San Francisco Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

January 30, 2015

Point Buckler LLC.
171 Sandpiper Drive
Pittsburg, California 94565

**ATTENTION:** John Sweeney

**SUBJECT:** Point Buckler Island Unauthorized Project, Suisun Marsh (ER 2012.038)

Dear Mr. Sweeney,

On November 19, 2015 the staff of the San Francisco Bay Conservation and Development Commission (BCDC) conducted a site visit to Point Buckler Island in the Suisun Marsh. Based on observations made at the site, and after reviewing other information, the staff is concerned about unauthorized work occurring on Point Buckler Island. The purpose of this letter is to inform Point Buckler LLC., as the owners of this property, that aspects of its current project are inconsistent with the Suisun Marsh Preservation Act (SMPA)[1]. This letter also describes for Point Buckler LLC., the regulatory framework that governs the Suisun Marsh and, specifically, this property.

**Background.** The SMPA is the primary land use law in the Suisun Marsh and is partially administered at the local level through the Suisun Marsh Management Program/Local Protection Program (LPP) and the Individual Management Plans (IMP). BCDC has primary state responsibility for the implementation of this program, while also delegating local responsibility to the Suisun Resource Conservation District (SRCD) to oversee management practices in the marsh. SRCD is setup as the special district that provides property owners with assistance in permitting, and guidance on activities in the marsh. SRCD functions as the local agency that landowners work with to ensure compliance with the various state and federal regulatory agencies with jurisdiction in the marsh.

**Managed Wetland or Tidal Marsh.** In our conversations with you, you have described Point Buckler as a managed wetland and have stated that the work that you have conducted thus far is for the purpose of restoring it to that use.

The SMPA defines a managed wetland as:

> "[t]hose diked areas in the marsh in which water inflow and outflow is artificially controlled or which waterfowl foods plants are cultivated, or both, to enhance habitat conditions for waterfowl and other water-associated birds, wildlife, or

[1] Given the location of Point Buckler Island, this project is also subject to BCDC's McAteer-Petris Act Jurisdiction, triggering regulatory review under the Act and subjecting you to the enforcement remedies pursuant to the Act (Cal. Govt. Code §§ 66605, 66632, 66637-66641.9)

> fish regardless of whether such areas are used for hunting or fishing or non-consumptive uses such as nature study, photography, and similar passive wildlife activities, or a combination of both such consumptive and non-consumptive uses" (Cal. Pub. Res. Code § 29105).

Based on available information, the history of the site, and our recent site visit, it is our position that this property has never been managed in accordance with the LPP or IMPs and thus has never functioned as a proper managed wetland as defined by the SMPA and LPP. Therefore, Point Buckler Island is a tidally influenced marsh and has lost its designation as a managed wetland.

BCDC acknowledges that certain development is exempt under the SMPA (Cal. Pub. Res. Code § 29501.5), including "any development specified in" the LPP, which includes the IMPs and, specific to your property, the "Annie Mason Point Club" Plan. However, although this property may have, at or about the time of preparation of the IMP, been deemed a "managed wetland," the on-the-ground conditions at this site never satisfied the legal definition of a managed wetland. Our research indicates that the "Annie Mason Point Club" Plan was never properly implemented and that the property long ago reverted to tidal marsh due to neglect, abandonment, and/or the forces of nature. Once a property has been allowed to revert to a tidal marsh, it cannot thereafter be re-established as a managed wetland absent a Marsh Development Permit. In considering an application for such a permit the baseline from which BCDC will examine your project is that of a tidally influenced marsh and not a managed wetland.

**Permit Requirements.** The SMPA requires any person wishing to perform or undertake development in the marsh to obtain a Marsh Development Permit (Cal. Pub. Res. Code § 29500). Development is defined in the law in part as the placement or erection of any solid material or structure on land, or in or under water, and also includes grading, removing, dredging, mining, or extraction of any materials (Cal. Pub. Res. Code § 29114). Lastly, any work that cannot be retroactively approved through a Marsh Development Permit, will likely need to be removed, restoring the site to its prior condition. We recommend that you restore the site to its prior condition, following our approval of a professionally prepared plan, or begin working with BCDC to legalize the work by compiling a Marsh Development Permit application.

