. INTRODUCTION

A. The Setting

In the 1970s, the Legislature enacted the Suisun Marsh Preservation Act, which protects duck clubs and duck ponds because they grow plants that provide food for ducks and other waterfowl. Although duck ponds are artificial managed wetlands, they are considered "vital" because they provide food and habitat that natural tidal marsh does not. The Suisun Marsh Preservation Act requires that individual management plans be prepared for duck clubs, and requires that duck clubs comply with their management plans. Although it requires a permit for most activities within the marsh, it specifically exempts the repair and reconstruction of structures such as levees.

Point Buckler is a small island in the Suisun Marsh. It has had a levee around it, and has been managed as a duck club, since the 1920s. In the 1980s, in accordance with the Suisun Marsh Preservation Act, an individual management plan was prepared for Point Buckler (the "Club Plan"). The Club Plan called for a tight levee. Tight levees are needed for duck ponds because they allow water to be maintained at a constant level, rather than rising and falling with the tides. Nevertheless, breaches in the levee appeared in the 1990s and 2000s. In 2014, the levee was repaired. That repair is the subject of this dispute. The Regional Water Quality Control Board, San Francisco Bay Region thinks that the repair is so egregious that it has imposed on John Sweeney and Point Buckler Club, LLC (jointly "Mr. Sweeney") the highest penalty it has ever imposed: $2.828 million.

At first, the levee repair was no big deal. Staff from the San Francisco Bay Conservation and Development Commissions ("BCDC") and the Suisun Resource Conservation District ("SRCD") observed the repair in April 2014, when it was just starting. They knew John Sweeney from his management of another duck club, and could have called him and told him to stop if they thought that the repair was in violation of any requirement. But they did not call him until October 2014, when the repair was effectively complete, and did not visit the island until November 2014. At that time, BCDC staff gave Mr. Sweeney a copy of the Club Plan and told him that no permit would be required as long as the levee repair was in conformity with the plan.

In February 2015, the Corps visited the island and told Mr. Sweeney he could obtain after-the-fact coverage for the levee repair by submitting an application under a Corps permit known as

Regional General Permit 3, or "RGP 3", that generally allows for levee maintenance through a streamlined process. Because the Regional Board has issued a 401 certification for RGP 3, no additional approval is needed from the Regional Board. Mr. Sweeney filled out and signed the application while the Corps representative was on the island, and she took the application with her for processing.

Despite this friendly beginning, things quickly turned hostile. At the end of January 2015, BCDC staff reversed their position and asserted that the levee repair needed a permit even if it was in conformity with the Club Plan. In July 2015, Regional Board staff issued a notice of violation, and followed with a cleanup and abatement order in September 2015 (the "2015 Order"). The Corps lost Mr. Sweeney's application.

Mr. Sweeney and his former and present counsel attended several meetings with BCDC and the Regional Board staff and tried to resolve the matter, to no avail. The Regional Board insisted on at least partial destruction of the levee, and was not willing to agree to any permit process in which restoration of flow through the former breaches in the levee might be combined with a duck club and other recreational activities.

Why did agency staff turn hostile? Mr. Sweeney believes that the change arises out of an attempt to "steal" duck clubs in the Suisun Marsh. The story begins with a map prepared in 2004 by Dr. Stuart Siegel, the principal consultant to the Regional Board and BCDC. That map is entitled "Suisun Tidal Wetland Restoration Projects", and it identifies Point Buckler, among several others, as a "Completed Project". There is no dispute that this map is wrong. There was no restoration "project" at Point Buckler or for most of the other islands. Nor were there Corps permits for the restoration project a Point Buckler, as the San Francisco Estuary Institute database used to say. Dr. Siegel has revised the map so that it no longer refers to completed restoration projects, but rather to tidal marshes that have been naturally restored.

Mr. Sweeney believes that Dr. Siegel fraudulently misrepresented the status of these islands so that the Regional Board and BCDC, among other agencies, could benefit from federal grants that apparently required the agencies to show that they had completed wetland restoration projects. This accusation of fraud has been made openly and publicly by Mr. Sweeney, who believes that the

agencies want to take control of any duck club where a levee has been breached, and to prohibit the owner of those clubs from using their properties as duck clubs, mitigation banks, or anything else. Mr. Sweeney believes that the Regional Board wants to convert all duck clubs in the Suisun Marsh to tidal wetlands, and intends to accomplish this goal by prohibiting other uses and imposing harsh penalties. Dr. Siegel is now being investigated by the Federal Bureau of Investigation.

In December 2015, after the Regional Board refused a request for an extension of time, Mr. Sweeney filed suit challenging the 2015 Order. Mr. Sweeney argued that the order violated due process, and asked for a stay of that order. The Solano Superior Court granted the motion and imposed a stay.

Regional Board staff decided to retaliate. Before suit was filed, there was no demand for any penalties related to Point Buckler. Within days after Solano Superior Court granted the say, however, the Regional Board and BCDC initiated plans against Mr. Sweeney that would result in the imposition of the highest penalty either agency has ever imposed.

On January 4, 2016, staff formally asked Executive Officer Bruce Wolfe to rescind the order, with the understanding that the order would be re-issued after a hearing. The next day, Mr. Wolfe rescinded the order. Two days after that, there was a three-hour interagency meeting and expert witness call attended by six members of the prosecution team, including Dyan Whyte, the Assistant Executive Officer. Although the other agencies have not been identified, they must have included BCDC and the U.S. Environmental Protection Agency ("EPA"), which in January 2016 signed a "joint offense" agreement to cooperate with Regional Board staff against Mr. Sweeney. During January, Regional Board staff held three other internal strategy meetings, another interagency meeting, and a 2.5 hour "expert witness" strategy meeting. Regional Board staff demanded access to Point Buckler so that their experts could collect data to be used against Mr. Sweeney, and refused to meet with Mr. Sweeney until those data had been collected. Plainly, during January 2016 Regional Board staff developed a plan to penalize Mr. Sweeney for filing suit and challenging their authority.

In March 2016 the Regional Board's consultants, led by Dr. Siegel, visited the island and collected data. Two months later, the consultants issued a report that said everything negative that could be said about Mr. Sweeney, and nothing positive. That same month, Regional Board staff

proposed a penalty of $4.6 million, and BCDC staff, relying on the same technical report, proposed a penalty of $952,000. The highest penalty previously imposed by the Regional Board was less than $2 million, and the highest penalty previously imposed by BCDC was $220,000.

Regional Board staff did not hide their intent to destroy Mr. Sweeney. They demanded a penalty of $4.6 million even though they assessed his assets at $4.2 million. Mr. Sweeney pointed out that that figure was much too high; it included a house he no longer owned, and ignored his principal liabilities, including the cost of restoring Point Buckler. Mr. Sweeney had less than $100,000 in cash, and was unable to pay his lawyers and consultants. Although he argued that any money he was able to raise should go to restoring the island rather than paying penalties, Regional Board staff refused to propose a lower number, or to give Mr. Sweeney any credit for money spent restoring the island.

In August 2016 the Regional Board issued another Cleanup And Abatement Order (the "2016 Abatement Order"). Mr. Sweeney timely petitioned the State Board, which dismissed the petition after 90 days. Mr. Sweeney has since filed suit in Solano Superior Court challenged that order and BCDC's penalty order, which was issued in November 2016.

In December 2016 the Regional Board issued an order imposing a penalty of $2.828 million (the "Penalty Order").

B. Reasons For Rescinding The Penalty Order

For seven reasons, the State Board should rescind the Penalty Order.

First, the Regional Board has violated the Suisun Marsh Preservation Act, which requires all state agencies to act in conformity with that act and with the policies of the Suisun Marsh Protection Plan. Both the Preservation Act and the Protection Plan call for the preservation and protection of duck clubs and their dock ponds, which provide food and habitats for waterfowl. Duck clubs are entitled to maintain, repair, and reconstruct their levees without a permit from BCDC, and are also *required* to maintain their levees and duck ponds. Because the Regional Board *penalizes* Mr. Sweeney for doing work that has been authorized, encouraged, and even required by the Preservation Act and Protection Plan, it is not an action in conformity with that act and plan, and therefore is in violation of the Preservation Act.

Second, the Regional Board violated Constitutional due-process protections and the California Administrative Procedure Act because it did not provide a fair trial, and certainly not the appearance of a fair trial. Among other things, due process requires that the decision-making and advisory functions of the Regional Board be separated from the prosecutorial functions. But the Regional Board did not did not separate functions. Neither the Board itself nor the advisory team ruled on any of the substantive legal issues. Although they took argument and issued decisions only on the procedural legal issues (such as how much time counsel for Mr. Sweeney could speak at the hearing), they effectively left the prosecution team to rule on the substantive legal issues, thereby violating the requirement for separation of functions, violating the requirement that the Regional Board decide the legal issues, and giving the appearance of an unfair trial.

Due process also prohibits ex parte communications with the Regional Board. One of the Board members engaged in ex parte communications hostile to Mr. Sweeney. He called Mr. Sweeney a liar (even though Mr. Sweeney had accurately characterized the discussion, as confirmed by a transcript), and allowed an interested party to act on his behalf. Mr. Sweeney moved to have this Board member recused, and the Regional Board ruled against recusal. But when this same Board member engaged in an ex parte communication in which he said something in Mr. Sweeney's favor (he said that the penalty was too high), he was immediately recused. By allowing ex parte communications that were hostile to Mr. Sweeney, but disallowing those in his favor, the Regional Board did not provide the appearance of a fair trial.

The Regional Board did not provide a fair trial, and the appearance of a fair trial, when it relied primarily on Dr. Siegel for determination of the factual issues. Because Dr. Siegel had been publicly accused by Mr. Sweeney of scientific and criminal fraud (and is now being investigated by the FBI for criminal fraud), Dr. Siegel was in position to be impartial. By relying on a consultant who so obviously had a personal grudge against Mr. Sweeney, the Regional Board did not comply with due process.

The trial appeared to be unfair in many other ways. Mr. Sweeney was not given fair notice and an opportunity to respond because the prosecution team did not file an opening brief, and because it submitted new evidence with its reply brief. Mr. Sweeney was not given sufficient time at

the hearing to put on evidence and cross-examine prosecution team witnesses. Although the State Board had, with the Byron-Bethany hearings, demonstrated how a proper adjudicatory hearing should be conducted, the Regional Board refused to apply Byron-Bethany. As a result, the hearing was conducted like a typical hearing in which the Regional Board provides policy direction and oversight while deferring to staff—here, the prosecution team—on factual and legal issues. Because the Regional Board deferred to the prosecution team, rather than holding the prosecution team to their burden of proving the facts and the law, the Regional Board deprived Mr. Sweeney of a fair trial.

Third, the Regional Board misinterpreted the Porter-Cologne Act and Clean Water Act. The penalties in this case were imposed under Water Code § 13385, which authorizes penalties for violations of the federal Clean Water Act. Among the substantive legal issues that the Regional Board did not decide was the question of whether dirt that merely remains where it has been placed is nevertheless a "discharge" each day that it remains in place. The prosecution team relied on two federal district court cases from the 1980s in support of its assertion that there is a new discharge, and therefore a new violation, each day. Mr. Sweeney relied on two decisions of the United States Supreme Court from 2004 and 2013 for the contrary proposition. The Regional Board should have ruled in favor of Mr. Sweeney without much difficulty. By allowing the prosecution team to decide this legal issue, the Regional Board miscalculated the number of days at issue, and therefore miscalculated the penalty.

The Penalty Order was also based on the assertion that Mr. Sweeney violated Clean Water Act § 401, which requires applicants for a federal permit to obtain State certification. Mr. Sweeney was not an applicant for a federal permit. Section 401 therefore did not apply to him.

The Regional Board also imposed penalties for violating a provision of the Basin Plan which, according to the prosecution team, prohibits the levee repairs at Point Buckler. But the Basin Plain does not mention levee repairs, and cannot reasonably be interpreted to prohibit levee repairs that provide for duck ponds, which support the beneficial uses of wildlife habitat and recreational use.

Fourth, the Regional Board was unconstitutionally vindictive. "Unconstitutional vindictiveness" is the name given to a situation in which penalties are imposed or increased in

response to a party's exercise of its rights. Here there was no assertion of penalties against Mr. Sweeney until he filed suit against the Regional Board and argued that the 2015 Order violated due process. It plainly did, because it was issued without a hearing. Due process usually requires a pre-deprivation hearing; in some cases it allows for a post-deprivation hearing when the hearing is held as soon as possible. Here the Regional Board took the position—and *continues* to take the position—that no hearing whatsoever is needed. When the Solano Superior Court agreed with Mr. Sweeney and stayed the 2015 Order, the Regional Board retaliated. In early January 2016, two days after rescinded the order, staff held a meeting in which the attack on Mr. Sweeney was planned and coordinated. In March the consultants collected data, and in May 2016 Regional Board staff issued an administrative complaint demanding the highest penalty the Regional Board had ever issued. BCDC followed a few days later with its own penalty complaint, also demanding the highest penalty that agency has ever issued. Regional Board staff now say that the penalty process was initiated before the lawsuit, but there are no notes, e-mails, or other documentation of that supposed initiation, and there was no mention of penalties in the two meetings Mr. Sweeney held with Regional Board staff in October and November 2015.

Fifth, the Regional Board has violated provisions of the California and United States Constitutions protecting against excessive fines and overzealous penalty prosecutions. Regional Board staff were plainly out to destroy Mr. Sweeney. They demanded a penalty of $4.6 million, when by their own calculation Mr. Sweeney had only $4.2 million in assets. When they were told that their calculation of his asserts was much too high, they responded by falsely inflating the value of Point Buckler. As part of the additional evidence submitted with their reply brief, staff asserted that Point Buckler was worth more than $3 million. They must have known this number was false, because at the hearing they lowered their value to $1.2 million. Neither of these numbers acknowledges that the island is subject to the 2016 Abatement Order, which requires restoration of the island, at a cost that could easily exceed $1.2 million. The true value of Point Buckler is undoubtedly negative. Mr. Sweeney also testified that he has only a small amount of cash, and he cannot pay the penalty. Nevertheless, the Regional Board specifically declined to reduce the proposed penalty because of Mr. Sweeney's inability to pay. (Note that the Board started with the

prosecution team's proposal, rather than starting with zero and asking whether the prosecution team had proved its case.)

The penalty here is so severe that it would deprive Mr. Sweeney of everything he owns. When a penalty is this severe, it is no longer an administrative procedure. It is a criminal matter. The protections afforded in criminal proceedings by the United States Constitution and California Constitution apply, including the requirement that the prosecution team's facts be proved by clear and convincing evidence or beyond a reasonable doubt, and the protection against excessive fines. The Regional Board violated these requirements.

Sixth, the Regional Board's factual determinations were not supported by the evidence. To justify the record high penalty, the prosecution team's consultants concocted three harms that they attributed to the levee repair. They said that the levee repair dried out of the island, there was a "mass dieoff" of vegetation, and there was "likely" harm to endangered fish. But the levee repair did not dry out the island because it was already dry except for a few channels and ditches. The consultants effectively conceded this issue when they backed off their original assertion that there was daily tidal flooding of the entire island and conceded that the daily tidal influence was seen only in the channels and ditches.

