PROSECUTION TEAM'S STAFF SUMMARY REPORT
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R2-2016-1008

INTRODUCTION

Enforcement is a critical element of the Water Board's regulatory framework. It deters violations and encourages the regulated community to anticipate, identify, and correct violations as quickly as possible. Appropriate penalties and other consequences for violations offer some assurances of equity between those who choose to comply with requirements and those who violate them. It also improves public confidence when government is ready, willing, and able to back up its requirements with action.

The upcoming hearing on administrative civil liability complaint R2-2016-1008 (Complaint) follows the issuance of Cleanup and Abatement Order R2-2016-0038 (CAO),[1] which found that John D. Sweeney and Point Buckler Club, LLC, (Dischargers) caused or permitted waste to be discharged or deposited into waters of the State and United States, and created or threatens to create a condition of pollution. These unauthorized discharges included fill into tidal channels and tidal marsh on Point Buckler Island (Site or Island). In the CAO, the San Francisco Bay Regional Water Quality Control Board (Water Board) found that the Dischargers violated the San Francisco Bay Basin Water Quality Control Plan (Basin Plan) and Clean Water Act section 301 (33 U.S.C. 1311). At the December 14, 2016, hearing, the Prosecution Team will be proposing that the Water Board impose a $4,600,000 penalty for these illegal activities. The Prosecution Team has provided evidence to support the factors in the State Water Resources Control Board (State Board) Water Quality Enforcement Policy's penalty methodology, which was used to determine the proposed liability. Attachment to the Complaint (Exhibit A) includes the Prosecution Team's step-by-step analysis of each factor. This Staff Summary Report highlights several of the key components of the penalty methodology.

BACKGROUND

As described in the CAO and at the August 10, 2016, Water Board Hearing, the Site is located in the Sacramento-San Joaquin Delta within the Suisun Marsh, a valuable natural resource of hemispheric importance. The Water Board found that most, if not all, of the Island is below the high tide line, and is jurisdictional under the Clean Water Act (CAO Findings 5-13, 59). Dischargers must obtain a Clean Water Act section 401 water quality certification (401

[1] All references to the CAO are to CAO R2-2016-0038 unless otherwise indicated.

certification) from the Water Board before conducting dredge and fill activities within federal jurisdictional waters. In this case, the Dischargers failed to obtain any permits.

When Mr. Sweeney purchased the Island in 2011, it was fully tidal. Seven breaches in a remnant levee provided daily tidal exchange, and overtopping of the remnant levee and channels provided intermittent exchange between estuarine waters and the Site's interior channels and tidal marsh. By May 19, 2012, Mr. Sweeney started conducting unauthorized construction activities, including excavating trenches on the Island's north and south sides and depositing the spoils onto the Island's tidal marsh.

Aerial photographs and Mr. Sweeney's declarations indicate that he started building the 4,710-foot levee around the Island by March 8, 2014. Mr. Sweeney used heavy machinery to excavate earthen material, creating a substantial borrow ditch, and placed the material on tidal marsh to build up a new levee. He finished building the levee by October 2014, close to the time when he transferred the Site's title to Point Buckler Club, LLC. The levee filled in the seven breaches and created a barrier preventing tidal exchange to the Island's interior channels and marsh. The fill remains in place and continues to harm beneficial uses (Expert Report, Exhibit 11, Appendices G, H, J, P, and Q).

VIOLATION 1: UNAUTHORIZED FILL

The three key factors concerning the unauthorized fill violation are 1) whether the activities were a violation; 2) the number of days of violation; and 3) the quantity of fill involved. This section explains the evidence supporting each of these factors.

A. A VIOLATION OCCURRED.

The Complaint alleges that Mr. Sweeney's placement of fill into waters of the State and United States violated Basin Plan Prohibition No. 9 and Clean Water Act section 301.[2] The Basin Plan is the master policy document the Water Board uses to regulate water quality in the San Francisco Bay region. The Basin Plan contains discharge prohibitions to protect water quality. 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, turbidity or discoloration in surface waters or to unreasonably affect or threaten to affect beneficial uses.

The intent of this prohibition is to prevent bottom deposits from damaging aquatic biota by smothering non-motile life forms and destroying spawning areas.

[2] The Prosecution Team used its discretion in alleging these actions in the alternative instead of as separate violations. If the Board chooses to, it remains within their purview to find these are separate and distinct violations.

