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

May 7, 2015

Wilson Wendt
Miller Starr Regalia
1331 N. California Blvd., 5th Floor
Walnut Creek, California 94596

SUBJECT: Point Buckler Island Unauthorized Project, Suisun Marsh
BCDC Enforcement File No. ER2012.038

Dear Mr. Wendt:

The San Francisco Bay Conservation and Development Commission (BCDC) is in receipt of the letter, dated March 25, 2015, sent on behalf of your client, John Sweeney d/b/a Point Buckler, LLC. Thank you for the response. While the BCDC staff is willing to accommodate your request for a meeting, we believe it is appropriate to respond to the March 25, 2015 letter to re-iterate our position.

As discussed in BCDC's initial January 30, 2015 letter, it is the staff's position that, although Point Buckler may have qualified as a "managed wetland" under the SMPA at the time of the original preparation of the "Annie Mason Duck Club" ("AMDC") individual management plan, or IMP, a fundamental change in site conditions occurred at the Point Buckler[1] property as a result of years of neglect, failed attempts at site management, and the occurrence of natural forces. Due to this fundamental change in site conditions, the characteristics of this property are those of a tidally influenced marsh and not a managed wetland as defined by the Suisun Marsh Preservation Act ("SMPA") (Cal. Pub. Res. Code § 29105). Therefore, as a result of these changes, the IMP for Pt. Buckler, and the "safe harbor" based on the IMP that, as you correctly noted, is provided by SMPA § 29501.5, became inapplicable. Given the fundamental change this property underwent, any future work now requires a Marsh Development Permit. Our letter also identifies as additional compliance concerns Mr. Sweeney's placement of docks and containers at Pt. Buckler, none of which are authorized by the IMP. In the remainder of this letter we will offer brief responses to the other points you raise in your letter.

The two substantive issues you raise in your March 25, 2015 letter are the following: (1) jurisdiction; and (2) the applicability to Pt. Buckler of the Marsh Development Permit requirement of SMPA § 29500.[2]

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[1] For purposes of this letter BCDC will refer to the property as Point Buckler and not to it as its past or other known name of "Annie Mason Point Duck Club".

[2] Please understand the decision not to address every issue raised in the March 26, 2015 letter is in no way intended as a dismissal of the other issues you have raised.

Jurisdiction. In your letter, at page two, you state confusion over BCDC jurisdiction based on factual chronology provided by Mr. Sweeney and a summary statement in a 2011 BCDC Enforcement chart. The only jurisdictional issue in this case is whether Point Buckler Island is within BCDC's jurisdiction. In your letter, you advance no argument disputing that Point Buckler lies within the primary management area of the Suisun Marsh, as defined in SMPA § 29101, and thus is within the BCDC's regulatory jurisdiction under the SMPA. Therefore, this is not an outstanding issue of concern.

Permit Requirements. In your letter, at page three, you refer to and describe the "current condition" of Point Buckler Island and then proceed to conclude the operation of the island "has always constituted it as a managed wetland under both elements of the definition contained in the SMPA." We are unable to agree with your factual assertion, as we believe it to be contradicted by several factors. As discussed in our original letter, based on the lack of site management, we believe that the facts and circumstances of this matter, as shown, in part, on relevant aerial photography, demonstrate that the IMP for Pt. Buckler 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. Please see attached photographs that illustrate the tidal nature (and the lack of any water control) of the property *prior* to Mr. Sweeney's unauthorized work.

Further, BCDC acknowledges that certain development is exempt under the SMPA (Cal. Pub. Res. Code § 29501.5), including "any development specified in" the Suisun Marsh Management Program ("LPP"), which includes the IMPs and, specific to your client's property, the "Annie Mason Point Club" Plan. Again, 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.

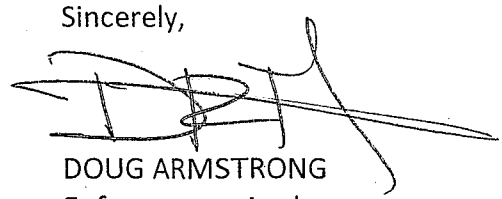
In your letter, at page three, your letter states, " the IMP shows clearly that there existed at the time of certification of the IMP two tidal gates allowing entry and circulation of water into the interior ditch system. Those tidal gates remain although the easterly gate has failed to function over the years...." BCDC disagrees with this assertion that two tidal gates have been the mechanism by which water has been controlled on the property historically. To the contrary, the evidence suggests that the tidal flow of the bay had multiple points of entry throughout the island all of which were completely uncontrolled and subject to natural tidal influence. Therefore, when the new levees were constructed, the historic natural tidal influence to the island was cut off.