The assertion that there was a mass dieoff turned out to be an apparent difference between the plants inside and outside the levee, as observed in March 2015. The vegetation on Point Buckler is senescent, meaning it dies back in the winter and sends out new shoots in spring. Aerial photographs show that the island is usually brown in winter, and that it does not turn green the same month each year. In 2012 it was brown in May but very green in August. In 2016 it was very green in May but relatively brown in August. In March, the prosecution team's consultant observed more new shoots outside the levee than inside it. But by May 2016 the interior of the levee was overgrown with green vegetation. There was no mass dieoff of vegetation.

There was no direct evidence of harm to endangered species. The prosecution team asserted that harm was "likely" to endangered fish, because the levee repair cut off tidal access to the channels and ditches that could have been habitat for those endangered fish. Mr. Sweeney's expert noted that channels in which endangered fish gather are likely to attract predators, which can become

"killing fields". As a result, it was impossible to say whether the levee repair harmed or helped endangered fish. The prosecution team's evidence consisted only of speculation.

Seventh, and finally, the Regional Board is engaging in a pattern of abuse. It complies with legal requirements only when convenient. Sometimes, there is no authority to support its behavior. For example, it continues to insist that it can issue a cleanup and abatement order without a hearing, even though the Solano Superior Court ruled against it on this issue, and even though the case it cites for this proposition stands for the exact opposite—a hearing *must* be held. More often, it takes positions that border on frivolous. The United States Supreme Court has twice held that a discharge under the Clean Water Act requires the *addition* of pollutants to a water of the United States; pollutants already in those waters are not a discharge because they are not added. If a district court said something different twenty years earlier, that statement is no longer good law. Yet Regional Board staff insist that the old district court cases prevail over the holdings of the United States Supreme Court.

The Bagley-Keene Open Meeting Act required the penalty hearing to be open, and prohibited the Board from going into closed session. The Board nevertheless went into closed session, citing a provision that allows for closed sessions in adjudications conducted in accordance with Chapter 5 of the Government Code—but not Chapter 4.5. Mr. Sweeney's hearing was conducted in accordance with Chapter 4.5. By going into closed session, the Board violated the Bagley-Keene Act.

The Regional Board is not normally involved with levee repairs, which are covered under RGP3. The Regional Board has issued a 401 certification for RGP3, but does not handle any of the paperwork for RGP3, which is managed by the Suisun Resources Conservation District ("SRCD") and the U.S. Army Corps of Engineers. In order to penalize Mr. Sweeney, Regional Board staff have taken the position that RGP3 covers only levee maintenance, and *does not* cover the repair of breaches in the levee. And yet, as we write this in January 2017, levees in Suisun Marsh are being breached by the storms and high tides, and duck club owners are scrambling to get emergency repair authorization under RGP3. To the best of our knowledge, the Regional Board is not insisting that no repairs can be done without a 401 certification, or that the duck clubs will be penalized if they repair the breaches in their levees.

Nor should it. The duck club owners should be allowed to repair their levees and protect their duck ponds. Mr. Sweeney should too. Mr. Sweeney is an enthusiast who fell in love with the Suisun Marsh. He has married into a family that has lived in the marsh for four generations. He bought an island that had been used as a duck club since the 1920s, from a woman who told him that he was supposed to repair the levee. Three years later, he repaired the levee and began to restore the duck ponds. Duck ponds provide vital habitat to waterfowl, support beneficial uses, and are protected by the Suisun Marsh Preservation Act. Although the levee may not have been repaired for 20 years, at another duck club BCDC has authorized (in fact, demanded) the repair of a levee that had been breached for 15 years, without objection or interference from the Regional Board. Mr. Sweeney's efforts to repair a levee and restore duck ponds that had been in existence for nearly 100 years does not warrant the highest penalty ever imposed by the Regional Board. Ultimately, it does not matter whether the penalty was imposed as a vindictive response to Mr. Sweeney's successful suit against the Regional Board, or to "steal" duck clubs that have not promptly repaired breaches in their levees, or because Regional Board staff in good faith concluded that there was harm to tidal marsh. In any case, the Regional Board should not destroy an individual who tried to restore waterfowl habitat protected by the Basin Plan and the Suisun Marsh Preservation Act. Cooler heads should prevail.

The State Board should rescind the Penalty Order.

II. IDENTIFICATION OF PETITIONER

Petitioners are John D. Sweeney and Point Buckler Club, LLC (jointly "Mr. Sweeney"), and should be contacted through counsel:

JOHN BRISCOE
LAWRENCE S. BAZEL
MAX ROLLENS
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
(415) 402-2700
Fax (415) 398-5630
jbriscoe@briscoelaw.net
lbazel@briscoelaw.net
mrollens@briscoelaw.net

III. REGIONAL BOARD ACTION TO BE REVIEWED

Order No. R2-2016-0048 Imposing Administrative Civil Liability On John D. Sweeney And Point Buckler Club, LLC, Point Buckler Island, Suisun Marsh, Solano County.

IV. DATE OF REGIONAL BOARD ACTION

The Order was signed by Bruce Wolfe on December 20, 2016.

V. STATEMENT OF REASONS WHY THE REGIONAL BOARD ACTION WAS IMPROPER

The Regional Board action was improper for the reasons set out in the points and authorities in section IX below.

VI. MANNER IN WHICH PETITIONER IS AGGRIEVED

Mr. Sweeney is aggrieved because the Penalty Order illegally requires him to pay a penalty of $2.828 million, as specified in section IX below.

VII. STATE BOARD ACTION REQUESTED BY PETITIONER

Petitioner requests that the Order initially be stayed, and then be rescinded.

VIII. BACKGROUND

A. The Island Has Been A Duck Club Since The 1920s

Duck clubs use levees to maintain control over water levels in the duck ponds. (Declaration of John D. Sweeney ("Sweeney Decl."), ¶ 2.)[1] Conversations with previous owners of the island confirm that it was used as a duck club back to the 1920s. (*Id.*) An aerial photo dated 1948 shows that Point Buckler was ringed by a levee at that time. (Technical Report, fig. A-1.)[2] From at least 1981 through 1996, there was a house on the northern tip of the island. (*Id.*, figs. A-3 through A-12.)

B. The Previous Owner Told Mr. Sweeney He Was Supposed To Repair The Levee

There were ponds on the island in 1948. (*Id.*, fig. A-1.) A pond is visible in an aerial photograph taken in 1981. (*Id.*, fig. A-3.) These ponds apparently silted in, perhaps when storms and wave action breached the levee. After 1981, there is no sign of any pond in any aerial

[1] Electronic copies of most documents cited in this petition have been provided in the accompanying "Documents Relevant To Petition".

[2] Point Buckler Technical Assessment [Etc.], dated May 12, 2016, prepared for the Regional Board. Included in the record by BCDC staff in the Administrative Record. Mr. Sweeney does not agree with most of the Technical Report, but does not dispute the aerial photographs it presents.

photograph until two small ponds were dug in 2012. (*Id*., figs. A-4 to A-25.) By the early 1980s, therefore, the island was high and dry.

In 1984, as mitigation for the transfer of water from the Delta to southern California, the California Department of Water Resources ("DWR") proposed to install a pump and to maintain that pump. (Bazel Decl., ex. 1 at 103.) Duck clubs do not generally use pumps because they do not need them. (Sweeney Decl., ¶ 2.) Duck ponds are typically below high tide levels, and can be filled simply by opening the tide gates. There is only one reason that a pump would have been installed at Point Bucker. Because the island was high and dry, water had to be pumped up onto the island. But pumping is not enough to create duck ponds. There must be a tight levee to hold the water in the place. If water were pumped onto the island before the levee was repaired, it would simply run off. (*Id*.)

DWR made clear that it would not install the pump until the levee was repaired: "The pumping equipment will be built and installed when the landowner has improved the island's levee system to provide adequate protection of the island." (Bazel Decl., ex. 1 at 103.) A letter from DWR dated 1988 asserts that the pump has not yet been installed because the levee has not yet been repaired. Documents dated January 1990 identify levee repairs. (*Id*., ex. 2.) According to the previous owner, the levee was repaired in the early 1990s, and DWR installed the pump. (Sweeney Decl., ¶ 3.)

An old pump and a generator are still there. The pump is designed to float in the open water, and to draw water a few feet below the surface. There was a hose to carry the pumped water over the levee and onto the island, where it would have flooded a large area that could be used as a duck pond. (*Id*.)

By 2011, however, the levee fell into disrepair. When Mr. Sweeney purchased the island in 2011, the previous owner told him DWR was requiring that the levee be repaired. (*Id*.) Although DWR has no records relating to the Point Buckler, and no institutional memory about installing the pump (*id*.), DWR continued to identify the pump and its operating costs as mitigation until 2014, when it "deleted from document because the breach in the exterior levees had not been fixed" (Bazel Decl., ex. 3).

C. Even Before The Levee Repair, The Island Was High And Dry

Although Mr. Sweeney was not a kiteboarder when he purchased the island, he started using the island for kiteboarding in 2012. In May 2012, he mowed part of the western tip of the island. He also used bulldozers to knock over vegetation and clear pathways across the island. The vegetation was brown and brittle, and appeared dead. (Sweeney Decl., ¶ 4.) Photographs taken from that time show the brown vegetation. (*Id*., exs. 1-2.)

The Prosecution Team's technical expert has explained that each winter the above-ground part of the vegetation dies off, and then grows back in the spring and summer. (Bazel Decl., ex. 4 at 85-86, 87.) The vegetation that was knocked down in May 2012 quickly grew back, as can be seen in the aerial photograph dated August 2012. (Technical Report, fig. D-3.)

Aerial photographs of the island show that some of the time the vegetation on the island is green (e.g. summer 2012), and some of the time it is brown (e.g. January 2013, January 2014, January 2015). (Technical Report, figs. D-2, D-6, D-13, D-27.) The aerial photographs from June 2013 and June 2014 show some green, but less than the summer 2012 photograph. (*Id*., figs. D-9, D-19.) The vegetation appears to have been affected by the drought. In 2012, the island was mostly brown in May, and did not turn green until August. (Technical Report, figs. D-1 and D-3.) In 2016, however, the island was very green in May, as shown by ground-level photographs. (Sweeney Decl., ex. 3.)

Beginning in 2012, Mr. Sweeney drove bulldozers across the island, and found dry ground except in the channels and ditches. His bulldozers did not get bogged down in wet soil, and when walking around the island he did not see any wet soil. (Sweeney Decl., ¶ 6.)

From 2012 through 2014, Mr. Sweeney and other kiteboarders used the "lawn" on the western side of the island. This area is outside the levee. During this time, Mr. Sweeney never observed any wetting of the kiteboard lawn from tidal waters. Nor did anyone ever report to him that the lawn had become wetted. (*Id*.)

Aerial photographs since 1981 show no sign of water in the interior of the island, other than the channels and ditches. (Technical Report, figs. A-4 through A-25, D-1 through D-31.)

Most of the interior of the island, therefore was high and dry even before the levee repair.

D. Mr. Sweeney Truly Wants To Restore The Duck Club

In 2014, Mr. Sweeney repaired the levee. His purpose in repairing the levee was to restore the duck ponds. The levee repair was not needed for kiteboarding, which had been going on since 2012 outside the levee. The levee was not needed to dry out the island, because it was already high and dry. (*Id.*, ¶ 7.)

Mr. Sweeney understood that the old pump on the island had been used to pump water into the duck ponds, and that the levees would have to be repaired in order to re-create those duck ponds. Mr. Sweeney recognized that he could also recreate ponds by digging them out, and that a levee would also be needed for that purpose. Without a levee, water would not remain in the ponds; it would drain away during low tides. (*Id.*)

Mr. Sweeney understood that duck clubs are authorized to remove old vegetation by discing or burning. He intended to disc, seed with plants that would attract waterfowl and provide food for them, and then roll the area to cover the seeds. He brought a disc and a roller onto the island for that purpose. (*Id.*, ¶ 8.)

In 2015, Mr. Sweeney dug four small semicircular duck ponds on the island. These ponds have no purpose except as duck ponds. He planted trees around the ponds to improve the habitat for waterfowl, but these trees died. (*Id.*, ¶ 9.)

Mr. Sweeney would still like to restore one or more duck ponds on the island. (*Id.*)

E. Mr. Sweeney Did Not Know He Needed A Permit

At the time he began the levee repair, Mr. Sweeney had never heard of the phrase "401 cert". He was not aware he needed any permit for the levee repair. Although he had previously obtained a permit from the U.S. Army Corps of Engineers (the "Corps")—a regional general permit known as "RGP3"—he did not believe one was needed for Point Buckler. (*Id.*, ¶ 10.)[3]

[3] In 2011, Mr. Sweeney obtained an RGP3 through SRCD for an emergency repair of the levee at Chipps Island. Because the levee could not be repaired by placing dirt into the breach, it was repaired using a container. The Corps asserted that the container was not a proper repair method, and issued a notice of violation. Mr. Sweeney responded, and the Corps dropped the issue. In 2016, after Mr. Sweeney had sold Chipps Island, the container failed. The new owners obtained another RGP3 and repaired the levee. (Sweeney Decl., ¶ 11.)

He had spoken with the Suisun Resource Conservation District ("SRCD"), had been told that Point Buckler was not a member of SRCD, and believed that RGP3 permits were used for SRCD members. He also thought that permits were not needed for non-tidal islands, and that Point Buckler was not tidal. There was huge difference between Chipps Island and Point Bucker. After the levee break, the interior of Chipps Island was under several feet of water. In comparison, Point Buckler was always high and dry. (*Id.*, ¶ 12.)

He had also contacted BCDC, and was told that Point Buckler was not within BCDC jurisdiction. His understanding was that other duck clubs who were not members of SRCD did not obtain permits. In comparison, he understood that he needed a permit (actually a lease) from the State Lands Commission for the dock at Point Buckler. He therefore applied for an obtained a lease. During that process, no one told him that he needed a permit from the Corps, BCDC, the Regional Board, or anyone else. (*Id.*)

In retrospect, it is clear that there were several misunderstandings, including misunderstandings by the regulatory agencies. SRCD was incorrect when it said that Point Buckler was not a member of SRCD. It has responsibility for all duck clubs in the marsh, and lists Point Buckler as a member (Bazel Decl., ex. 5.) BCDC was wrong when it said that Point Buckler was not within its jurisdiction. Although BCDC staff do not recall this conversation, there is no doubt that at the time BCDC staff were confused about their jurisdiction. They posted on the BCDC website an assertion that Chipps Island is not within BCDC jurisdiction (Sweeney Decl., ex. 4), although they now acknowledge the contrary.

Confusion, however, is not culpability.