Clean Water Act section 301 states, "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344[3] of this title, *the discharge of any pollutant by any person shall be unlawful*" (33 U.S.C. 1311, emphasis added). Clean Water Act section 1362(6) defines the term "pollutant" as "dredged spoil, solid waste, …rock, sand…discharged into water." As previously briefed for the CAO hearing, Water Code section 13050(l) defines pollution as an alteration of the quality of the waters of the State by waste "to a degree which unreasonably affects" either the waters for beneficial uses or the facilities that serve those beneficial uses. The earthen material discharged is a waste because it was caused by and associated with human habitation, and is harmful to the aquatic environment consistent with the definition contained in Water Code section 13050(d). (See also discussion in Prosecution Team's Rebuttal Brief for the CAO hearing, pp. 7-10.)

B. THE VIOLATION HAS OCCURRED FOR 1,013 DAYS AND CONTINUES.

Days of violation include both days the discharge occurred, and the days in which the discharge remained in place. In *United States v. Cumberland Farms of Connecticut, Inc.* (1986) 647 F.Supp. 1166, the United States Army Corps of Engineers asserted Clean Water Act violations against a farmer who was filling, draining, and ditching wetlands. The Court clearly stated fill remaining in wetlands is a violation:

> A day of violation constitutes not only a day in which [Discharger] was actually using a bulldozer or backhoe in the wetland area, but also every day [Discharger] allowed illegal fill material to remain therein.

(*Id*., p. 1183 (citing *U.S. v. Tull,* (1983) 615 F. Supp. 610)).

The Prosecution Team used March 8, 2014[4, 5] as the first day of violation because an aerial photo taken on that day shows that in the southern portion of the Island approximately 1,200 feet of the new levee was constructed, and 1,170 feet of the borrow ditch was excavated by then and the first breach is closed. (Point Buckler Technical Assessment of Current Conditions and Historic Reconstruction Since 1985 technical report (Expert Report, Exhibit 11, Figs. D-15, K-19).[6] Mr. Sweeney stated he finished the work on the levee around the Island in September 2014 (Declaration, p. 2, para. 4, Exhibit 7.a). Aerial photos show that he finished excavating the

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[3] These are a few specific sections from Clean Water Act subchapter III, Standards and Enforcement, and subchapter IV, Permits and Licenses.

[4] Construction likely began before March 8, 2014, however, the aerial photo in Exhibit 11 (Expert Report) Figures D-15 and K-19 is the earliest evidence of levee construction.

[5] Evidence shows that trenches in the north and south portion of the Island were excavated with the fill placed on tidal marsh as early as May 19, 2012 (Exhibit 11, Figures D-1 and K-15). However, the Prosecution Team chose to exercise its discretion and start the days of violation when the levee construction begun since that conduct produced the most significant damage to the beneficial uses.

[6] Figure D-15 is the aerial photo, and Figure K-19 is the photo with text boxes and arrows by Dr. Stuart Siegel.

borrow ditch and constructing the new levee by October 29, 2014 (Expert Report, Exhibit 11, Figures D-25 and K-29). Title to the Island transferred to the Club on October 27, 2014 (Grant Deed, Exhibit 12.c., p. 13). The levee remains in place, closing off all seven breaches and blocking tidal exchange to the Island's interior channels and marsh. The violations continue as long as fill remains in place. As of the date of this submittal, no fill has been removed; in fact, the Dischargers continue to place structural fill on top of the tidal marsh, as described below. By December 14, 2016, the Dischargers will have accrued 1,013 days of violation.

C. DISCHARGERS FILLED TIDAL WATERS.

The levee construction is the primary activity resulting in discharge of fill into waters of the State and United States and the Prosecution Team chose to exercise its discretion in assessing Violation 1 for levee construction only, the primary unauthorized action that resulted in approximately 8,586 cubic yards of fill (1,490,186 gallons) (Expert Report, Exhibit 11, Fig. K-4). However, there were other unauthorized actions by the Dischargers as described below.

- Additional Earthen Fill: Aerial photos document other activities, including the construction of four crescent-shaped ponds, building a ramp to the water's edge on the west end, and building two crossings across the borrow ditch on the east and west end (Expert Report, Exhibit 11, Figs. K-29-K40). These activities resulted in an additional discharge of fill to approximately 0.51 acre of tidal marsh wetland. (Expert Report, Exhibit 11, Fig. K-2).