Similarly, at page three, your letter states, "none of the filling and levee maintenance activities cut off any tidal inflow points into the interior of the island." This assertion is incorrect, as we believe the aerial photographic evidence shows precisely the opposite. The erosion that occurred on many points of the island prior to Mr. Sweeney commencing his work was so significant that levees no longer controlled water inflow and outflow from the island because, in many locations, levees did not exist. This evidence further supports the assertion that management no longer occurred at the site, thus the IMP no longer applied, and a Marsh Development Permit was required to conduct this work.

Lastly, at page three and four, your letter asserts that Public Resource Code section 29422 ("Section 29422") requires BCDC to send notice and a request for corrective action to the local agency pertaining to the implementation of specific IMPs, and no such notice was sent pertaining to Point Buckler Island. BCDC does not agree with this interpretation of Section 29422. Section 29422 discusses whether or not the LPP is being administered in accordance with the standards set forth in the SMPA and the Suisun Marsh Protection Plan ("SMPP"). Section 29422 is not concerned with whether or not a property owner is fully implementing an IMP, or whether efforts to implement an IMP are successful. BCDC is not aware of any evidence that suggests the LPP is being administered in a manner that is in conflict with the SMPA and the SMPP.

Again, BCDC believes the appropriate step for Point Buckler, LLC. is to restore the site to its original condition or begin the Marsh Development Permit application process, among other things, with the help of an environmental specialist. BCDC staff will be contacting you to schedule a meeting to work towards a resolution on this issue.