F. Agency Staff Were Aware Of The Levee Repair, But Did Nothing To Stop It Until After It Was Complete

On March 19, 2014, SRCD and BCDC staff were on a tour of the Suisun Marsh. (Bazel Decl., ex. 6, ¶ 17.) They observed "excavation and redeposit of excavated material" at Point Buckler. The work "appeared to have as its purpose the construction of a new exterior levee." Mr. Chappell was surprised by this work because he believed that it needed permits that had not been issued. (*Id.*)

In March 2014, at the time of this observation, only a small fraction of the levee repair had been done, and there was tidal flow into all the interior channels and ditches. (Technical Report, fig. D-15.) If SRCD or BCDC staff had taken any action at that time to inform Mr. Sweeney of their concerns, things would have been very different. Because they knew him, they could easily have called or e-mailed him.

But SRCD staff did not take any action, and BCDC staff did not take any action for seven months: from March to October 2014. By October 2014, work on the levee was effectively complete, although some final touches remained to be done. (Sweeney Decl., ¶ 14.) In October 2014, BCDC called Mr. Sweeney and asked for a site visit. BCDC invited Regional Board staff to join in the site visit. (*Id.*)

That visit took place in November 2014. Regional Board staff did not attend, apparently because there was not enough room in Mr. Sweeney's boat for everyone, and because the agencies did not obtain another boat.

During the November 2014 visit, BCDC staff provided Mr. Sweeney with a copy of the individual management plan for Point Bucker (the "Club Plan"), and told him that if his work was done in accordance with the Club Plan it was OK. (*Id.*; *see* PRC § 29501.5 (no permit required for work specified in an individual management plan).) The Club Plan calls for "tight levees". (*Id.*, ex. 5.)

On January 30, 2015, BCDC staff wrote Mr. Sweeney and, for the first time, asserted that the levee repair was not covered by the Club Plan. (Sweeney Decl., ex. 6.) It took BCDC staff nine months, from March 2014 to January 2015, to conclude that there was a violation. Mr. Sweeney and has previous counsel met and corresponded with BCDC during spring and summer 2015. (*Id.*, ¶ 15.)

In February 2015, Corps staff visited the island and informed Mr. Sweeney that he could obtain "after the fact" permitting approval through the Corps' Regional General Permit 3 ("RGP3"). Corps staff assisted Mr. Sweeney in filling out the form, which he signed and gave to Corps staff. He did not keep a copy for himself. The Corps did not make any additional requests of Mr. Sweeney, or accuse him of any violations, until March 28, 2016, when the Corps wrote Mr. Sweeney that the case was being transferred to EPA for possible enforcement. The Corps did not suggest that

Mr. Sweeney contact Regional Board staff or obtain approval from the Regional Board. Duck clubs do not normally contact Regional Board staff for levee repairs, because the Regional Board has issued a "section 401 certification" for RGP3, and nothing more is needed. (Bazel Decl., ex 7.)

In February 2016, a Freedom of Information Act request was submitted to the Corps to obtain the RGP3 application, among other things. The Corps did not produce a copy of this application. On October 11, 2016, EPA staff transmitted a copy of the application to counsel for Mr. Sweeney, without the signature page, and explained that the Corps had located it only within the previous few weeks. (*Id*. ¶ 9.)

G. The Proscution Team Issued A Cleanup And Abatement Order Before Visiting The Island Or Meeting With Mr. Sweeney

On July 28, 2015, the Regional Board's prosecution team took their first action. They issued a notice of violation. (Sweeney Decl., ex. 7.) They followed with the issuance of a cleanup and abatement order on September 11, 2015 (the "Initial Order"). (*Id*., ex. 8.) Both the notice and the Initial Order were issued before the prosecution team had met with Mr. Sweeney, and before they had set foot on Point Buckler. (*Id*., ¶ 17.) Previous counsel for Mr. Sweeney requested a hearing on the Initial Order, but the prosecution team refused. (Bazel Decl. ¶ 10 and ex. 9.)

The Initial Order had two deadlines: the first called for the submittal of information, and the second (although vague) called for a plan to destroy at least part of the levee repair. (Sweeney Decl., ex. 8 at 4-5.) In October 2015, Mr. Sweeney's current counsel and consultants met the first deadline and submitted a technical report and additional information. (Bazel Decl., exs. 10-11.)

Mr. Sweeney invited the prosecution team to visit the island, and in October 2015 they toured the island with staff from BCDC, California Department of Fish and Wildlife, the Corps, and the U.S. Environmental Protection Agency ("EPA"), and with Stuart Siegel, who said he was consulting for BCDC. (*Id*., ¶ 12.)

Mr. Sweeney met with the prosecution team in October 2015 and again in November 2015. During those meetings, his counsel tried to establish a "permitting track" on which at least some of the work done on the island could be permitted. (*Id*., ¶ 13.) Although the prosecution team has since agreed to the concept of permitting kiteboarding and a duck club on the island (along with the restoration of most of the island), at that time they were not receptive to permitting anything. (*Id*.)

Nevertheless, Mr. Sweeney proposed to conduct extensive additional scientific studies, including a topographic survey, in return for an extension of the second deadline, which at that time was set at January 1, 2016. (*Id*., ¶ 14.) Mr. Sweeney asked for an extension of the deadline until April 2016.

During the two meetings with staff in October and November 2015, counsel for Mr. Sweeney explained that if the deadline were not postponed he would have to go to court to obtain a stay. (*Id*.) Staff nevertheless refused to extend the January 1 deadline. (*Id*., ex. 11.)

H. The Solano Superior Court Stayed The Initial Order

Water Code § 13320(a) requires that anyone objecting to a Regional Board action must file a petition with the State Water Resources Control Board ("State Board") within 30 days. In October 2015, Mr. Sweeney filed a petition. (Bazel Decl., ¶ 15 and ex. 12.) Mr. Sweeney also requested a stay of the Initial Order. The State Board did not issue a stay. In January 2016, the State Board denied the petition. (*Id*.)

On December 23, 2015, Mr. Sweeney filed suit against Bruce Wolfe and the Regional Board in Solano Superior Court, and on December 28 moved ex parte for a stay. (*Id*., exs. 13-14.) He argued that the prosecution team had not complied with the due process requirements applicable to a cleanup and abatement order. The Court agreed, and issued the stay. (*Id*., ex. 15.)

I. Regional Board Staff Responded With A Vengeance

The prosecution team decided to retaliate. On January 4, 2016, staff formally asked Mr. Wolfe to rescind the order, with the understanding that the order would be re-issued after a hearing. (*Id*., ex. 16.) On January 5, Mr. Wolfe rescinded the order. (*Id*., ex. 17.) On January 7, there was a three-hour interagency meeting and expert witness call attended by six members of the prosecution team, including the Assistant Executive Officer. (Submission, ex. 35.) Although the other agencies have not been identified, they must have included BCDC and EPA, which in January 2016 signed a "joint offense" agreement to cooperate with the prosecution team against Mr. Sweeney. (Bazel Decl., ex. 18.) During January, the prosecution team held three other internal strategy meetings, another interagency meeting, and a 2.5 hour "expert witness" strategy meeting. (Submission, ex. 35.) Plainly, during January 2016 the prosecution team developed a plan to

penalize Mr. Sweeney for challenging their authority, and coordinated their attack with BCDC and EPA.

Following the rescission of the Initial Order, Mr. Sweeney tried to meet with the prosecution team, and a meeting was set for February 22. (*Id*., ex. 19 at 2-3.) Counsel for Mr. Sweeney suggested that Mr. Sweeney could "restore the tidal wetlands and also the duck ponds, and also maintain some uplands", which would satisfy everyone's needs:

> I would like to find a way to resolve this matter, and hope that the meeting will give us some sense of the path that will get us there. Although I understand that the Regional Board is very unhappy with Point Buckler Club, I'm not clear about what the real concerns are--- and therefore can't intelligently respond to them.
>
> ….
>
> It isn't clear to me why the club can't restore the tidal wetlands and also the duck ponds, and also maintain some uplands. In a typical 404 situation, the project proponent wants to fill wetlands in order to build a project, and the regulatory agencies want to maintain wetlands. Here the club wants to create wetlands out of uplands. I'm not clear on why the creation of wetlands is so problematical.

(*Id*. at 2.)[4]

The prosecution team refused to meet, however, until they had inspected the island. (*Id*. at 1.) They canceled the meeting set for February. (*Id*., ¶ 18.) They insisted on doing the work that Mr. Sweeney had offered to do. As a result, there was no point in Mr. Sweeney performing the work. (*Id*.)

After many e-mails, Mr. Sweeney agreed to an inspection in early March. The prosecution team wanted the inspection to be in later February, and obtained an inspection warrant. (*Id*., ¶ 19.) Mr. Sweeney objected to some of the statements made in the warrant affidavit, and to some of the statements made in an amendment to the warrant. (*Id*., exs. 21-23.) The inspection took place on March 2, 2016. The prosecution team was accompanied by staff from the U.S. National Marine Fisheries Service. (Sweeney Decl., ¶ 18.)

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[4] In February 2016 counsel made the same suggestion to BCDC staff:

> I don't see any reason why there can't be tidal wetlands on the island along with duck ponds and uplands. The Club remains interested in a resolution. There ought to be a way to work our differences out.

(Bazel Decl., ex. 20 at 2.) BCDC staff never responded to this letter. (*Id*., ¶ 17.)

In April, the prosecution team met with the District Attorney's Office in Solano County. (Prosecution Team Submission, ex. 35.) No doubt the purpose of that meeting was to recruit the District Attorney's Office to join in the war against Mr. Sweeney. The District Attorney's Office, however, has not taken action against Mr. Sweeney. (Sweeney Decl., ¶ 19.) Nor has any action been taken against Mr. Sweeney by the agencies responsible for protecting endangered species: California Department of Fish and Wildlife, U.S. Fish & Wildlife Service, and U.S. National Marine Fisheries Service. (*Id.*)

On May 12, 2016, the prosecution team released the Technical Report prepared by their consultants. On May 17, the prosecution team issued a proposed cleanup and abatement order and a complaint for administrative civil liability. Appendix A to the complaint calculated that Mr. Sweeney had a total net worth of $4.2 million, and proposed a penalty of $4.6 million. (Appendix A at A11, A14.) Plainly, the prosecution team wants to destroy Mr. Sweeney.

Six days later, on May 23, BCDC issued a cease and desist order and an administrative liability complaint demanding that Mr. Sweeney pay $952,000 in penalties. BCDC relied on the Technical Report that had been publicly released only on May 12. BCDC must have been coordinating with the prosecution team.

J. The Prosecution Team's Consultants Concede One Technical Issue

The prosecution team asserts that the levee repair has caused three types of harm to the island: (1) "draining and drying out" of the island, (2) harm to vegetation on the island, including "mass dieback" of vegetation, that resulted in harm to wildlife, and (3) harm to endangered fish. (Cleanup and Abatement Order No. R2-2016-0038 ("CAO"), ¶¶ 62, 69, 70.) Mr. Sweeney and his consultants dispute these conclusions. On the first of these issues, the prosecution team's consultants have made an important concession.

The prosecution team's concern about drying out the island seems to have been a key sticking point in this dispute. The Initial Order asserts that the levee repair "cut off crucial tidal flow to the interior of the Site, thereby drying out the Site's former tidal marsh areas" (Sweeney Decl., ex. 8 at 2, ¶ 8.), even though the prosecution team had never visited the island at the time it issued

the Initial Order. Mr. Sweeney has protested that this assertion is not true. (*E.g*. Bazel Decl., exs. 8, 19.)

In the Technical Report, their consultants inflamed the prosecution team's fears. The consultants asserted that "Point Buckler was subject to daily tidal inundation to the…interior of the island". (Technical Report at 5.) In response, Mr. Sweeney explained that the levee repair could not have dried out the island, because the island was already high and dry. (Bazel Decl., ex. 24 at 21-28.) The prosecution team's consultants conceded, in their rebuttal, that the island interior was usually dry:

> Vegetated upper intertidal marsh plains such as those at Point Buckler do not have daily tidal flooding, but only periodic tidal flooding.

(Bazel Decl., ex. 25 ("Rebuttal Report") at 2.)

How often is this "periodic tidal flooding"? According to the rebuttal report, "overbank tides occur infrequently (as much as a few times per month to none for several months)"; "these tides last briefly"; "they are fairly shallow". (*Id*. at 3.) In a revised figure, the prosecution team's consultants show that only the channels and ditches received daily tidal flows before the levee repair. (*Id*. at 4.) As a result, the parties now agree that the interior of the island was generally high and dry.

This issue also highlights problems in communications between the prosecution team and Mr. Sweeney. If the drying out is so important, why hasn't any regulatory agency ever asked Mr. Sweeney to restore the tidal flow by opening the tide gate at the island? None ever has. (Sweeney Decl., ¶ 20.) Nor has any of the agencies expressed any interest in flooding part of the island to create a duck pond, as Mr. Sweeney would like to do. (*Id*.)

Even after the rebuttal report, the prosecution team has insisted on referring to the interior of the island as "tidal marsh". As BCDC has acknowledged, real tidal marsh is subject to "daily tidal action":

> Tidal marshes are defined as vegetated areas within the [Primary Management Area of Suisun Marsh] which are subject to *daily tidal action*.

(Bazel Decl., ex. 6, ¶ 6 (definition from Section II, Exhibit C of the Suisun Marsh Management Program, cited by BCDC staff in penalty complaint against Mr. Sweeney).) The high-and-dry interior of Point Buckler is not subject to daily tidal action, and it is therefore not tidal marsh.

Nevertheless, Mr. Sweeney does not dispute that the vegetation that grows inside the levee on Point Buckler is the same vegetation that grows outside the levee, including areas that are tidal marsh.

Which takes us to the second issue: vegetation. The prosecution team asserts that there have been mass dieoffs of vegetation on Point Buckler, and that the island is now dominated by pickleweed, a nuisance plant. But these assertions are simply wrong, as Mr. Sweeney's consultants have now established beyond any doubt. Dr. Siegel has acknowledged that the plants turn brown because they are senescent: the aboveground part turns brown and dies back in the winter, and grows back in the spring. (Bazel Decl., ex. 4 at 85-88.)

The prosecution team asserts that the harm to vegetation "likely" resulted in harm to waterfowl, but there is no evidence that Mr. Sweeney's activities harmed waterfowl. What is indisputably clear is that the prosecution team's activities harmed waterfowl because they prevented Mr. Sweeney from completing the duck ponds and planting vegetation that provides duck food.

The Suisun Marsh Protection Plan—BCDC's blueprint for protecting the marsh—explains that waterfowl prefer duck ponds to natural tidal marsh because the duck ponds are planted with species that provide duck food. (See section immediately below.)

On the third issue—harm to endangered fish—the parties agree that the levee repair cut off daily tidal flow into the channels and ditches, and that there is no direct evidence of any harm to endangered fish. The prosecution team's consultants thought that there was "likely" harm to endangered fish because they believed that the channels provided food and protection for the endangered fish. But Mr. Sweeney's expert pointed out that they have not taken predation into account, and that the channels provide good hiding places for predators. He also notes that the borrow ditch is substantially wider and deeper than the preceding ditches, thereby providing improved habitat for endangered fish.