- Additional Structural Fill: The Dischargers also placed structures, a kind of fill, on tidal wetlands, violating Basin Plan Prohibition No. 9 and Clean Water Act section 301. Aerial photos show that on September 1, 2012, there was no dock off the south-east side of the Island in Andy Mason Slough (Expert Report, Exhibit 11, Figure K-9). On April 2013, there was a small boat dock, about 8 feet by 37 feet (*Id.,* Figure K-11). By February 2014, Mr. Sweeney had expanded it significantly (*Id.*, Table K-4). Fill in tidal wetlands and waters totals approximately 0.17 acre for the old dock placed onto the Island, the new expanded dock, two shipping containers, three trailers, two helicopter pads, three windbreak platforms, two other platforms, and a wood pile[7] (*Id.*).

In total, the unauthorized placement of earthen and structural fill into approximately 3 acres tidal wetlands and waters violates Basin Plan Prohibition No. 9 and Clean Water Act section 301, and is contributing to the ongoing degradation of approximately 27.18 acres of the Site's interior tidal marsh.

[7] Note that approximately 0.18 acre of Astroturf was added to the Island in spring/summer of 2016. This amount of fill was not added to the calculations used for the Complaint or the updated economic benefit analysis contained later in this report.

VIOLATION 2: FAILURE TO OBTAIN 401 CERTIFICATION (PERMIT)

The Water Board regulates dredge and fill activities through the Clean Water Act section 401 water quality certification process. Through this process, the Water Board places conditions on dredge and fill activities to ensure compliance with the Clean Water Act; namely, ensuring protection of beneficial uses and compliance with the Basin Plan's water quality objectives. The 401 certification process dovetails with permits that dischargers must obtain from the Army Corps of Engineers: Clean Water Act section 404 permits to dredge or discharge fill into waters of the United States, and/or Rivers and Harbors Act section 10 permits to build docks or other navigational obstructions in waters of the United States. The Complaint alleges that the Dischargers failed to obtain any of the above authorizations.

The Complaint alleges that from the first date of known construction, May 19, 2012, Mr. Sweeney failed to obtain a 401 certification to dredge and discharge fill material into waters of the United States. The Complaint similarly alleges that the Club failed to obtain 401 certification from the date it took ownership of the Island, October 27, 2014. Both parties have yet to apply for 401 certification.

The Complaint alleges May 19, 2012, as the first day of this violation because an aerial photo taken that day shows two new pilings later used for the dock in Andy Mason Slough, two newly excavated trenches in the north and south with fill placed on adjacent tidal marsh, and a walkway into the water on the north end (Expert Report, Exhibit 11, Fig. K-5). The Complaint and the Expert Report discuss in detail the Dischargers' additional unauthorized activities including: building and expanding the dock, excavating 2.93 acres for the new borrow ditch, trenches, etc.; constructing 4,710 feet of new levee; and filling 3.23 acres across the Island, all of which required 401 certification (*Id.*, Tables K-2, K-3). By December 14, 2016, the Dischargers will have violated the permitting process for 1,671 days.[8]

ADMINISTRATIVE CIVIL LIABILITY ASSESSMENT METHODOLOGY

The Water Board has the authority to impose penalties for these violations through Water Code section 13385. Subdivision (e) requires that the Water Board consider a number of factors, which are included in the Enforcement Policy's methodology. The Enforcement Policy provides guidance to the State and Regional Water Boards to impose fair, firm, and consistent enforcement. Complaint Exhibit A explains how the Prosecution Team applied the methodology to the facts of this case and reached a recommended penalty amount. The Prosecution Team calculated the penalty up through the original date of the hearing, August 10, 2016, when it issued the Complaint. A straightforward application of the methodology resulted

[8] The Complaint Exhibit A describes how the Prosecution Team collapsed days of violation for Violation 2 for the penalty methodology. Applying the same method to December 14, 2016, the days of violation would be 61 for use in calculating the liability amount to impose.

in a penalty amount of **$11,226,468.**[9] In consideration of "Other Factors as Justice May Require," the Prosecution Team reduced the recommended penalty to **$4,600,000**.

The Prosecution Team anticipates that much of the discussion at the hearing will focus on the ability to pay, economic benefit, and culpability factors, each of which is discussed in more detail below. The updated ability to pay analysis considers a recent real estate purchase and potential interest in real estate owned by two limited liability companies related to Chipps Island. The updated economic benefit analysis revises the minimum liability amount.