Given the scope of this project, BCDC recommends you hire an environmental specialist to assist you in the site restoration and/or BCDC application process. Our application can be found on our website (http://www.bcdc.ca.gov/forms/forms.shtml) by clicking "permit application form." The application must describe all work undertaken, including anything inadvertently omitted from this letter. Put simply, our failure to describe a project element does not obviate the need for including it in your application. Please note, this is the application for all BCDC permits and thus some portions will not apply to you, while others will require explicit details. Lastly, until an application is before BCDC, we request you stop work. However, should your expert suggest intermediate measures to restore tidal action in order to minimize adverse habitat impacts, please seek BCDC review and approval prior to undertaking these measures.

**Description of Violations.** Based on the site visit conducted by staff on November 19, 2014, there appear to be at least five violations - listed below - on your property:

1. The unauthorized installation of an approximately 288-square-foot dock on the eastern portion of the island in Annie Mason Slough, which sometime between the Fall of 2013 and Spring 2014 was enlarged to roughly 1,400 square feet.
2. The unauthorized placement of two mobile army trailers (20 feet x 40 feet) on the northwest side of the Island and one on the southeast side of the island.
3. The unauthorized placement of two shipping containers on the southeast side of the island.
4. During the reconstruction of levees on the island, three major tidal channels were filled with no culverts provided, thus removing crucial tidal flow to the interior of the Island. Further, it appears from the extent of the levee construction that this once tidally active marshland has been drained and converted to upland. The LPP does provide for the repair and maintenance of levees that, at the time of initial BCDC certification, excluded tidal action from areas that were the subject of IMPs included in the SRCD component of the LPP. However, the LPP also expressly prohibits both the diking off and filling of tidal marsh areas unless under the authority of a Marsh Development Permit issued by the BCDC. Because this area has reverted back to a tidally influenced marsh, all of ditching and levee work requires an after-the-fact Marsh Development Permit. We believe the following channels were diked off with no culverts:
    a. The primary tidal channel, on the northeast portion of the island, prior to levee construction had a channel mouth of approximately 15 feet wide and flowed into the interior of the island through a channel system that extends at least 1,300 feet inland.
    b. The southern tidal channel flowing roughly 1,100 feet through the southern borrow ditch, and extending to the interior of the island through 2 channels, roughly 300 and 500 feet in length.
    c. The northwestern tidal channel flowing roughly 900 feet with small tidal flows to the interior of the island.
5. Work has been conducted outside the appropriate work windows for Chinook Salmon, Delta Smelt, Clapper Rail, and Salt Marsh Harvest Mouse. This potentially significant impact to Bay resources – as more specifically determined by state and federal resource agencies may require mitigation measures.

**Possible Future Enforcement Options.** You are potentially subject to one or more of these enforcement remedies for past and possible future violations:

1. **Executive Director Cease and Desist and Civil Penalty Order.** When the Executive Director determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that may require a permit from the Commission without securing a permit or may be inconsistent with any permit previously issued by the Commission, the Executive Director may issue an order directing that person or governmental agency to cease and desist. We may use this tool if you undertake any further actions that constitute a violation of the law, which in your case would include continuing any work without a Marsh Development Permit.

2. **Commission Cease and Desist and Civil Penalty Order.** When the commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that: (1) requires a permit from the commission without securing a permit; or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order requiring such person or government agency to cease and desist.

3. **Fines.**
   a. Any person who intentionally or negligently violates any provisions of the SMPA shall be subject to a civil fine of not to exceed five thousand dollars ($5,000) [Cal. Pub. Res. Code § 29610].

   b. In addition to any other penalties, any person who intentionally or knowingly commences any development in violation of this division shall be subject to a civil fine of not less than fifty dollars ($50) and no more than five thousand dollars ($5,000) per day for each day in which the violation occurs.

   c. If any person negligently or intentionally violates a cease a desist order issued pursuant to Section 29601 of the Public Resource Code, then the penalties provided above shall not apply and the penalties provided in Section 66641 of the Government Code shall apply.

BCDC is handling this matter as an enforcement case. However, our primary goal is to obtain the owners' cooperation and bring the property into conformance with the above-described laws and policies as soon as possible. At this point, BCDC believes the appropriate first step is to restore the site to its original condition or begin the Marsh Development Permit application process with the help of an environmental specialist. We understand this letter may generate more questions and thus, at this time, the BCDC staff is available to

meet and discuss your project and the associated violations. Your professionalism from the start has been appreciated and we look forward to continuing to work with you to resolve this matter cooperatively.

Sincerely,

DOUG ARMSTRONG
Enforcement

cc: Wilson Wendt, Attorney, Miller Starr Regalia
Dana Dean, Attorney, Law Offices of Dana Dean
Greg Sowards, Code Enforcement, Solano County
Mike Yankovich, Planning Program Manager, Solano County
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