K. The Suisun Marsh Preservation Act And Suisun Marsh Protection Plan Call For The Preservation Of Duck Clubs

The Suisun Marsh Preservation Act (the "Preservation Act") requires all California state agencies to "carry out their duties and responsibilities in conformity with" that act and with the policies of the Suisun Marsh Protection Plan (the "Protection Plan"):

> 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.

(PRC § 29302(a), *see* § 29004 (referring to the Protection Plan).)

The purpose of the Protection Plan is "to preserve the integrity and assure continued wildlife use" of the Suisun Marsh. (Bazel Decl., ex. 26 (Suisun Marsh Protection Plan) at 9.) The Protection Plan, which was updated in 2007, emphasizes the importance of duck clubs to the Suisun Marsh. Duck clubs, which "encourage production of preferred waterfowl food plants", "are a vital component of the wintering habitat for waterfowl migrating south":

> In the Suisun Marsh, about 50,700 acres of managed wetlands are currently maintained as private waterfowl hunting clubs and on publicly-owned wildlife management areas and refuges. Because of their extent, location and the use 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. Managed wetlands also provide habitat for a diversity of other resident and migratory species, including other waterbirds, shorebirds, raptors, amphibians, and mammals. Managed wetlands can protect upland areas by retaining flood waters and also provide an opportunity for needed space for adjacent wetlands to migrate landward as sea level rises.

(*Id*. at 12 (Environment Finding 5).) Duck clubs "have made considerable contributions to the improvement of the Marsh habitats for waterfowl":

> The Marsh is well known for waterfowl hunting in California. ….
>
> The recreational values of the Marsh, particularly for duck hunting, have been a significant factor in its preservation. Private duck clubs…have made considerable contributions to the improvement of the Marsh habitats for waterfowl as well as other wildlife.

(*Id*. at 28.) Duck clubs "have worked to maintain the area's habitat value and to protect the natural resources of the Marsh":

> Market hunting of waterfowl began in the Suisun Marsh in the late 1850s, and the first private waterfowl sport hunting clubs were established in the early 1880s. …. Generations of hunting club owners and members have worked to maintain the area's habitat value and to protect the natural resources of the Marsh. Today, waterfowl hunting is the major recreational activity in the Suisun Marsh…

(*Id*. (Recreation and Access Finding 2).)

The Protection Plan establishes, as its first recreational policy, an encouragement of duck clubs:

> Continued recreational use of privately-owned managed wetlands should be encouraged.

(*Id*. at 29 (Recreation and Access Policy 1).)

Under "Land Use and Marsh Management", the Protection Plan once again emphasizes the importance of duck clubs:

> Within [the primary management] area, existing land uses should continue, and land and water areas should be managed so as to achieve the following objectives: …
>
> • Provision of habitat attractive to waterfowl
>
> • Improvement of water distribution and levee systems …

(*Id*. at 33.) These concepts are reinforced by the findings in this section, which emphasize the importance of managing to "to enhance the habitat through the encouragement of preferred food plant species":

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

(*Id*. at 34 (Land Use and Marsh Management Finding 2).)

Duck clubs, in short, "enhance the habitat" for waterfowl by growing "preferred food plant species" that do not occur naturally.

Recent scientific work by the U.S. Geological Survey has confirmed that waterfowl prefer duck ponds to natural tidal marsh, and raises concerns about the loss of duck ponds and conversion of some duck ponds to tidal marsh. (Bazel Decl., exs. 27-28.)

Although counsel for Mr. Sweeney and BCDC dispute whether the Club Plan is still legally in effect, there should be no dispute that protecting and promoting duck clubs is an important part of marsh preservation, which is the goal of the Suisun Marsh Preservation Act.

Preservation of duck clubs is also consistent with the Basin Plan, which identifies recreation and wildlife habitat as beneficial uses.

Most significantly, the Preservation Act specifies that no permit is required for levee repair and reconstruction:

> Notwithstanding any provision of this division to the contrary, no marsh development permit shall be required pursuant to this chapter for the following types of development and in the following areas: ….
>
> (b) Repair, replacement, reconstruction, or maintenance that does not result in an addition to, or enlargement or expansion of, the object of such repair, replacement, reconstruction, or maintenance.

(PRC § 29508.)

L. Mr. Sweeney Has Agreed To Submit Permit Applications

Despite these adversarial proceedings, Mr. Sweeney has been meeting with the prosecution team and staff from BCDC and EPA. (Bazel Decl., ¶ 8.) Mr. Sweeney has agreed to submit permit applications to BCDC, the Regional Board, and the Corps. In July, Mr. Sweeney submitted a conceptual proposal in which the levee at Point Buckler would remain in place, but would be breached in several places. (*Id*., ex. 29.) A relatively small area would be developed as a duck pond, and a small area would be used for kiteboarding. Most of the island would be restored to the condition it was in before the levee was repaired.

The prosecution team's Staff Summary Report acknowledges that "restoration of tidal marsh may be compatible with kiteboarding and duck hunting activities". (CAO Staff Summary Report at 3.) That compatibility is best developed through the permitting process, rather than through a penalty order. The permitting process provides a method for achieving a resolution that can enhance the beneficial use of recreation on the island, while restoring tidal flows to the island. The prosecution team has requested additional technical information, which Mr. Sweeney and his consultants are in the process of gathering and preparing. (Bazel Decl., ¶ 26.)

In August 2016 the Regional Board issued Cleanup and Abatement Order No. R2-2016-0038, which requires the submission of an interim corrective plan in November 2016, and restoration and mitigation plans in February 2017. Mr. Sweeney filed a petition with the State Board (Bazel Decl., ex. 30), and filed suit after that petition was dismissed, but is nevertheless has been proceeding to respond to the CAO. In September 2016, Mr. Sweeney met with staff of the Regional

Board, BCDC, and EPA, and submitted a draft interim corrective action plan, as called for by the CAO. Mr. Sweeney revised that draft in response to comments at that meeting, and submitted a final interim corrective action plan in October 2016 within the deadline specified in the CAO.

Mr. Sweeney did not need the repaired levee for anything other than restoring the duck ponds, and he did not need a levee around the entire island to maintain duck ponds. He repaired the levee, which ran around nearly the entire island, because that is what he thought he was supposed to do. He dug the small semicircular ponds, planted trees around them, and put decoys in them, in the hopes that he could create some duck ponds. Mr. Sweeney is a great supporter of the Suisun Marsh, and his wife's family has lived in the marsh for four generations. But he is not an expert in duck ponds. The semicircular ponds were too small, and the trees died. Mr. Sweeney brought a disc and roller to the island to plant duck food by discing the soil, seeding, and rolling to cover the seeds, but did not complete the work because the agencies objected. (Sweeney Decl., ¶22.)

Because he tried to restore a duck club, and because he took the prosecution team to court, Mr. Sweeney now is in danger of losing everything he has.

If he had known what would happen, he would not have proceeded as he did. He would like to resolve his differences with the three agencies, restore the island to their satisfaction, and proceed with his life. But he cannot restore the island if he has to pay the proposed penalty. (Sweeney Decl., ¶ 23.)

Mr. Sweeney has no income and almost no cash. He has some assets that he would like to sell to raise money for the work to be done on the island, but they are not readily liquidated. In particular, he has a landing craft with a sale price of $895,000. Unfortunately, that craft has been listed for sale for three years, and it still has not sold. It will be difficult for Mr. Sweeney to raise the money he needs to do the work on the island. (Sweeney Decl.)

In May 2016, the prosecution team estimated the costs of permitting the work at Point Bucker at $1.1 million. This number includes mitigation for temporal losses, which the CAO requires regardless of whether any kiteboarding or duck-club activities are permitted. This figure of $1.1 million does not, however, include the cost of doing the actual work to restore the island. That figure has not been estimated, but it would certainly be substantial.

If he has to pay any substantial penalty, Mr. Sweeney will not be able to pay the permitting costs, provide for mitigation, or do the work to restore the island. (Sweeney Decl., ¶ 24.) If any penalty is imposed, it should be postponed, so that Mr. Sweeney can use available money to restore the island, and waived when the prosecution team has agreed that the work is done.

M. Compared To Other Penalties, The Penalty Is Disproportionately High,

The penalty policy recognizes that a penalty can be adjusted when it is "entirely disproportionate to assessments for similar conduct". (State Board (May 20, 2010) Water Quality Enforcement Policy[5] at 19.) Regional Board staff apparently do not keep a list of the highest penalties, and did not provide a list in response to Public Records Act request. (Bazel Decl., ¶ 29.) Staff suggested that counsel for Mr. Sweeney conduct our own review of the penalty orders, which are posted online. (*Id*.) That suggestion was followed, and the following table identifies the top ten penalties for the last ten years:

Order Number	Penalty	Facts
R2-2011-0015 In the matter of: Julio Cesar Palmaz And Amalia B. Palmaz, Trustee Of The Amalia B. Palmaz Living Trust, And Cedar Knolls Vineyards, Inc.	$1,927,000	For placing cave spoils in wetlands and waters of the US. Pay $85,000; $1,742,000 suspended upon completion of the work in approved restoration work plan; $100,000 suspended upon completion work in temporal loss mitigation work plan
R2-2011-0022 In the matter of: City Of Pacifica	1,700,000	For 100,000 gallons of raw sewage discharged and 6.9 million gallons of partially treated sewage bypassed to surface waters. Pay $880,000; $820,000 suspended upon completion of supplemental environmental projects.
R2-2009-0026 Administrative Civil Liability For: Sewerage Agency Of Southern Marin, Mill Valley, Marin County	1,600,000	For 4,818,800 gallons discharged from treatment plant. Pay $800,000 in three payments spread over three years; $800,000 suspended upon completion of supplemental environmental projects.
R2-2012-055 In the matter of:	1,539,100	For 3,125,493 gallons discharged, 2.5 million not recovered or cleaned up.

[5]http://www.swrcb.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf

Sanitary District #1 Of Marin, A.K.A. Ross Valley Sanitary District		Pay $807,350; $731,750 suspended upon completion of supplemental environmental projects.
R2-2016-1012 In the matter of: California Water Service Company	1,020,000	For 8,207,560 gallons of chloraminated water discharged, leading to at least 230 dead fish, including steelhead. Pay approximately $500,000; instead of $495,481 in cash, Cal.Water will spend $600,000 on capital improvements beyond those required by law.
R2-2009-0015 Administrative Civil Liability For: City Of San Mateo San Mateo County	950,000	For 3.5 million gallons of raw sewage discharged to surface waters. Pay $190,000; $760,000 suspended upon completion of supplemental environmental projects.
R2-2011-0044 In the matter of: City of San Bruno	621,100	For discharge of 2 million gallons of raw sewage, 1.9 million gallons were not recoverable. Pay $325,550; $295,550 suspended upon completion of the supplemental environmental projects.
R2-2014-1003 In the matter of: San Francisco Public Utilities Commission	608,310	For discharge of 180,900 gallons of water with high pH and elevated total suspended solid, 37,500 gallons high pH, 2.32 million gallons chlorinated potable water, and 16,500 gallons super-chlorinated water (which killed 28 steelhead). Pay $330,328; $277,982 suspended upon completion of the supplemental environmental projects.
R2-2010-0103 In the matter of: ConocoPhillips Company	600,000	For violations of the effluent limitations.
R2-2010-0085 In the matter of: OG Property Owner, LLC	530,000	For alleged violations of the Construction General Permit, WDR Order, and Basin Plan.

Readily apparent from this list is the fact that almost all of these penalties were imposed on municipalities and large companies—huge companies in the case of ConocoPhilips—that can easily pay a multimillion-dollar penalty. There is one case directed at individuals associated with a winery, but in that case the winery did not assert any inability to pay. Here the penalty is directed at an individual with no revenue stream, who has almost no cash or other liquid assets.

The prosecution team asserted that the proposed penalty in this case is the highest administrative penalty ever imposed by the Regional Board. (Sweeney Decl., ex. 9.) Is the levee repair here the most egregious act that has ever taken place within this Board's jurisdiction? Surely not.

Surely the Kinder Morgan matter was more egregious. (*See* Bazel Decl., ex. 32.) That matter involved three separate oil spills. In one of those spills, 123,732 gallons of oil (2,947 barrels) were discharged into a duck club in the Suisun Marsh. (*Id*. at 1.) Toxic oil is undoubtedly worse for waterfowl and endangered fish than mere dirt. That case was filed in court, which allowed for greater penalties than in an administrative proceeding. And yet in that case Kinder Morgan paid only $1,360,448 in penalties to the Regional Board. Because the harm alleged here is much less than the harm in Kinder Morgan, the penalty here should be much less than the penalty in that case. In other words, the penalty here is disproportionately high.

As shown on the chart above, the highest penalty imposed by the Regional Board in the last ten years was $1.9 million—substantially less than the $2.828 million imposed here. That case, the Cedar Knolls winery matter, is in some ways a useful comparison. In that case, as in this one, the alleged violations involved the placing fill. (Bazel Decl., ex. 33 at 1-2.) Most of the others involved wastewater discharges. The prosecution team in that case alleged Cedar Knolls filled two wetlands and associated streams on the 14.2 acre parcel, and then built vineyards atop the fill. (*Id*. at 1.) Of the $1.9 million penalty, only $85,000 was due within 30 days as a penalty. An additional $1,742,000 was suspended as long as Cedar Knolls completed an approved restoration work plan, which was "to reconstruct, revegetate, restore and remediate the two wetlands and associated waters that were disturbed". The remaining $100,000 was suspended as long as Cedar Knolls completed the work in a temporal loss mitigation and monitoring work plan, which would provide "compensatory habitat to mitigate the temporal impacts" to wetland habitat. (*Id*.)

In other words, the Regional Board allowed Cedar Knolls to apply 95% of the penalty to site restoration. That was "in the best interest of the public as it involves the restoration of two specific areas of the [site] to maximize wetland character and function in these areas, mitigation for temporal losses, and the payment of a civil liability." (*Id*. at 1.)

Any penalty imposed on Mr. Sweeney should have been subject to the same conditions, i.e. that all but 5% be postponed and suspended as long as Mr. Sweeney completes the on-site restoration and mitigation.

IX. POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION

Points and authorities in support of the legal issues raised by this petition are set out in sections X through XVI below.

X. THE PENALTY ORDER VIOLATES THE SUISUN MARSH PRESERVATION ACT

The Suisun Marsh Preservation Act imposes a "judicially enforceable" requirement on state agencies to act in conformity with the act and the Suisun Marsh Protection Plan:

> **Imposition of Judicially Enforcement Duty on State Agencies.**
>
> (a) 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.

(PRC § 29302.) The Regional Board, therefore, must carry out its duties and responsibilities "in conformity with" the Preservation Act and with the policies of the Suisun Marsh Protection Plan.