ABILITY TO PAY – UPDATED ANALYSIS

Water Board staff utilized publicly available resources to conduct a preliminary analysis of the Dischargers' ability to pay or ability to continue in business. The Dischargers currently hold at least three properties under various personal and affiliated business names, with a combined value of over $2.5 million (Westlaw records, Exhibit 34a). The Site is one such property with a county-assessed value of $159,901 (as of 2014). Based on the debt leveraged against the property by Mr. Sweeney and the Club, the actual property value is assumed to be at least $1.2 million (equal to the lien amount) (Deed of Trust, APN 0090-020-010, Solano County, recorded December 9, 2015; Exhibit 12c, pp. 1-5). No additional liens were found on the Site in the public records search and therefore, the property is considered unencumbered for the purposes of this analysis. Debt secured against the property is assumed to retain its value in cash form or land improvements.

A second property (Suisun City) was purchased by the John D. Sweeney trust on July 20, 2016, for $1,125,000 (Exhibit 34a). According to the Solano County filing, a mortgage was obtained for the amount of $805,000, leaving residual ownership equity of $320,000. An additional property, which has been used as the Club's listed address (Pittsburg) is held under the family trust name with an undisclosed assessed value. For the purposes of this analysis, the property value can be assumed to be the sale price of $200,000 (2009). An additional property (Tiburon) was sold on October 20, 2014, for $3,000,000. According to public record, the property may have been encumbered, as three county records noted property liens for $1.2 million in 2005, $159,000 in March 2007, and $100,000 in November 2007. Assuming these loans have been reduced by one-third based on recurring payments, the property was assumed to be leveraged to approximately $975,000, leaving approximately $2.025 million in potential capital gain.

In addition to real estate, Mr. Sweeney also holds title on a 100 foot steel hull vessel, valued at $895,000 based on the listed sales price (Delta Landing Craft Webpage. Accessed May 12, 2016, Exhibit 34a). Additional assets have been identified including heavy construction equipment, additional watercraft, vehicles, and cash accounts; however, these assets were not used in this analysis based on the complexity of ownership and availability of documentation.

[9] When days of violation from August 10 through December 14, 2016 are included, the methodology recommends imposing $11,092,191 for Violation 1, and $741,455 for Violation 2, totaling $11,833,646.

In addition to the real estate assets listed above, twelve parcels were identified under the ownership of SWS Chipps Island, LLC, and Chipps Island Sport & Social Club, both of which Mr. Sweeney has an as yet undetermined ownership interest (Exhibit 34a). A summary of the parcels located in Solano County are listed below:

Assessor's Parcel No.	Lot Size (acres)	Assessed Value (2016/17)
0090-060-020	26.00	$6,292
0090-060-030	61.76	$14,945
0090-060-300	7.99	$1,933
0090-060-310	56.00	$13,552
0090-060-340	44.13	$10,679
0090-060-360	102.74	$129,924
0090-060-380	2.96	$120,279
0090-060-460	125.46	$30,361
0090-060-470	141.32	$34,199
0090-060-480	32.36	$7,831
0090-060-490	40.00	$9,680
0090-060-500	15.06	$3,644
Total	655.78	$383,319

According to the Chipps Island webpage (http://www.chippsisland.com), eight "separately deeded clubs" consisting of the 12 parcels listed above are currently for sale at $18,350,000. No property liens were identified on any of the listed parcels. Because personal and business financial information has not been provided by Mr. Sweeney, it is unknown how much interest Mr. Sweeney has in these properties, and therefore, their values have been excluded from the initial ability to pay analysis.

Based on the information available, the Dischargers have various types of tangible assets that could be used to satisfy penalty payment. The simple analysis described above has revealed potential net assets worth in excess of $4.64 million, excluding Mr. Sweeney's interest in Chipps Island assets. If the Dischargers contest the ability to pay argument, additional financial documents relating to business revenue and assets, and personal asset valuation would be necessary to complete a more complex analysis.

ECONOMIC BENEFIT – UPDATED ANALYSIS

The economic benefit to the Dischargers is used as the minimum liability amount imposed for violations. The Enforcement Policy states that "The Water Boards should not adjust the economic benefit for expenditures by the discharger to abate the effects of the unauthorized conduct or discharge, or the costs to come into or return to compliance." Water Code section 13385(e) specifically states that "at a minimum, liability shall be assessed at a level that

recovers the economic benefits, if any, derived from the acts that constitute the violation." The Enforcement Policy dictates that:

> The adjusted Total Base Liability Amount shall be at least 10 percent higher than the economic benefit amount so that liabilities are not construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violations.