Sincerely,

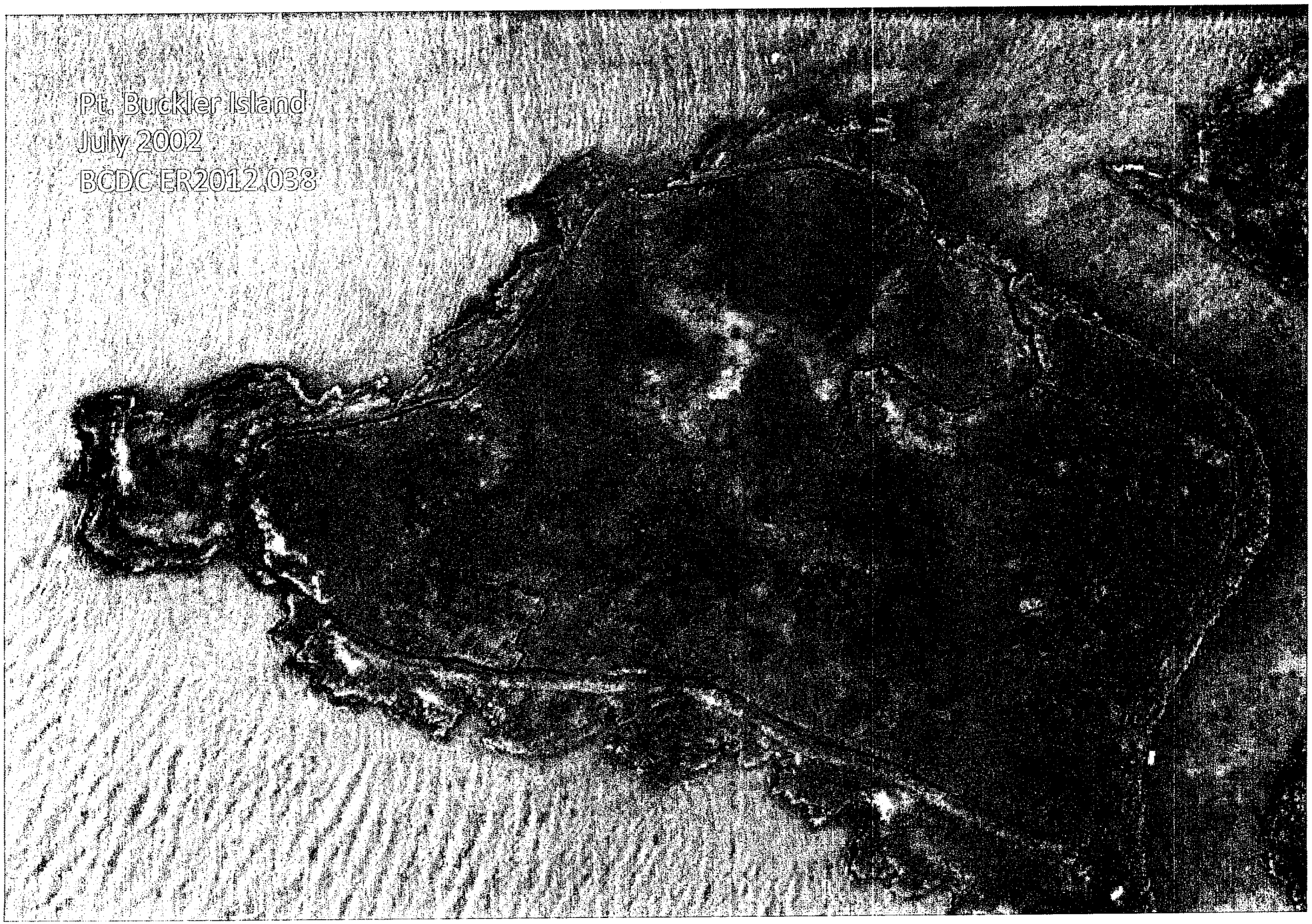


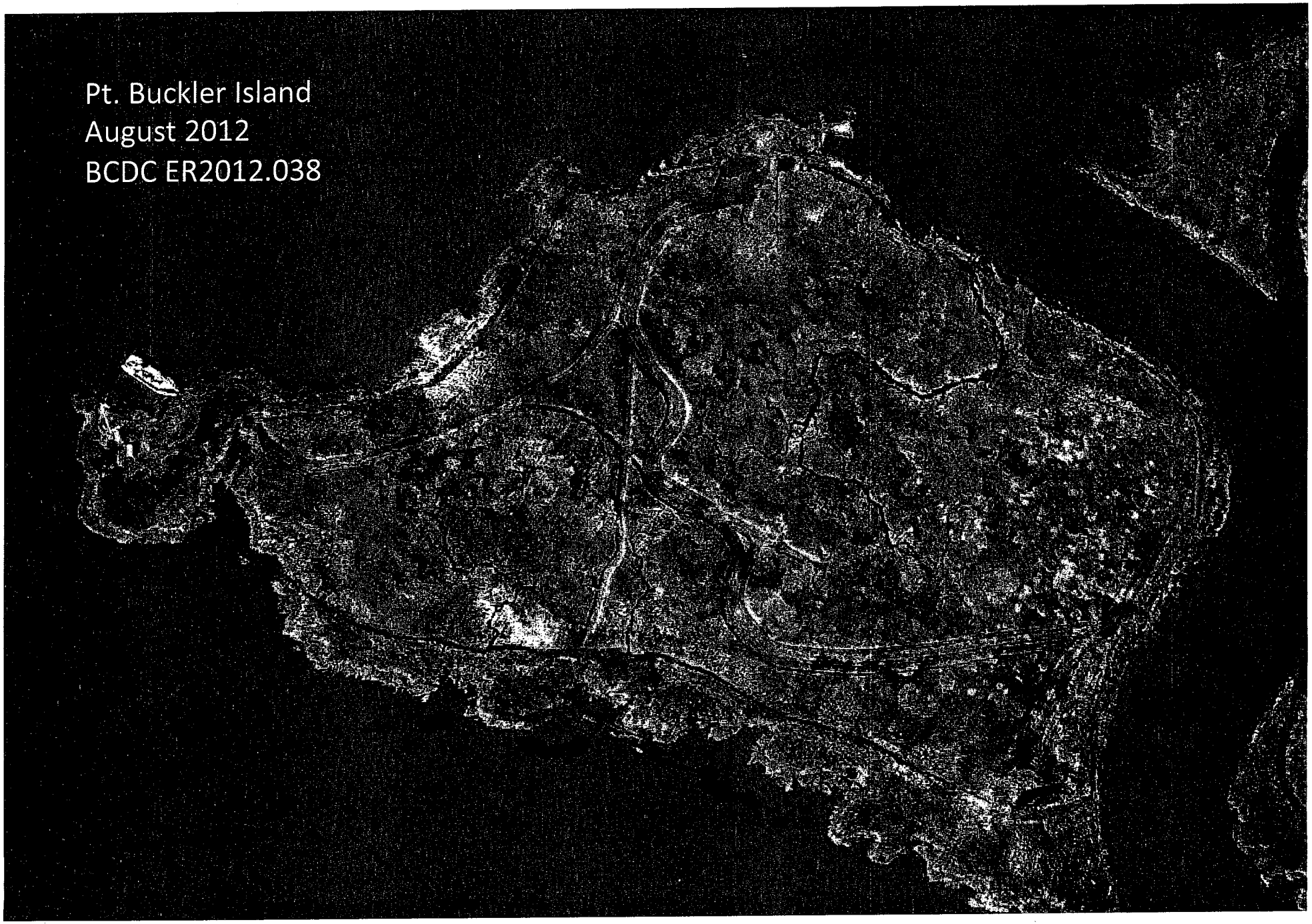
DOUG ARMSTRONG
Enforcement Analyst

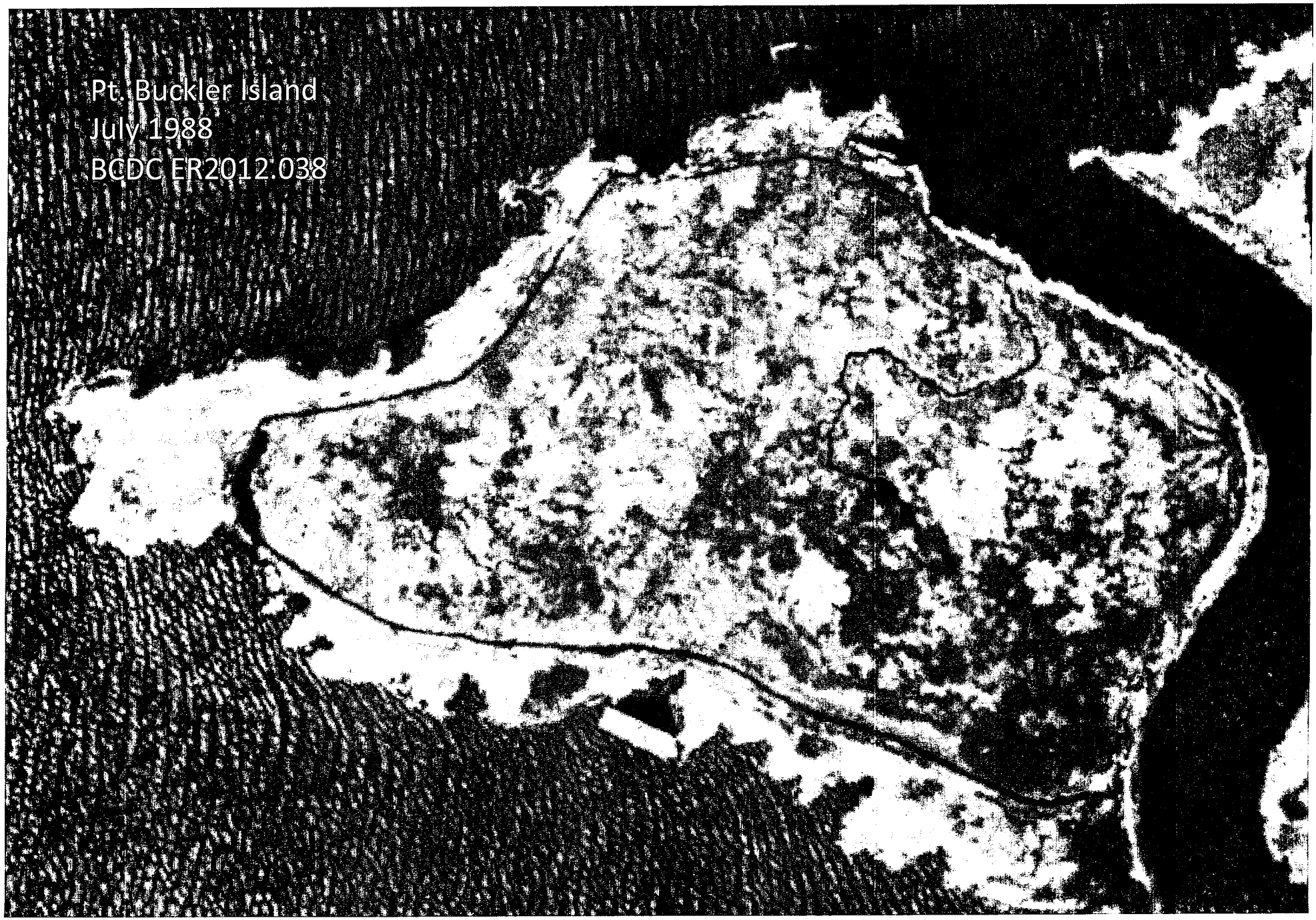
Enc.

DA/emc

cc: John Bowers, Staff Counsel, BCDC


Pt. Buckler Island
July 2002
BCDC ER2012.038


Pt. Buckler Island
August 2012
BCDC ER2012.038


Pt. Buckler Island
July 1988
BCDC ER2012.038