A. Levees Can Be Repaired Without A Permit

Although the Preservation Act generally requires a permit for "development" within the marsh, the Preservation Act exempts repairs and reconstructions:

> **Development Not Requiring Permit.**
>
> Notwithstanding any provision of this division to the contrary, no marsh development permit shall be required pursuant to this chapter for the following types of development and in the following areas: ….
>
> (b) Repair, replacement, reconstruction, or maintenance that does not result in an addition to, or enlargement or expansion of, the object of such repair, replacement, reconstruction, or maintenance.

(PRC § 29508.)

In addition to this general exemption, the Preservation Act imposes special requirements on duck clubs.

B. The Preservation Act Requires That An Individual Management Plan Be Prepared For Each Duck Club, And That Each Club Comply With Its Plan

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

The compliance obligation of each duck club runs with the land. In the words of SRCD's Suisun Marsh Management Program (the "Management Program"):

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

(Bazel Decl., ex. 39 at 18; *see* PRC § 29401(d) (requiring management program).)

C. The Club Plan Called For Tight Levees

The Club Plan here (1) specifies that "tight levees" are "necessary for proper water management", (2) calls for "maintenance of levees", and (3) refers to specifications for the "restoration" and "repair" of levees.

The Club Plan notes that levee problems from the 1970s had been resolved: "the situation has greatly improved and the club reports that it now has the water control structures and tight levees necessary for proper water management." (Bazel Decl., ex. 2 at 4.) "Proper water control", according to the plan, "necessitates inspection and maintenance of levees, ditches, and water control structures." (*Id.* at 5.) The plan also refers to a standard list of recommendations "for more information on the maintenance and repair of water control facilities." (*Id.*) This reference appears to be to the Management Program, which includes "Suisun Marsh Levee Specifications". (*Id.*, ex.

39 at C-11 through C-17.) The Management Program requires that "renovation, restoration, repair and maintenance of existing levees" must conform with these specifications. (*Id*. at C-6.)

Individual management plans must be reviewed every 5 years and may be modified. (PRC § 29422(a).) The Club Plan has never been modified. (Bazel Decl., ¶ 43.)

D. The Levee Repair Implemented The Club Plan

The levee repairs conducted in 2014 implemented the Club Plan. They restored a levee around the island. Where the existing levee was intact, the levee was maintained by placing material on top of it. (Sweeney Decl., ¶ 50.) On the northern side of the island, where the old levee had been eroded away, the repaired levee turn inland, and stayed inside the debris line. (*Id*.)

The levee repair work was stopped before it was complete because of regulatory objections. (*Id*., ¶ 51.) The Club intended to install another tide gate, and to make the slopes of the levee consistent with the Management Program. (*Id*.) The Club also intended to disc the soil, to plant vegetation preferred by waterfowl, and otherwise to create duck ponds. (*Id*.) The Club would like to proceed to complete the work and install duck ponds. (*Id*.)

E. A Penalty Is Not Consistent With The Preservation Act

The Penalty Order penalized Mr. Sweeney for implementing the Club Plan, which calls for tight levees, and which he is required to implement. The Penalty Order is therefore not consistent with the Preservation Act.

The prosecution team asserted, incorrectly, that Mr. Sweeney needed a permit from BCDC for the levee repair. The Regional Board accepted this assertion, and did not even consider whether the Penalty Order was consistent with the Preservation Act.

More generally, the Penalty Order is not consistent with the Legislature's intent that duck clubs be protected, and that duck clubs be maintained in perpetuity so that they can provide food for waterfowl—food that is not available naturally.

The Preservation Act also requires the Regional Board to act in accordance with the policies of the Protection Plan. The "policies of the protection plan" call for "[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. 26 at 29, 36.)

The Penalty Order is inconsistent with the "[c]ontinued recreational use of privately-owned managed wetlands" because it penalizes Mr. Sweeney for repairing the levee. A levee is required for managed wetlands—duck ponds—because duck ponds maintain a continuous water level even as the tide rises and falls. (Sweeney Decl., ¶ 52.)

The penalty is also contrary to the improvement and maintenance of "exterior levee systems as well as other water control facilities on the privately-owned managed wetlands". (Bazel Decl., ex. 26.)

In these ways as well, the Penalty Order violates the Preservation Act.

F. The Technical Report Is Wrong When It Says That The Club Plan Is No Longer In Effect

Dr. Siegel, who is not a lawyer, provided the prosecution team's legal analysis on whether the Club Plan is still in effect. His analysis is misleading and incomplete.

The process established by the Suisun Marsh Preservation Act is simple, straightforward, and consistent with its goal of maintaining duck clubs in perpetuity:

- First, individual management plans must be prepared for all "managed wetlands" (i.e. duck clubs).
- Second, those plans must be submitted to BCDC for certification.
- Third, once those plans are certified, the duck clubs must implement them, and must continue to implement them.
- Fourth, the individual management plans must be reviewed every five years, and if changes are necessary the plans can be modified.

Dr. Siegel quotes the definition of "managed wetlands" in the Preservation Act. (Technical Report at 6.) He does not dispute (and therefore concedes) that Point Buckler was a managed wetland, that an individual management plan was prepared for it—they were prepared, he says, for "all of the roughly 150 privately owned duck clubs (diked managed wetlands) in Suisun Marsh" and that all were certified. (*Id.*) As a result, there is no dispute that the first two bullet point above have been met.

Dr. Siegel proceeds to argue that (1) when the levee was breached, the island was no longer a managed wetland, and (2) therefore, the "regulatory benefits of its [individual management plan] no longer apply". (*Id*. at 6-7.) The prosecution team, in its rebuttal brief, adopts the same position. But this is wishful thinking, not statutory analysis.

The statute provides no expiration date on any club plan.

A key benefit provided by the Preservation Act is the ability to perform "development" without a permit from BCDC. (PRC § 29501.5.) This section says nothing whatever about "managed wetlands". It says that if the work is specified in an individual management plan, no BCDC permit is required. As far as the statute is concerned, the exemption applies even if the club has not been a managed wetland for 100 years—work specified in the plan can be done without a permit. Period. Dr. Siegel is therefore wrong when he says the benefit depends on the continued maintenance of a "management wetland".

Moreover, he misunderstands the logic behind the Preservation Act, which imposes burdens as well as benefits. Duck clubs are *required* to comply with their plans. The Preservation Act required SRCD to "issue regulations requiring compliance with any water management plan or program for privately owned lands". (PRC § 9962(a).) The Preservation Act also provides authority for SRCD to obtain a warrant to "enter onto privately owned lands…for the purpose of determining whether or not the landowner is complying with the regulations of the district", to refer noncompliance to the District Attorney's office for enforcement, and to obtain civil penalties. (PRC § 9962(c)-(d).) If, therefore, a duck club is not maintaining itself as a managed wetland, the remedy is to inspect the club, and to take enforcement action requiring that club to implement its plan and, if appropriate, to pay penalties for not implementing its plan.

Owners of managed wetlands, therefore, cannot simply abandon their managed wetlands. A BCDC regulation specifically prohibits anyone from abandoning a managed wetland without a BCDC permit. (PRC § 29500 (no development without permit), PRC § 29114 (development includes "change in the density or intensity of use of land"), 14 CCR § 10125 (defining "substantial change in use" to include "abandonment" of a "managed wetland").) Nor can the owner's obligation to implement an individual management plan be avoided by selling the property. The obligation

"runs with the land"—in other words, it automatically passes on to any new owner. (See discussion above.) Here none of the previous owners applied for a permit to abandon the managed wetland at Point Buckler, and no permit was issued authorizing its abandonment. Point Buckler is, therefore, still a "managed wetland" as a matter of law, regardless of whether it is a managed wetland as a matter of fact.

Dr. Siegel proceeds to invent his own provisions of the Preservation Act. He asserts that "landowners clearly have a reasonable amount of time to carry out repairs", but that the lapse at Point Buckler "clearly extends well beyond 'a reasonable amount of time'" because it is more than the five-year duration of a Clean Water Act permit. (Technical Report at 7.) In fact, however, there is nothing the Preservation Act providing for a "reasonable amount of time", or anything like what Dr. Siegel supposes. And the duration of a Clean Water Act permit is wholly irrelevant to the Preservation Act, which says nothing about Clean Water Act permits.

Ultimately, Dr. Siegel is putting his own preferences ahead of the Legislature's. He prefers natural tidal marsh over managed wetlands. But the Protection Plan concluded that duck clubs were "vital" because they provide food for waterfowl that natural vegetation does not. (See section II.C above.) The Legislature therefore proceeded, when it enacted the Preservation Act, to protect duck clubs and require them to tend to their duck ponds in perpetuity. That is what the Legislature wanted, and the Regional Board must act in conformity with the Legislature's direction.

To be sure, after nearly two years BCDC is also asserting that the Club Plan is no longer in effect. BCDC provides no legal analysis in support of this position, and it undoubtedly is acting out of a desire to move the Club into the permitting process rather than a belief in the correctness of its assertions.

The simple fact is that an individual management plan was prepared for Point Buckler and certified. No one disputes that. No one disputes that the Preservation Act does not set any duration on individual management plans. Nor does anyone dispute that the management plans must be reviewed every five years in perpetuity. BCDC does not deny that the Club Plan has never been modified. Because the Preservation Act specifies that the plans must be reviewed and can be

modified every five years in perpetuity, it implies that they continue in effect until they are modified. The Club Plan has never been modified. Therefore, it is still in effect. It's as simple as that.

XI. THE PENALTY ORDER VIOLATES DUE PROCESS

A party can establish that an agency has violated that party's "constitutional due process right to an impartial tribunal" in any one of four ways: (1) by identifying financial or other personal interest, (2) by establishing that "rules mandating an agency's internal separation of functions and prohibiting ex parte communications" have not been observed, (3) by showing actual bias, or (4) by showing that a particular combination of circumstances (sometimes referred to as the "totality of the circumstances"), creates an unacceptable risk of bias. (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 741.) Here numbers (2) and (4) apply. The Regional Board violated the due-process protections of the California and United States Constitutions.

A. Due Process Was Violated Because Of Commingling Of Functions

Due process requires agencies to separate advocates from decision makers, and prohibits ex parte communications between them:

> While the state's administrative agencies have considerable leeway in how they structure their adjudicatory functions, they may not disregard certain basic precepts. One fairness principle directs that in adjudicative matters, one adversary should not be permitted to bend the ear of the ultimate decision maker or the decision maker's advisers in private. Another directs that the functions of prosecution and adjudication be kept separate, carried out by distinct individuals.

(*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2006) 40 Cal.4th 1, 5.)

Alcoholic Beverage Control reaffirmed the separation and ex parte rules applied by a line of cases reaching back to at least 1950. (*See English v. City of Long Beach* (1950) 35 Cal.2d 155, 159 (holding that an administrative board deprived a person of a fair trial when its decision was based on ex parte communications "of which the parties were not apprised and which they had no opportunity to controvert"); *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1586-1587 (holding that "performance of both roles [i.e. advocate for a party and adviser to the tribunal] by the same law office is appropriate only if there are assurances that the advisor for the decision maker is screened

from any inappropriate contact with the advocate"); *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 93, 98 (confirming that "it is improper for the same attorney who prosecutes the case to also serve as an advisor to the decision maker", and holding that when an advocate acted as legal advisor to a hearing officer he violated due process); *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 812, 815 (holding that there was a "clear appearance of bias and unfairness" that violated due process when a deputy city attorney represented a party in proceedings before the Board in two unrelated cases, and then represented the Board itself in proceedings on "a writ petition in the superior court").)

In *Quintero*, the court of appeal overturned an agency action because of a "clear appearance of bias and unfairness". (*Quintero*, 114 Cal.App.4th at 812.) *Quintero* found that Hugh Halford, a deputy city attorney, played a "dual role". (*Id*. at 815.) He, like the prosecutors here, represented a party in proceedings before the Board, and then represented the Board itself in proceedings on "a writ petition in the superior court". (*Id*.)

Quintero concluded that this dual role created an unacceptable risk of bias:

> [A] prosecutor, by definition, is a partisan advocate for a particular position or point of view. Such a role is inconsistent with the objectivity expected of administrative decision makers. Accordingly, to permit an advocate for one party to act as the legal adviser for the decision maker creates a substantial risk that the advice given to the decision maker will be skewed, particularly when the prosecutor serves as the decision maker's adviser in the same or a related proceeding.

(*Id*. at 871, quoting *Nightlife*, 108 Cal.App.4th at 93, citations omitted.)

> For the Board to allow its legal adviser to also act as an advocate before it creates a substantial risk that the Board's judgment in the case before it will be skewed in favor of the prosecution. The chance that the Board will show a preference toward Halford, even "'perhaps unconsciously'" is present and unacceptable.

(*Id*., quoting *Howitt*, 3 Cal.App.4th at 1585.)

The State Water Resources Control Board imposes a strict separation between the members of the prosecution and advisory teams:

> The hearing officer and the other [State] Board members treat the enforcement team "like any other party." Agency employees assigned to the enforcement team are screened from inappropriate contact with Board members and other agency staff through strict application of the state Administrative Procedure Act's rules governing ex parte communications. (Gov. Code, § 11430.10 et seq.) "In addition, there is a physical separation of offices, support staff, computers, printers, telephones, facsimile machines, copying machines, and

> rest rooms between the hearing officer and the enforcement team (as well as the hearing team)," according to the Whitney declaration.

(*Morongo*, 45 Cal.4th at 735-736.)

Here, functions were not separated because the prosecution team ruled on the substantive legal issues. If functions had been property separated, the rulings would have been made by the Board or its advisory team. In fact, the advisory team ruled on some of the *procedural* legal issues, such as how much time counsel for Mr. Sweeney would have at the hearing. But it did not rule on any of the substantive legal issues. The Regional Board adopted the position taken by the prosecution team on the substantive legal issues, without providing for argument by both sides on those issues, and without any consideration, tentative ruling, or final ruling on those issues. By relying on the prosecution team for determination of the substantive legal issues, the Regional Board violated the requirement for separation of functions.

By refusing to rule on the substantive legal issues, the Regional Board also violated the California Administrative Procedure Act, which requires that a "decision shall be in writing, be based on the record, and include a statement of the factual and legal basis of the decision". (Gov. Code § 11425.10(a)(8).) The Penalty Order does not include a proper statement of the legal basis of the decision, because it does not consider or rule on any of the substantive legal issues.

Functions were also not separated, and the prohibition on ex parte communications not enforced, because Mr. Wolfe moved back and forth between the two teams, or at the very least engaged in ex parte communications. Mr. Wolfe issued the 2015 Order in September 2015. At that time, he was either acting as a member of the prosecution team, or as a member of the advisory team who engaged in ex parte communications with the prosecution team—internal discussions about the issuance of the 2105 Order was conducted behind closed doors, without any notice to or participation of Mr. Sweeney.

Despite his role in the issuance of the order, Mr. Wolfe was identified as part of the advisory team in the initial hearing notice. Mr. Sweeney objected to his participation on the grounds that separation of functions must be maintained, and that ex parte communications are prohibited. (Bazel Decl., ex. A (specifically Bazel Decl., ex. 38 at 6, ex. 40 in that proceeding).) The advisory team

granted this request and removed him from the advisory team, although it later claimed that he was not disqualified.