Since the Dischargers have continued to benefit while delaying the hearing on the Complaint, the Prosecution Team has updated its analysis consistent with the new hearing date, December 14, 2016, although it is not expected that the Dischargers will remove the fill by that date. This is a conservative and fair approach. The Water Board may reserve its right to enforce on additional days of violation after December 14, 2016, such as until the date tidal functions are restored at the Island in accordance with the CAO

In updating the economic benefit analysis, the first change proposed by the Prosecution Team was in determining what fees the Dischargers would have been charged had they applied for a 401 certification prior to starting activities. These fees are considered part of avoided costs. This calculation is not intended to imply that the Water Board would have permitted the discharges that did occur, but to simply quantify the cost they would have incurred if they had applied for permits. Board Staff Agnes Farres used the State Water Resources Control Board dredge and fill fee calculator for this analysis (version v9 9/21/2011) as seen in Exhibit 34c.[10] In her fee calculations, Ms. Farres used the assumption that the Dischargers applied for 401 certification immediately prior to beginning discharge activities on May 19, 2012, and included all known activities through December 14, 2016.

Fees are based on two fee categories: Fill and Excavation Discharges, and Channel and Shoreline Discharges. Discharges to linear features such as drainage features and shorelines are assessed under Channel and Shoreline Discharges, with the fee calculated based on discharge length in linear feet. This category includes the Dischargers' activities related to the levee construction and excavation of the borrow ditch. Non-linear discharges are assessed under Fill & Excavation Discharges, with the fee calculated based on the size of the discharge area in acres. This category includes the Dischargers' activities related to discharge of earthen fill in tidal marsh (e.g. four crescent basins, ramp to water's edge on the west end) and discharge of structural fill (e.g. boat dock, shipping containers, helicopter pads).

The fee was calculated as follows:

[10] This is the version of the fee calculator that was in use in May 2012. It is a Microsoft Excel spreadsheet and will be posted on the website at: http://www.waterboards.ca.gov/sanfranciscobay/water_issues/hot_topics/PointBuckler.shtml.

Fill & Excavation Discharges[11]	Discharge Size	Reference
Earthen fill	0.51 acre	Expert Report, Exhibit 11, App. K, Fig. K-2 (fill not related to levee or borrow ditch)
Earthen excavation	0.30 acre	Expert Report, Exhibit 11, App. K, Fig. K-2 (excavation not related to levee or borrow ditch)
Structural fill	0.17 acre	Expert Report, Exhibit 11, App. K, Table K-4
TOTAL	**0.98 acres**	
Channel & Shoreline Discharges		
Levee construction	4,710 ft. (2.55 acre)	Expert Report, Exhibit 11, App. K, Fig. K-4
Borrow ditch construction	4,430 ft. (2.63 acre)	Expert Report, Exhibit 11, App. K, Fig. K-4
TOTAL	**9,140 ft. (5.18 acre)**	

This version of the fee calculator yields a maximum amount of $59,000.

Consistent with the Basin Plan, in authorizing fill to wetlands, the Water Board would have required mitigation to ensure that there will be no net loss of wetland acreage or wetlands functions. In this case, the impacts to waters of the State and United States requiring mitigation are approximately 29.7 acres (Expert Report, Exhibit 11, Fig. 8). In his Declaration in Support of Ex Parte Application in Solano Superior Court, Mr. Sweeney estimated that mitigation banks charge approximately $100,000-200,000 per acre (Inspection Warrant Affidavit, Exhibit 7's Exhibit 3, p. 3).

State Board's Office of Enforcement Economic Expert Bryan Elder prepared the economic benefit analysis in the Complaint and updates for this staff report. Mr. Elder considered the range of $100,000-200,000 per acre of fill in updating his analysis as well as the unpaid permit fees. The economic analysis estimates that the total avoided permitting costs range from $3,029,000 to $5,999,000, depending on the cost of mitigation credits.[12] This cost estimate is based on a 1:1 mitigation ratio (one acre of compensatory mitigation for each acre impacted). This is a minimum estimate and, to comply with the State's No Net Loss Policy, the Water Board would likely have required a higher mitigation ratio to account for factors including temporal

[11] Since issuance of the Complaint, the Dischargers placed approximately 0.18 acres of Astroturf on tidal marsh at the west end of the Island, presumably for kiteboarding operations. This additional structural fill was not used in calculation of permitting fees in the economic benefit analysis for the Complaint.

[12] The analysis does not include additional costs associated with hiring a consultant to properly draft the permit application and implement permit conditions, and costs associated with potential monitoring.

losses; loss of or impacts to special status species and their associated habitats; mitigation located off-site; and out-of-kind mitigation (i.e. creation/restoration of wetlands other than tidal marsh, when impacts are to tidal marsh).

This cost estimate of purchasing mitigation credits is based on Mr. Sweeney's estimated cost, and is consistent with mitigation credit costs at Elsie Gridley Mitigation Bank at a 1:1 mitigation ratio. However, Elsie Gridley Mitigation Bank only has freshwater wetland credits available, which would be out-of-kind mitigation, resulting in an increased mitigation ratio required. Ms. Farres spoke with staff at Elsie Gridley Mitigation Bank and confirmed they would not have sufficient mitigation credits available for purchase. Therefore, the analysis presented here is likely very conservative because it does not consider the higher mitigation ratios that would be required (a 6:1 ratio is not unreasonable for the type of activities that occurred on the Island), and the likely greater cost of mitigation credits if they are even available for purchase elsewhere.

However, since the Water Board adopted a CAO in August with the expectation that the Dischargers will comply, the economic benefit can also be calculated as delayed cost. The BEN financial model provided by the United States Environmental Protection Agency was used to compute the economic benefit of delayed noncompliance. Cost estimates and other assumptions are detailed in the Economic Benefit Analysis tables created by Mr. Elder (August 31, 2016; Exhibit 34b). For computational purposes, the penalty payment date was established as December 14, 2016. Changes to this date will affect the total economic benefit. Based on specific assumptions within the model, the total economic benefit of the failure to obtain permit coverage at the time of construction as a delayed cost ranges from approximately $699,201 to $1,384,783.

Exhibit A to the Complaint contains the rest of the economic benefit analysis that has not changed, including an explanation that the Dischargers likely sold, or will sell, memberships to the Point Buckler Club, LLC for profit in excess of $600,000.

The Dischargers avoided costs associated with proper permitting and appropriate mitigation, and gained financially from illegal land improvements. The total economic benefit is estimated to be between $1,299,201 and $1,984,783 should the Dischargers be able to delay the mitigation costs[13] Using $100,000 as the cost for mitigation credits and considering them *delayed* costs sets the lower range for minimum liability at $1,429,121, which is economic benefit plus 10% consistent with the Enforcement Policy. At this time, it is speculative whether the Dischargers will comply with the CAO. Imposing the recommended penalty of $4,600,000 is consistent with using delayed costs driving the minimum liability of economic benefit plus ten percent instead of using avoided costs.

[13] The Enforcement Policy states that the Water Boards should not adjust the economic benefit when a discharger spends money to abate the effects of the unauthorized discharge/conduct, or the cost to come into compliance (Exhibit 1e., p. 21).

A. CULPABILITY FACTOR

Water Code section 13385 does not require a showing of intent or negligence as a prerequisite to imposing liability.[14] However, the methodology in the Enforcement Policy contains a culpability factor and notes that higher liabilities should result from intentional or negligent violations as opposed to accidents. In this case, the Prosecution Team asserts that Mr. Sweeney was fully aware of the permitting processes in light of his prior unauthorized levee repairs on other islands in the Delta.[15]

Mr. Sweeney was familiar with the Clean Water Act and its permitting and certification process. In 2008, he submitted to the Suisun Resource Conservation District an application for Regional General Permit 3 (RGP3) coverage to replace floodgates on Spinner Island, and in 2011 he received a Notice of Violation (NOV) from the Army Corps for unauthorized levee repair work at Chipps Island (Exhibits 19a and 40, respectively). The permit application requires specific details for proposed work, including levee repair and grading, which were performed at Point Buckler Island. The October 24, 2011, NOV describes how Mr. Sweeney's placement of a shipping container into the breached portion of a levee did not comply with the RGP3, Clean Water Act section 404, nor Rivers and Harbors Act of 1899 section 10. The NOV explained the permit requirements for placing dredged or fill material, building structures, and even generally working in jurisdictional waters, the same types of activities done at Point Buckler Island. Mr. Sweeney was fully aware of the permitting process, and intentionally chose to not comply when he built the levee around Point Buckler Island.