Mr. Wolfe nevertheless has been designated as the person who signs and issues the Abatement Order and Penalty Order, and who evaluates submissions to determine compliance. Because he has crossed over or held ex parte communications, separation of functions has not been maintained, and there has not been a trial is that is both fair and appears to be fair. (See cases cited above.)

B. Due Process Is Violated Because The Trial Was Biased Or Appeared To Be Biased

A trial must not only be fair; it must appear to be fair. The same applies to adjudicatory proceedings. (*See Morongo*, 45 Cal.4th 731, and cases it cites.) Here, Mr. Sweeney did not receive a fair trial because the "totality of the circumstances" created an unreasonable risk of bias.

The impression of bias was created, first and foremost, by the Regional Board's preferential treatment of the prosecution team. The prosecution team *was not* treated "like any other party". (*See Morongo,* quoted above.) Instead, the Regional Board treated the prosecution team like its own staff, which indeed they are. As discussed above, the legal positions taken by the prosecution team were taken as correct legal determinations, rather than as the disputed arguments of a party. Factual statements made by the prosecution team were also assumed to be true, and were not challenged by Board members. The burden was placed on Mr. Sweeney to disprove the assertions of the prosecution team, rather than on the prosecution team to prove their case.

The impression of bias was exacerbated by the advisory team's rulings on Mr. McGrath, who engaged in ex parte communications. He initially engaged in ex parte communications hostile to Mr. Sweeney. He accused Mr. Sweeney of lying, even though a transcript of the proceeding at issue showed that Mr. Sweeney was accurately characterizing the events, and did not object when an interested party offered to go to act on his behalf. Mr. Sweeney requested that he be recused. (Request For Recusal.) The advisory team denied this request. And yet, the very next day, when Mr. McGrath said something favorable to Mr. Sweeney—that the penalty was too high—he was immediately recused. A reasonable observer would conclude that the advisory team was biased when it refused to recuse for serious due-process offenses (including hostile statements towards a

party, falsely accusing that party of lying, and allowing an interested party to act on his behalf) but nevertheless instantly recused for the relatively benign offense of having expressed his thoughts to the prosecution team.

The impression of bias was solidified by the Regional Board's reliance on a Dr. Siegel, a consultant it knew had a personal dispute with Mr. Sweeney. Most of the evidence against Mr. Sweeney, including the evidence about jurisdiction, comes from Dr. Siegel.

Mr. Sweeney has publicly accused Dr. Siegel, the principal author of the Technical Report, of scientific and criminal misconduct. As a result, Dr. Siegel was in no position to provide a dispassionate assessment of Mr. Sweeney.

On May 14, 2015, Dr. Siegel e-mailed several people and asserted that "dealing with Sweeney" was a "HIGH RISK situation". (Sweeney Decl., ex. 11.) And yet a mere 16 minutes later Dr. Siegel e-mailed Mr. Sweeney and made a pitch to be hired by him. (*Id*., ex. 12.) Dr. Siegel bragged that "BCDC will accept my work whatever its findings are." (*Id*.) Mr. Sweeney declined Dr. Siegel's solicitation. (*Id*., ¶ 45.)

In 2004, Dr. Siegel's firm produced a map entitled "Suisun Tidal Wetland Restoration Projects". (Sweeney Decl., ex. 13.) On that map, Point Buckler (identified as "Taylor #801") is identified as a "Completed Project", as are several other locations. (*Id*.) But there never was any "restoration project" at Point Buckler. No one now disputes that the map is wrong.

Many agencies relied on this map. For example, the San Francisco Estuary Institute incorporated the information into its EcoAtlas wetland map and database. (Sweeney Decl., ex. 14). Surprisingly, the EcoAtlas asserts not only that the project status was "Construction completed", but it refers to a "Permit-USACE", i.e. a 404 permit from the Corps. (*Id*. at 2.) But, as the aerial photographs in the Technical Report show, in the years preceding 2004 there never was a project, and there never was construction. And there never was any permit from the Corps of Engineers for a restoration project on Point Buckler.

When the Club brought these errors to the attention of the San Francisco Estuary Institute, the agency conducted an internal investigation and determined that there were no records to support the conclusions in Dr. Siegel's map, and it removed the incorrect information from its database.

(Sweeney Decl., ex. 15). Even Dr. Siegel concedes that the 2004 map is wrong. The Technical Report includes a revised version of the map, in which Point Buckler and several of the other locations are identified as having had "natural" restoration when levee breaches were left unrepaired, rather than completed construction projects. (Technical Report, fig. 1.)

Mr. Sweeney believes that the errors in the 2004 map were intentional, and has made that belief known publicly. (Sweeney Decl., ¶ 49.) Mr. Sweeney believes that the incorrect statements about completed projects were intentionally false representations made to secure grants. The FBI is now investigating these claims.

In February 2016, counsel for Mr. Sweeney asked the prosecution team not to use Dr. Siegel when they inspected the island. (Bazel Decl., ex. 38.) Counsel reported on the 2004 map, on the rejection of Dr. Siegel as a consultant, and on Dr. Siegel's characterization of Mr. Sweeney as a "HIGH RISK situation".

The prosecution team initially agreed not to bring Dr. Siegel when they inspected the island. Nevertheless, for whatever reason, they brought him to the island and made him the lead consultant on this matter.

A scientist accused of scientific fraud is not in the best position to provide a cool-headed and impartial assessment of his accuser. Again and again, the Technical Report endeavors to reach conclusions unfavorable to Mr. Sweeney, and ignores evidence that favors him. Particularly noteworthy are the efforts made to justify a high-tide line of 8.2 feet while ignoring the obvious white high-tide line at roughly three feet lower elevation, and the efforts to conclude that the entire island was subject to daily inundation, when the aerial photographs show no sign of it. (See discussion below.)

On the issue of whether the Club Plan is still in effect, the Technical Report relies on the legal analysis of Dr. Siegel, who is not a lawyer. Allowing Dr. Siegel to provide legal analysis adds to the unfairness and bias in the Technical Report.

Because the Regional Board did not provide a hearing that was free from the appearance of bias, the Penalty Order should be rescinded.

XII. THE REGIONAL BOARD MISINTERPRETED THE CLEAN WATER ACT AND PORTER-COLOGNE ACT

A. The Regional Board Miscounted The Alleged Violations

The prosecution team argued that "[d]ays of violation include both days the discharge occurred, and the days in which the discharge remained in place." (Staff Summary Report at 3, citing *United States v. Cumberland Farms of Connecticut, Inc*. (1986) 647 F.Supp. 1166, which cited *United States v. Tull* (1983) 615 F.Supp. 610.) More recent cases, however, make clear that this assertion is no longer good law.

The Clean Water Act prohibits the "discharge of any pollutant," "[e]xcept in compliance with" the act. (Clean Water Act § 301(a), 33 U.S.C. § 1311(a).) The act defines "discharge of a pollutant" in terms of the *addition* of a pollutant: "any addition of any pollutant to navigable waters from any point source." (Clean Water Act § 502(12)(A), 33 U.S.C. § 1362(12)(A).) As a result, there cannot be a violation of the Clean Water Act unless there is an *addition* of a pollutant.

The U.S. Supreme Court has made clear that the mere movement of a pollutant within the navigable waters *is not* an addition:

> [I]f [two locations] are simply two parts of the same water body, pumping water from one into the other cannot constitute an "addition" of pollutants. As the Second Circuit put it in *Trout Unlimited*, "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot."

(*S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians* (2004) 541 U.S. 95, 109, last set of square brackets in original.) In *Los Angeles County Flood Control District*, the Supreme Court affirmed and extended this concept:

> We granted certiorari on the following question: Under the CWA [i.e. the Clean Water Act], does a "discharge of pollutants" occur when polluted water "flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river," and then "into a lower portion of the same river"? …the parties, as well as the United States as amicus curiae, agree that the answer to this question is "no."
>
> That agreement is hardly surprising, for we held in Miccosukee that the transfer of polluted water between "two parts of the same water body" does not constitute a discharge of pollutants under the CWA. We derived that determination from the CWA's text, which defines the term "discharge of a pollutant" to mean "any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12) (emphasis added). Under a common understanding of the meaning of

> the word "add," no pollutants are "added" to a water body when water is merely transferred between different portions of that water body. *See* Webster's Third New International Dictionary 24 (2002) ("add" means "to join, annex, or unite (as one thing to another) so as to bring about an increase (as in number, size, or importance) or so as to form one aggregate"). ….
>
> In Miccosukee, polluted water was removed from a canal, transported through a pump station, and then deposited into a nearby reservoir. We held that this water transfer would count as a discharge of pollutants under the CWA only if the canal and the reservoir were "meaningfully distinct water bodies." It follows, a fortiori, from Miccosukee that no discharge of pollutants occurs when water, rather than being removed and then returned to a water body, simply flows from one portion of the water body to another. We hold, therefore, that the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA.

(*L.A. County Flood Control Dist. v. NRDC, Inc.* (2013) 133 S.Ct. 710, 712-713, citations omitted.) In other words, the *movement* of a pollutant within a body of water is not an "addition", and therefore not a violation of the Clean Water Act. It necessarily follows that the *non-movement* of a pollutant that merely says in the same place within a body of water cannot be an addition, and therefore not a violation of the Clean Water Act.

The *Tull* case, which the prosecution team (and other older cases) relied on, was examined and distinguished in the recent *Rutherford* case. (*United States v. Rutherford Oil Corp*. (S.D.Tex. 2010) 756 F.Supp.2d 782.) As *Rutherford* concluded, "[o]nce the violator stops adding a pollutant in violation of a permit, the violation itself is over":

> "Addition" can mean either "the act or process of adding" or "the result of adding." Webster's Ninth New Collegiate Dictionary 55 (1990). Section 1311(a)'s use of the phrase "in compliance with" and the placement of "by any person" behind the word "discharge" points toward the former definition, which indicates a discrete action, instead of the result of that action. Ordinarily, one speaks of an action done "by a person," "in compliance with" rules. This ordinary meaning is dispositive. *Once the violator stops adding a pollutant in violation of a permit, the violation itself is over.* What remains are the effects of the violation, but absent a continuing obligation that is itself violated, the effects are not themselves violations. A discharge in violation of the obligation at issue under § 1311(a) is not a continuing violation on the basis that the discharger fails to remedy its effects.

(*Id*. at 790-792, emphasis added, citations omitted; *see also Friends of Warm Mineral Springs, Inc. v. McCarthy* (M.D.Fla. May 8, 2015, No. 8:13-cv-3236-T-23TGW) 2015 U.S. Dist. LEXIS 60601, at *9 (citing *Rutherford* with approval and distinguishing *Tull* and similar cases.)

Because "the days in which the discharge remained in place" are not violations of the Clean Water Act, they are not violation of Water Code § 13385.

The prosecution team asserts that Mr. Sweeney worked on the levee repair for about five to six months, from March to September 2014. Mr. Sweeney generally worked five days a week, although he took a month off. (Sweeney Decl., ¶ 26.) Five to six months is about 20-26 weeks. That figure, multiplied by five days per week, produces a total of about 100-130 days. Because this is a penalty proceeding, any uncertainty should be interpreted in favor of Mr. Sweeney, and the figure of 100 days should be used, rather than the figure of 887 days the prosecution team used in Appendix A (App. A at A5) or the 1013 days used in the Staff Summary Report (Summary Report at 3). This correction alone reduces the initial "per day" liability (which makes up about one third of the total initial liability) by almost $3 million:

	Initial "Per Day" Liability	Percent of Initial "Per Day" Liability
Staff Summary Report	$3.1 million	100%
Appendix A	$2.7 million	88%
Corrected	$0.3 million	10%

The prosecution team's calculation of the initial liability was therefore much too high—many millions of dollars too high.

Because the Penalty Order is based on a false premise—that each day the dirt remains in place is a new violation—it should be rescinded.

B. There Is Not Violation Of Section 401

Section 401 of the Clean Water Act requires "[a]ny applicant for a Federal license or permit to conduct any activity…which may result in a discharge into the navigable waters" to provide a "certification from the State" to the agency permitting that discharge. Here, Mr. Sweeney is not an applicant for a federal license or permit. The section therefore does not apply to him.

Also worth noting is the fact that any failure to provide that certification is not a violation of the Clean Water Act. Section 301(a) specifies what a violation of the act is:

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(33 USC § 1311(a).) Noticeably absent from this prohibition is section 401 (33 USC § 1341). As a result, any failure by the Club to request a 401 certification would not be a violation of the Clean Water Act.

The reasoning of Congress is clear. If the applicant does not submit a section 401 certification, the applicant never gets an NPDES permit. There is no harm to the environment from not requesting a certification, and as a result there is no reason to penalize any failure to request a certification.

Here, the prosecution team alleged that Mr. Sweeney "failed to obtain a 401 Certification". (Complaint, ¶ 57.) Because he was not an applicant, he has not violated section 401 of the Clean Water Act. Because he has not violated section 401, he has not violated Water Code § 13385(a)(5), as alleged by the prosecution team. (Complaint, ¶ 63.)

Because the Penalty Order was based on a false premise—that Mr. Sweeney violated section 401—it should be rescinded.

C. The Basin Plan Does Not Prohibit Levee Repairs

The prosecution team alleged that Mr. Sweeney violated the Water Code § 13385(a)(4) "for violating Basin Plan Discharge Prohibition No. 9". (Complaint, ¶ 63.) But the Water Code cannot fairly be interpreted as having been violated, consistent with the rule of lenity (discussed below).

Prohibition No. 9 prohibits the discharge of "Silt, sand, clay, or other earthen materials from any activity in quantities sufficient to cause deleterious bottom deposits…." As the Basin Plan explains, "[t]he intent of this prohibition is to prevent damage to the aquatic biota by bottom deposits which can smother non-motile life forms, destroy spawning areas, and, if putrescible, can locally deplete dissolved oxygen and cause odors."

Here the levee repair cannot legitimately be characterized as "deleterious bottom deposits", even though a small amount of material was placed in the breaches. There is no evidence that the levee repair was deleterious to any benthic organisms or anything else on the bottom in those

breaches, where water undoubtedly moved rapidly and swept the bottom clean of anything that could be swept away by the tidal flows. There is no assertion of any spawning areas *in the breaches*. As a result, the prohibition does not apply.

D. The Reference To "Gallons" Does Not Apply To Dirt

The Water Code imposes a penalty for "gallons" discharged but not cleaned up. (Water Code § 13385(c)(2).) But "gallons" is not normally used to refer to dirt, and there is no indication that the Legislature intended it to refer to dirt. As a result, the statute should be interpreted, in this penalty proceeding, *not* to apply to dirt.

Because the Penalty Order is based on these false premises and misinterpretations of the Clean Water Act and Porter-Cologne Act, it should be rescinded.

XIII. THE REGIONAL BOARD WAS UNCONSTITUTIONALLY VINDICTIVE

A. The Penalty Commits Retaliation In Violation Of The First Amendment

To bring a First Amendment retaliation claim, a person must allege that:

> (1) it engaged in constitutionally protected activity; (2) the defendant's actions would "chill a person of ordinary firmness" from continuing to engage in the protected activity; and (3) the protected activity was a substantial motivating factor in the defendant's conduct—i.e., that there was a nexus between the defendant's actions and an intent to chill speech.