The CAO Staff Summary Report further discusses Mr. Sweeney's culpability, as evidenced by his Facebook postings and the continued construction activities after notification of violations and requests to stop work. In particular, a Facebook post from February 2014 regards building a "buckler house," that "I need a crew to frame and out the prefab together but won't be till August. Not building to code or w [sic] permits" (Exhibit 7c's attached Exhibit 5). Mr. Sweeney's intentions to continue construction activities without permits did not change even after the Water Board Prosecution Team issued an NOV on July 28, 2015, to Point Buckler Club, LLC, and the San Francisco Bay Conservation and Development Commission (BCDC) issued a letter on January 30, 2015, requesting the Dischargers to stop work and apply for permits (BCDC letter to Point Buckler, LLC, Exhibit 17a).

Unauthorized work continued. Between January 29, 2015, and April 2, 2015, the Dischargers excavated a fourth crescent pond, and placed fill onto tidal marsh; placed fill in the borrow ditch for a crossing on the west end; placed fill on tidal marsh to build a road to the water's

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[14] Note that section 13385 also does not require a showing of a condition of pollution or nuisance as does Water Code sections 13304 and 13350. See also *U.S. v. Board of Trustees of Florida Keys Community College* (S.D. Fla. 1981) 531 F.Supp. 267, 274, describing no general intent is needed to violate the Clean Water Act.

[15] Complaint Exhibit A pages A7 and A8 contain a full analysis of how the culpability factor was assessed for both violations. The discussion here supplements that analysis.

edge; mowed and graded; and added shipping containers and trailers for helipads onto tidal marsh. These actions show the Dischargers' blatant disregard for regulatory requirements. On April 22, 2016, BCDC issued a cease and desist order to the Dischargers (Exhibit 10a).

Mr. Sweeney's intentional misconduct warrants a high culpability factor in the methodology, and justifies imposing a large administrative civil liability amount.

EVIDENCE OVERVIEW

The evidence in this submittal includes the evidence submitted for the CAO hearing. While Exhibits 1 through 31 were previously provided, this submittal adds Exhibits 32 through 44.

Exhibit 32 contains the final adopted CAO and the transcript from August 10, 2016, hearing. The Water Board considered the evidence and arguments at the August 10, 2016, hearing. The information noticed in the Complaint in the Factual Basis for the Alleged Violations, paragraphs one through 55, nearly mirror what the Water Board adopted as findings in paragraphs one through 78 of the CAO it issued.

The Water Board has already made the following determinations, which are dispositive of the key allegations in the Complaint (CAO, Exhibit 32a, pp. 12-13):

- The Dischargers' unauthorized activities are in violation of the Basin Plan Prohibition No. 9.
- The Dischargers are in violation of Clean Water Act section 301.
- Neither discharger applied for a Clean Water Act section 401 certification.

The Water Board has found that Mr. Sweeney begun unauthorized activities in May 2012 when he excavated trenches and discharges the fill onto marsh surface (CAO, Exhibit 32a, p. 4). The Water Board has found that Mr. Sweeney (CAO, Exhibit 32a, pp. 4-5):

- Installed a boat dock in Andy Mason Slough, and replaced it with a larger dock.
- Excavated 4,430[16] feet of a new borrow ditch from tidal marsh, tidal remnant levee, and tidal waters.
- Constructed 4,710[17] feet of a new levee on top of tidal marsh, tidal remnant levee, and tidal waters.
- Excavated the four crescent shaped ponds and placed the fill on tidal marsh.[18]
- Discharged fill in the borrow ditch for the west borrow ditch road crossing.
- Discharged fill onto tidal marsh in the west end to create a road to the water's edge.
- Placed shipping containers and trailers on the marsh.

[16] This reflects the total amount excavated by adding the information from CAO paragraphs 22 through 25.

[17] This reflects the total amount constructed by adding the information from CAO paragraphs 22 through 25.

[18] This and the remaining bullet point actions occurred after receiving a stop work request from BCDC (January 2015) (Exhibit 17a).

- Constructed two helicopter pads on tidal marsh.[19]
- Constructed three wind-break platforms on tidal marsh.

Similarly, the Water Board has found that the Dischargers' unauthorized activities caused harm to the beneficial uses, relevant to factors in the methodology. The findings include (CAO, Exhibit 32a, pp. 11-12):

- Construction of the new levee blocked tidal channels and overland tidal flow into 27.18 acres of the Island's interior tidal marsh.
- The beneficial uses impacted by the unauthorized activities include estuarine habitat, fish migration, preservation of rare and endangered species, fish spawning, wildlife habitat, and commercial and sport fishing.
- By blocking tidal action, the Island has been deprived of estuarine waters. This is draining the Island and causing mass dieback of tidal marsh species; increasing salinity; eliminating tidal sedimentation contributing to marsh accretion; likely preventing young salmonids from accessing feeding grounds; likely preventing the export of food material for Delta smelt; and likely preventing longfin smelt from accessing spawning grounds.
- The degradation of tidal marsh vegetation likely resulted in degraded wildlife habitat for waterfowl, passerines birds, and mammals.