(*Ariz. Students' Ass'n v. Ariz. Bd. of Regents* (9th Cir. 2016) 824 F.3d 858, 867, citations omitted.) All three elements are met here.

The first element is satisfied because Mr. Sweeney engaged in speech and conduct protected by the First Amendment. In December 2015 he filed suit against the Regional Board and its staff alleging that staff violated his Constitutional due process rights. (Bazel Decl., ex. 13.) Beginning in 2015, Mr. Sweeney also met with journalists and reporters who published Sweeney's opinions, many of which were critical of the Regional Board. (Sweeney Decl., ¶ 40.) These activities are protected by the First Amendment.

The second element is satisfied because the Regional Board imposed a penalty of $2.828 million, which Mr. Sweeney cannot pay and takes away everything Mr. Sweeney has. The threat of losing everything would chill a person of ordinary firmness from continuing to speak out

and assert his Constitutional rights. (*See Bd. of Cty. Comm'rs v. Umbehr* (1996) 518 U.S. 668, 674 (government impermissibly interferes with speech by threatening or causing pecuniary harm).)

The third element—a nexus between the agency actions and an intent to chill speech—is established by the sequence of events and the magnitude of the penalties demanded. Before Mr. Sweeney filed his suit, there was no threat of penalties, by either the prosecution team or BCDC, for the repair of the levee. (Bazel Decl., ¶ 37; Sweeney Decl., ¶ 41.) Afterwards, the prosecution team demanded $4.6 million penalties, and BCDC staff demand nearly an additional million.

This change from no penalties to penalties began immediately after Mr. Sweeney succeeded in obtaining a stay from the Solano Superior Court, which agreed that the prosecution team had not complied with the requirements of due process. On January 4, Dyan Whyte, the Assistant Executive Officer, asked Mr. Wolfe to rescind the Initial Order. (Bazel Decl., ex. 16.) On January 5, he did. (*Id*., ex. 17.) On January 7, Ms. Whyte and five other members of the prosecution team held a three-hour interagency meeting and "expert witness call". (Prosecution team ex. 35.) Although the other agencies are not identified, they must have included BCDC and EPA, who signed a "joint offense" agreement with the prosecution team at that time. (Bazel Decl., ex. 15.)

The prosecution team's experts produced their technical report on May 12, 2016. Five days later, on May 17, the prosecution team made public their administrative penalty complaint, which asked for a penalty of $4.6 million. Six days after that, BCDC made public its own demand for nearly $1 million in penalties. Both the prosecution team and BCDC relied on the technical report, which had been published only a few days before the penalty complaints were made public.

Plainly, the prosecution team and BCDC decided in early January 2016 that if Mr. Sweeney wanted due process, they would make him suffer.

Moreover, the proposed penalties were the highest ever. (Sweeney Decl., ex. 9.) The prosecution team's proposed penalty of $4.6 million was more than twice as high as the highest penalty imposed during the past ten years. (Bazel Decl., ex. 33.) BCDC's proposed penalty of $952,000 was much higher than the all-time-high BCDC administrative penalty of $220,000. (*Id*., ex. 37.)

The nature of the coordinated attack on Mr. Sweeney was confirmed when, on September 1, 2016 the Corps sent Mr. Sweeney a notice of violation for an issue related to Chipps Island. (Bazel Decl., ¶ 40.) Although the letter was dated September 1, the prosecution team included a copy of that letter as part of its September 2 submission in this penalty proceeding, and BCDC staff provided another copy on September 7 as part of a submission in a different penalty proceeding. (Bazel Decl., ¶ 40.) It is fair to conclude that the letter was coordinated among the prosecution team, BCDC, and EPA so that it would be issued and could be presented as part of the prosecution team's September 2 submission, so that it could be used to characterize Mr. Sweeney as a scofflaw, and so that it would chill his speech and hurt him even more.

This proceeding is also inconsistent with the provisions of the anti-SLAPP law, Code of Civil Procedure § 425.16 et seq., because it persecutes Mr. Sweeney for exercising his Constitutional rights.

The Penalty Order, therefore, was First Amendment retaliation in violation of the Constitution.

B. The Penalty Is Unconstitutionally Vindictive

The "imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be…a violation of due process of law." (*Blackledge v. Perry* (1974) 417 U.S. 21, 25.) The *Blackledge* case "established a presumption of unconstitutional vindictiveness" when a penalty is increased in response to a person's exercise of legal rights. (*Thigpen v. Roberts* (1984) 468 U.S. 27, 30.) It is "patently unconstitutional" to "chill the assertion of constitutional rights by penalizing those who choose to exercise them". (*United States v. Jackson* (1968) 390 U.S. 570, 581.)

Here, there is a presumption of unconstitutional vindictiveness because there was no threat of penalties by either the prosecution team or BCDC staff before Mr. Sweeney filed his suit, and because immediately after Mr. Sweeney obtained a stay from the Solano Superior Court the prosecution team and BCDC staff mobilized to penalize him and make him suffer for his insistence on due process. (See section immediately above.)

The Penalty Order, therefore, is unconstitutionally vindictive.

XIV. THE PENALTY ORDER IS AN EXCESSIVE FINE

A. The Penalty Order Violates The Eighth Amendment's Excessive Fines Clause

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." (*Austin v. United States* (1993) 509 U.S. 602, 609-610, citation and internal quotations omitted.) "[A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as [the U.S. Supreme Court has] come to understand the term." (*Id.* at 621, emphasis in original, citation and internal quotations omitted.)

A fine must be proportional:

> The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the [fine] must bear some relationship to the gravity of the offense that it is designed to punish.

(*United States v. Bajakajian* (1998) 524 U.S. 321, 334.) In *Bajakajian*, the U.S. Supreme Court held that a fine violates the Excessive Fines Clause "if it is grossly disproportional to the gravity of a defendant's offense." (*Id.*) The Court has focused on three criteria: (1) the degree of the defendant's reprehensibility or culpability, (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions, and (3) the sanctions imposed in other cases for comparable misconduct. (*Cooper Indus. v. Leatherman Tool Group, Inc*. (2001) 532 U.S. 424, 435, citations omitted.)

Here, the penalty is grossly disproportional under all three criteria. First, Mr. Sweeney has a low culpability. Second, the prosecution team has not established any relationship between the penalty and damage to the environment. Third, the proposed penalty is disproportionate to other comparable matters.

1. Low Culpability

The prosecution team based its assertions of culpability on events at Chipps Island, where Mr. Sweeney performed an emergency repair to close a levee breach. As the prosecution team

acknowledges, he obtained coverage for that work under the Corps' general permit RGP3. (App. A at A7.) Because the breach could not be closed by the placement of dirt, Mr. Sweeney used a container to close the breach. The Corps issued a notice of violation informing Mr. Sweeney that the use of a container was not allowed; he responded, and the Corps did not follow up. He did not need a 401certification for that work, and the Regional Board did not have any involvement in the matter. At the time, Mr. Sweeney did not even know what a 401 certification was.

The events at Chipps Island, therefore, cannot have put Mr. Sweeney on notice of the need for a 401 certification for the levee repair at Point Buckler. The prosecution team does not argue to the contrary.

The prosecution team asserts that if Mr. Sweeney had coordinated with SRCD and the Corps, "he would have been made aware of other permitting required for the work performed, including a 401 Certification." (App. A at A7-A8.) But history proves otherwise. Neither agency informed Mr. Sweeney of the need for a 401 certification.

Corps staff visited Point Buckler in February 2015 and inspected the levee repair. That staff person did not say to Mr. Sweeney, "You need a 401 cert from the Regional Board." (Sweeney Decl., ¶ 34.) Instead, she said that the levee repair could be covered by RGP3. He filled out the form with her at the island and signed it. She took it with her. He did not hear back from the Corps until spring 2016, when the Corps sent a letter transferring the matter to EPA. (*Id.*)

No 401 certification is needed for coverage under RGP3, because it is a general permit and the Regional Board has already issued a 401 certification. (Bazel Decl., exs. 7, 35.)

The Corps, therefore, did not in fact do what the prosecution team speculates it would have done. It did not advise Mr. Sweeney that he needed a 401 certification. On the contrary, it advised him that the work could be covered by RGP3, which does not need a 401 certification.

The prosecution team asserts that, had he contacted SRCD, SRCD would have told Mr. Sweeney he needed a 401 certification. But in 2011 Mr. Sweeney did contact SRCD about Point Buckler. (Sweeney Decl., ¶ 35.) He was told that Point Buckler was not one of SRCD's active clubs. (*Id.*)

In March 2014, when work on the levee was just beginning, SRCD had an opportunity to notify Mr. Sweeney of the permitting requirement. The Executive Director of SRCD observed the work, understood that the work was a levee repair, and believed that the work needed permitting. He knew Mr. Sweeney, Mr. Sweeney's phone number, and Mr. Sweeney's e-mail address. And yet he did not call Mr. Sweeney, send an e-mail, or stop by and chat. (Sweeney Decl., 35.)

Mr. Sweeney was not required to consult with SRCD; coverage under RGP3 can be obtained directly from the Corps. (Bazel Decl., ex. 35.)

As a result, there was no reason for Mr. Sweeney to consult with SRCD, and SRCD's acts prove that it would not have gone out of its way, even to make a phone call, to notify Mr. Sweeney.

Moreover, when SRCD and BCDC visited Point Buckler in November 2014, after the repair was effectively complete, Mr. Sweeney *was not* told that he needed a 401 certification. On the contrary, BCDC staff told him that his repair would not need a permit as long as it was consistent with the Club Plan.

The prosecution team's culpability argument, therefore, consisted of speculation that was contradicted by undisputed fact.

At the time he began the levee repair, Mr. Sweeney had never heard of the phrase "401 cert", and did not know he needed a permit. He contacted SRCD and BCDC and received incorrect information that must have resulted from confusion. He obtained a lease from the State Lands Commission, and was not told that he needed any approval from the Regional Board.

Because RGP3 does not require a 401 certification, duck clubs rarely if ever a need to obtain a 401 certification. The prosecution team has not identified even a single 401 certification issued to a duck club. In these circumstances, when the Regional Board is not present and other agencies make incorrect statements, Mr. Sweeney's lack of knowledge cannot reasonably be considered to be culpability.

2. No Relationship Between Penalty And Harm

The prosecution team did not contend that the penalty is based on cost to remediate the alleged harm to the environment, and the Regional Board did not impose the penalty based on considerations such as cleanup cost or other measures of compensability.

Although harm is a factor used in the penalty consideration, it is merely an adjustment that increases or decreases the penalty. The penalty is not based on any calculation of remedial cost, loss of use, or any economic assessment of harm.

3. Disproportionate To Other Comparable Matters.

The penalty here is quite unlike other comparable matters. For a start, the penalty is much higher than penalties imposed for real environmental harms, like raw-sewage discharges and oil spills. As discussed above, the highest penalty imposed by the Regional Board in the last ten years was $1.9 million—substantially less than the $2.828 million imposed here. That case, the Cedar Knolls winery matter, involved the placement of fill, as this one dose. Of the $1.9 million penalty assessed in that case, only $85,000 was due within 30 days as a penalty. An additional $1,742,000 was suspended as long as Cedar Knolls completed an approved restoration work plan, which was "to reconstruct, revegetate, restore and remediate the two wetlands and associated waters that were disturbed". The remaining $100,000 was suspended as long as Cedar Knolls completed the work in a temporal loss mitigation and monitoring work plan, which would provide "compensatory habitat to mitigate the temporal impacts" to wetland habitat. In other words, Cedar Knolls had to pay an $85,000 penalty, and to spend money on restoring wetlands. Here Mr. Sweeney is required to spend money, perhaps even more money, on restoration and mitigation, and in addition has to pay $2.828 million—more than 30 times as much as the real Cedar Knolls penalty.

Moreover, the Cedar Knolls case was unusual. There have apparently been no penalties of any sort imposed on Suisun Marsh duck clubs by the Regional Board.

The penalty imposed here is therefore grossly disproportionate to the penalty, or lack of penalty, imposed by the Regional Board in comparable cases.

The penalty here is therefore grossly disproportional to the gravity of the alleged offense, and a violation of the Excessive Penalties clause.

B. Safeguards Applicable To Criminal Prosecutions Should Be Applied

Even where a legislature has identified a penalty as civil, a statutory scheme can be so punitive in purpose or effect that it is transformed into a criminal penalty. (*Hudson v. United States* (1997) 522 U.S. 93, 99.) The U.S. Supreme Court, in the *Mendoza-Martinez* case, established tests

for determining whether a penalty is criminal in effect. (*Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144, 169.) Two of these tests confirm that the proposed sanction is criminal.

First, the proposed punishment "promotes the traditional aims of criminal punishment—retribution and deterrence." (*See id*. (describing the retribution and deterrence as a test for whether a penalty is criminal in effect).) The prosecution team proposed the penalty for reasons of revenge and retribution, and the Regional Board imposed the penalty for those reasons. The prosecution team has made no effort to calculate any actual damage to the environment. Nor does the enforcement policy provide any method for quantifying tangible environmental damage. As a result, the penalties are not compensatory, but punitive.

Second, the proposed punishment is excessive. (*See Mendoza-Martinez*, 372 U.S. at 169.) It lacks any relation to environmental injury, and is designed to destroy Mr. Sweeney and take away everything he has. The prosecution team initially calculated Mr. Sweeney's net worth at $4.2 million, and demanded a penalty of $4.6 million. After BCDC imposed a penalty, the prosecution team falsely inflated its calculation of Mr. Sweeney's net worth to justify the proposed $4.6 million penalty.

In the Clean Water Act, Congress limited the administrative penalties to a maximum of $125,000. Although the Porter-Cologne Act does not set a maximum for administrative penalties, it should be interpreted as prohibiting penalties that are substantially higher than the Clean Water Act. After all, this section of the Porter-Cologne Act was designed to make provisions of the Water Code consistent with the Clean Water Act, and to provide penalties consistent with the Clean Water Act. (*E.g.* Water Code §§ 13370, 13372, 13385.) The Legislature could not have intended to give the Regional Board powers so onerous that it could deprive a person of everything he owns without the protections of judicial procedure, including the protections afforded to criminal defendants.

When a proceeding is criminal in nature, the procedural safeguards guaranteed by the Fifth and Sixth Amendments apply. (*Mendoza-Martinez*, 372 U.S. at 168.) Every procedural safeguard afforded to criminal defendants should also have been afforded here, including a jury trial and proof beyond a reasonable doubt.

Because these procedures were not implemented, no penalty should have been imposed.

C. Due Process Requires A Heightened Burden Of Proof

The U.S. Supreme Court has "explicitly [held] that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship*, 397 U.S. 358, 364 (1970).) Because this proceeding is criminal in effect, the beyond-a-reasonable-doubt standard applies and the prosecution team should have proved each fact of its case beyond a reasonable doubt.