The Prosecution Team anticipates the majority of the discussion at the hearing will pertain to employing the factors in the penalty methodology since the Water Board has already found the Dischargers committed the violations. To assist with the penalty determination, the December 14, 2011 Executive Officer Summary Report on the Enforcement Policy Penalty Methodology is included in Exhibit 33.

Exhibit 34 contains the evidence Mr. Elder used in his ability to pay and economic benefit analyses for both the original Complaint Exhibit A and updates contained in this staff report.

Because the Enforcement Policy recommends the Water Board add staff costs to the penalty amount, Exhibit 35 contains a spreadsheet of conservatively estimated staff costs spent up until the Complaint issuance. Since the statutory minimum of economic benefit is significantly larger than staff costs, no additional staff costs were tracked. An estimate of staff costs can be calculated upon the Water Board's request.

Exhibit 36 contains the meeting notes and a draft concept figure from July 22, 2016. On this date, the Parties met, along with representatives from BCDC and the Environmental Protection Agency, in an effort to encourage compliance with applicable permitting programs. Although the Dischargers cancelled a meeting scheduled for September 8, efforts are being made to meet again in October.

[19] This and the remaining bullet point actions occurred after receiving an NOV from the Water Board (July 2015) (Exhibit 9).

Aerial photos from July and August 2016 are included in Exhibit 37 to provide insight into more recent conditions at the Island.

Exhibit 38a contains e-mails between Mr. Sweeney, the Suisun Resource Conservation District, and the Army Corps that regard Mr. Sweeney's unauthorized levee repair at Chipps Island in 2011. These demonstrate Mr. Sweeney's knowledge of the permitting programs and his willful avoidance of permits for his activities at Point Buckler Island. His actions are identified in the Army Corps of Engineers Notices of Alleged Violations from October 2011 and August 2016 in Exhibit 40.

Exhibit 38b is a letter from Mr. Sweeney to Suisun Marsh Club Owners. His signature block indicates he has an interest in four duck clubs in the Delta, again demonstrating he is a sophisticated party who knew, or at the very least should have known, about the permitting programs.

Exhibit 39 contains Point Buckler Club Facebook postings, and Exhibit 41 is the California Secretary of State Business Entity information for Point Buckler Club, LLC.

Exhibits 42 and 43 are online references for critical habitat designations for fish species and federal planning documents. In the adopted CAO, the Central California Coast population segment of steelhead was removed from the findings of species having critical habitat designation in Suisun Bay at the Prosecution Team's request. No designation of critical habitat in Suisun Bay exists for the species and it should be excluded from the Complaint (Paragraphs 11a and 11b). Instead, the Central Valley steelhead population is affected as Suisun Bay is designated as critical habitat for this species.

Exhibit 44 contains graphics from Dr. Stuart Siegel and Dr. Bruce Herbold showing a cross section of a typical estuary to upland, a 2016 longfin smelt survey, and Delta smelt tow net index graphics. These are included in evidence for possible use in the Prosecution Team's presentation on December 14, 2016. They are visual aids for the information already contained the Expert Report in Exhibit 11 and the Experts' Response in Exhibit 22.

The Prosecution Team reserves its right to request that the Water Board take official notice of any additional laws, regulations, policies, orders, or similar documents as needed at the hearing.

CONCLUSION

The Dischargers blatantly disregarded the authorities and permitting requirements of various agencies and purposefully avoided obtaining a Water Board permit to fill tidal channels and wetlands. The Dischargers conducted activities in a manner that would not have been permitted and impacted wetlands without mitigating for the loss of the water quality functions and values provided by these waters. The Dischargers have caused harm to nearly 30 acres of

wetlands habitat critical for threatened and endangered species in Suisun Bay. The Dischargers economically benefitted by avoiding the permitting process. The Prosecution Team respectfully requests that the Water Board find the Dischargers in violation, consistent with the CAO, and impose a minimum of $4,600,000 to deter future violations and to rectify the harm caused to the beneficial uses provided by the Suisun Marsh, to the water quality program's integrity, and to the people of California.