Instead, the prosecution team produced only the most flimsy evidence in support of many of its claims, including the claim that Mr. Sweeney dried the island out, that the levee repair resulted in a mass dieoff of plants, and that there was "likely" harm to endangered fish. The prosecution team did not produce substantial evidence even that the Regional Board has jurisdiction over most of the levee repair, which was on ground that was high and dry and not clearly below the high-tide line.

This evidence does not meet the standard of proof beyond a reasonable doubt.

The U.S. Supreme Court requires proof by "clear and convincing evidence" when the individual interests at stake in a state proceeding are "particularly important". (*Addington v. Texas* (1979) 441 U.S. 418, 424.) At stake here is everything Mr. Sweeney has, because the Regional Board has taken it all away. As a result, the clear-and-convincing standard should have been applied even if the beyond-a-reasonable-doubt standard was not applied.

The prosecution team's evidence does not meet the clear-and-convincing standard either.

As a result, no penalty should have been imposed.

D. The Rule Of Lenity Applies

The U.S. Supreme Court has established that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity". (*United States v. Bass* (1971) 404 U.S. 336, 347, citations omitted.) The rule of lenity applies to actions for civil penalties. (*See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (for statute with both civil and criminal penalties, "whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies").)

Here, the Porter-Cologne Act contains both civil and criminal penalties. (Cal. Water Code §§ 13385 (civil penalties), 13387 (criminal penalties).) Thus, in accordance with *Leocal v. Ashcroft*,

the rule of lenity applies here whether the matter is termed criminal, quasi-criminal, civil, or administrative.

Because the Regional Board imposed an excessive fine, and because it did not comply with procedural requirements applicable to criminal penalties, the Penalty Order is invalid.

XV. FACTUAL DETERMINATIONS ARE NOT SUPPORTED BY THE EVIDENCE

On the key factual issues, the prosecution team's evidence was nonexistent, thin, speculative, or just plain wrong. The prosecution team was wrong when it asserted that the island was subject to daily inundation, a point the team now concedes. The prosecution team continues to be wrong about the effect of the levee repair on vegetation on the island. They present only speculative evidence about harm to endangered fish. And they have not established that the Regional Board has jurisdiction over most of the levee repair.

A. The Island Was Not Subject To Tidal Inundation

As explained above, the island was not subject to daily inundation by the tides. The island was not "tidal marsh", because tidal marshes are subject to *daily* inundation by the tides—as explained by the Suisun Marsh Preservation Plan, the legislatively approved plan for protecting Suisun Marsh. The island was not subject to daily tidal inundation, except for the channels and ditches.

The prosecution team conceded this point. In the Technical Report, a figure shows that the entire island is subject to daily tidal inflows. In response to Mr. Sweeney's comments on the 2016 Abatement Order, however, the prosecution team revised the figure so that it shows daily tidal inundation only in the channels and ditches.

The prosecution team continued to insist that island was tidal marsh. It argued that even plants above the high tide line, and therefore not subject to daily tidal inundation, could be tidal marsh. But the Suisun Marsh Protection Plan provides the applicable definition of "tidal marsh" for legal purposes, and Point Buckler does not meet its definition because there is no daily inundation of the island.

B. There Was No Mass Dieoff Of Vegetation

The prosecution team insists that there was a "mass dieoff" of vegetation on the island. (CAO, ¶ 62.) Mr. Sweeney's expert, Dr. Terry Huffman, has considered this assertion and concluded that it is false. His declaration explains his investigation of vegetation on the island and his conclusions. (Declaration of Terry Huffman.)

The photographs taken in May 2016 directly disprove the assertion of mass dieoff. They show that the island was green with lush vegetation. (Sweeney Decl., ex. 3.)

The prosecution team's principal consultant conceded at least part of this point. Dr. Siegel agreed that the aboveground part of the plants on the island die off seasonally—the technical term, he says, is "senescent"—and that they grow back seasonally. (Bazel Decl., ex 4 at 86-88.) He also agreed that these types of vegetation behave the same way regardless of whether they are inside or outside a levee. (*Id*.) Aerial photographs show the island routinely turned brown—very brown—before the levee was repaired. In May 2016, after a relatively wet winter, the island turned green.

The Technical Report's assertion of mass dieoff appears to have been based on observations made during the one day in March 2016 that the prosecution team's consultants were on the island. Those consultants apparently observed, on that single day, that vegetation outside the levees was sending out new shoots, whereas vegetation inside the levee was not. But that one day of observation did not and could not determine whether these senescent plants would grow new shoots a few days or weeks later. By May, they were lush with vegetation.

The prosecution team has also asserted that the island is now dominated by pepperweed, an invasive species. (CAO, ¶ 62.) That statement is not accurate. Some pepperweed plants are present on the island, but they are not dominant. They appear to have been there before the levee repair, as determined by aerial photographs.

C. The Evidence Does Not Establish Any Harm To Endangered Fish

The prosecution team did not submit any evidence of actual harm to endangered species. It contended only that there was "likely" harm. (CAO, ¶ 66 ("likely prevented…young salmonids from accessing feeding grounds"), ¶ 67 ("likely prevented…the export of food materials"), ¶ 68 ("likely prevented…longfin smelt from accessing spawning grounds"). The prosecution team has

presented no evidence that young salmonids actually used Point Buckler, that the export of food materials was eaten by any endangered fish, or that longfin smelt used the island for spawning.

Mr. Sweeney's expert, Dr. David Mayer, reviewed the evidence and concluded that the prosecution team's assertions rely on an unwarranted assumption: that predation is of no significance. (Declaration of David Mayer.) As Dr. Mayer explained, predation is quite significant to the survival of the endangered fish at issue. The prosecution team's consultants have not considered the harm that could have come to endangered fish when the channels were open.

In other words, the prosecution team assumes that the channels at Point Buckler provided only benefits to endangered fish. It would be easy to conclude, if the channels truly provided only benefits, then it is "likely" that harm was created by taking away those benefits. But this assumption is false. If the channels attracted endangered fish, they undoubtedly attracted predators. Because the prosecution team does not have enough information about predation—they have provide none—they cannot determine whether on balance the channels were beneficial or harmful to the endangered fish.

D. The Prosecution Team Has Not Established Jurisdiction

The Staff Summary Report did not specifically present any evidence on jurisdiction. To the extent it relied on the Technical Report and Rebuttal Report prepared by the team's consultants, the showing was inadequate.

The assertion of jurisdiction depends entirely on the location of the "high tide line". The prosecution team's consultants calculated the high tide line in two ways.

First, they looked at the debris line, or "wrack" line, on the island. The Corps specifies that the high tide line "may be determined…by…a more or less continuous deposit of…debris". (33 CFR § 328.3(c)(7).) Aerial photographs of Point Buckler show that there is a distinct debris line *at the edge* of the island, and that this debris line has been there since at least 1958 (Technical Report, figs. A-2 through A-25, D-1 through D-36.) This debris line is made up of light-colored floatable materials like wood and vegetation. (Sweeney Decl., ex. 10.)

The aerial photographs show that most of the levee repair was inland from the debris line. (Technical Report, figs. D-15 through D.25.) It was therefore *above* the high-tide line, and outside of the Regional Board's jurisdiction.

The prosecution team relied on bits of lightweight vegetation, no doubt thrown up high on the levee by wave and wind action, to mark the wrack line. (Technical Report.) And from this information concluded that the high tide line was at a level in which the entire island would have routinely been flooded.

This conclusion is disproven by the absence of any debris or wrack in the interior of the island. The prosecution team's consultants did not identify any. Dr. Huffman specifically looked for debris in the interior, and found none. (Huffman Decl., ¶ 17.) Because there is no evidence of any debris at or inside most of the levee, the debris-line method confirms that most of the levee is above the high tide line, and therefore outside Regional Board jurisdiction.

Second, the prosecution team used historical water-elevation data collected by the U.S. National Oceanic and Atmospheric Administration ("NOAA") at Port Chicago, California. But the prosecution team did not relate the data from Port Chicago to Point Buckler using a scientifically sufficient method.

The prosecution team should have installed a tide gage at Point Buckler for at least a few weeks, surveyed the elevation of the water measured by the tide gage, compared the tide graphs from that tide gage to those at Port Chicago, and identified the relationship between the two. (*See* Huffman Decl., ¶ 27.) But the prosecution team did not install a tide gage.

Instead, their consultant tried to relate the measurements using a single observation of a wet board at Point Buckler. (Technical Report, App. I.) That single observation showed, according to the prosecution team's consultants, that high tide at Point Buckler was 0.3 feet higher than at Port Chicago. But the consultants, when using the "wet-board method", did not determine the elevation *of the water* at Point Buckler. Instead, it determined the elevation of the top of the wetted area of the board. This method produces an elevation approximately 9 inches higher than the actual water elevation. (Huffman Decl., ¶ 26.) The conversion factor used by the prosecution team in the Technical Report is therefore wrong.

In the Rebuttal Report the prosecution team refers to an adjustment factor provided by NOAA, which was calculated in the 1930s. This adjustment factors is no longer correct, because it is much higher than the elevation observed using the "board method". The adjustment factor would

have produced an elevation of about 7.7 feet NAVD88 for the high tide on February 17, 2016. The consultants, using the wet-board method, concluded that the elevation was 7.3 ft. If the actual water level were used, the elevation would have been as low as 6.5 ft.

And even this elevation is suspect, because it does not conform to the water levels observed on the other photograph taken by the prosecution team within a few minutes of the wet-board photograph. (Bazel Decl., ex. 36.) This other photograph shows exposed elevations below 6.0 ft. (*Compare id*. with elevations in Bazel Decl., ex. C (specifically, Bazel Decl., ex. 35 in that proceeding).) The only legitimate scientific conclusion is that the actual high-tide line cannot be determined from Port Chicago at this time because the conversion factor is uncertain.

Before accepting the conclusions about the high tide line and about jurisdiction in either the Technical Report or the Rebuttal Report, the Regional Board should have held a *Daubert* hearing. (*See Daubert v. Merrell Dow Pharmaceuticals* (1993) 509 U.S. 579.)

E. The Penalty Order Harms Wildlife

The prosecution team provided no evidence of harm to waterfowl or any other wildlife. On the contrary, repairing the levee and restoring the duck ponds indisputably would have been a benefit to wildlife.

The beneficial use of Wildlife Habitat is defined to include "the preservation and enhancement of vegetation and prey species used by wildlife, such as waterfowl". (*Id*., ex. 34 at 2-7.) The purpose of the levee was to restore duck ponds, which are extremely beneficial for waterfowl. Waterfowl prefer duck ponds to natural tidal marsh, as explained by the Suisun Marsh Protection Plan—the official blueprint for protecting the marsh—and confirmed by recent scientific studies from USGS. The Penalty Order should have acted to protect the beneficial use of Wildlife Habitat. Instead, it harms wildlife habitat by penalizing Mr. Sweeney, and thereby preventing him from restoring the duck ponds.

XVI. THE REGIONAL BOARD IS ENGAGING IN A PATTERN OF ABUSE

The Regional Board complies with legal requirements only when convenient. Sometimes, there is no authority to support its behavior. For example, it continues to insist that it can issue a cleanup and abatement order without a hearing, even though the Solano Superior Court ruled against

it on this issue, and even though the case it cited for this proposition stands for the exact opposite—a hearing must be held.

A. The Regional Board Violated The Bagley-Keene Open Meeting Act

The Bagley-Keene Act required the penalty hearing to be open, and prohibited the Board from going into closed session. The Board nevertheless went into closed session, citing a provision that allows for closed sessions in adjudications conducted in accordance with Chapter 5 of the Government Code—but not Chapter 4.5. Mr. Sweeney's hearing was conducted in accordance with Chapter 4.5. By going into closed session, the Board violated the Bagley-Keene Act.

B. The Prosecution Team Submitted False Data

The prosecution team initially demanded a penalty of $4.6 million, even though by their own calculation Mr. Sweeney had only $4.2 million in assets. That calculation put a value of $1.2 million on Point Buckler Island, based on the assessment of Brian Elder. After Mr. Sweeney explained that he had no money, and that the value of Point Buckler was grossly overstated, the prosecution team inflated it even more. Mr. Elder opined—as part of the evidence that was improperly submitted with the prosecution team's reply brief—that the value of Point Buckler was actually $3.225 million. Mr. Elder and the prosecution team must have known that this number was nonsense, because at the hearing Mr. Elder reverted to the initial valuation of $1.2 million.

Neither of these numbers acknowledges that the island is subject to the 2016 Abatement Order, which requires restoration of the island, at a cost that could easily exceed $1.2 million. The true value of Point Buckler is undoubtedly negative.

By submitting false data, the prosecution team behaved improperly.

C. The Regional Board Takes Inconsistent Positions On Levee Repair

The Regional Board is not normally involved with levee repairs, which are covered under the Corps general permit RGP3. The Regional Board has issued a 401 certification for RGP3, but does not handle any of the paperwork for RGP3, which is managed by SRCD and the Corps. In order to penalize Mr. Sweeney, Regional Board staff have taken the position that RGP3 covers only levee maintenance, and *does not* cover the repair of breaches in the levee.

And yet, as we write this in January 2017, levees in Suisun Marsh are being breached by the storms and high tides, and duck club owners are scrambling to get emergency repair authorization under RGP3. To the best of our knowledge, the Regional Board is not insisting that RGP3 does not apply to the repair of these breaches, that a 401 certification must be obtained, or that the duck clubs will be penalized if they repair the breaches in their levees.

If the Regional Board did, it would be wrong. The Corps has issued RGP3, and the Corps acknowledges that RGP3 covers repair of levee breaches. The Regional Board is therefore also wrong when it says that RGP3 would not have covered repair of the breaches at Point Buckler.

The point here, however, is not that the Regional Board has taken an incorrect legal position, but that it takes inconsistent positions on the same issue.

D. The Regional Board Is Trying To "Steal" Point Buckler And Other Duck Clubs

Regardless of whether Dr. Siegel committed fraud, there is no doubt that the Regional Board is trying to "steal" Point Buckler and many other duck clubs in the Suisun Marsh. The Regional Board's position is that once a levee is breached, and the interior of the island becomes tidal marsh, the owner cannot use the land without approval from the Regional Board. By asserting control over Point Buckler and other duck clubs, the Regional Board is effectively taking ownership of the land without paying for it. In this sense, the Regional Board is stealing duck clubs.

The Regional Board considers tidal marsh so valuable that it would prefer not to allow the duck club owners to make any use of their land at all. If any uses are approved, the owners will have to provide mitigation—they will have to pay at least $100,000 per acre to use land that is only worth $7,000 per acre. The Regional Board is thereby leaving Point Buckler and the other duck clubs with no economic use of their land. It is taking property without just compensation in violation of the Constitution.

XVII. CONCLUSION

The Penalty Order should be rescinded.

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BRISCOE IVESTER & BAZEL LLP

By: _____
Lawrence Bazel
Attorneys for John D. Sweeney and
Point Buckler Club, LLC