
San Francisco Bay Regional Water Quality Control Board

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December 23, 2015
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Point Buckler Club LLC/John Sweeney
c/o Briscoe Ivester & Bazel LLP
155 Sansome Street
San Francisco, California 94104
Attn: Lawrence Bazel, lbazel@briscoelaw.net

**Subject: Response to Information Provided in Cleanup and Abatement Order Submittals,
Point Buckler Island, Solano County**

Dear Mr. Bazel:

We are sending you this letter as the designated representative for your client, Point Buckler Club LLC (Point Buckler Club LLC or Discharger). Thank you for meeting with the Regional Water Board staff on October 7, 2015, and November 20, 2015, and submitting materials on October 16, 2015, responding to Provision 1 of Cleanup and Abatement Order No. R2-2015-0038 (CAO) issued for unpermitted construction and land development activities performed at Point Buckler Island (Site). This letter: (a) clarifies Regional Water Board policies, including permitting requirements, that the Discharger failed to comply with prior to, and since, unauthorized activities began on the Island, and (b) responds to certain assertions made by the Discharger.

Permitting Requirements the Discharger Failed to Satisfy

Based on our review of your Provision 1 Submittal and available information, we have reached the following conclusions:

1. Point Buckler Club LLC did not apply for or obtain any Water Board permits for levee construction and associated filling, grading, and vegetation removal activities. The California Water Code (CWC) section 13260 requires that any person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the State, shall file with the appropriate Regional Water Board a Report of Waste Discharge (ROWD). CWC section 13264 further provides that no person shall initiate any

new discharge of waste, or make any material changes in any discharge, prior to the filing of the ROWD required by CWC section 13260. Point Buckler Club LLC failed to file a ROWD with the Regional Water Board prior to conducting construction and land development activities with the potential to adversely impact the quality of waters of the State.

2. The Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan), Table 4-1 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." In constructing and rebuilding the levees on Point Buckler Island, Point Buckler Club LLC discharged earthen materials directly to tidal channels and wetland areas which resulted in a detrimental impact to waters of the State.
3. The U.S. Army Corps of Engineers' (Corps') Regional General Permit 3 (RGP 3) and the corresponding Clean Water Act Section 401 water quality certification issued by the Regional Water Board on June 27, 2013 (Certification), have explicit application requirements that must be followed to obtain RGP 3 authorization. Point Buckler Club LLC never submitted the forms required to obtain coverage under RGP 3 and the Certification. Additionally, RGP 3 and the Certification provide well-defined descriptions of the types of activities authorized therein. Based on the information submitted by the Discharger and other available information including, but not limited to, a recent Site inspection by staff and aerial photographs, we conclude that much of the construction and other land development activities performed by the Discharger at the Site are beyond the scope of activities which could have been authorized pursuant to RGP 3 and the Certification. Please note that even if the Discharger had qualified for and obtained coverage under RGP 3, which it did not, RGP 3 states that "This permit does not obviate the need to obtain other Federal, State or local authorizations required by law."
4. State Water Resources Control Board NPDES General Permit for Stormwater Discharges Associated with Construction and Land Disturbance Activities, Order No. 2009-0009-DWQ as amended by Order Nos. 2010-0014-DWQ and 2012-0006-DWQ (General Permit), requires that any construction activity, including, but not limited to, clearing, grading, grubbing, or excavation, or any other activity that results in a land disturbance of equal to or greater than one acre, must obtain coverage under the General Permit. The General Permit also requires electronic filing of all permit-related compliance documents. These documents include, but are not limited to, Notices of Intent, Storm Water Pollution Prevention Plans, annual reports, Notice of Terminations (NOTs), and numeric action level (NAL) exceedance reports. The construction activities at the Site disturbed more than one acre of land. The Discharger failed to apply for coverage under, and comply with, the requirements of the General Permit.

Response to Discharger's Assertions Regarding RGP 3 and Site Conditions

In a letter to Mr. Bruce Wolfe from Briscoe Ivester & Bazel, dated October 16, 2015 (October 16 Letter), the Discharger asserts that "the work at issue...comes within the scope of RGP 3 and its associated section-401 certification." RGP 3 and the Certification only authorize repair and maintenance of existing levees. We conclude that the work performed was far outside of the scope of what could be considered repair and maintenance. Specifically, RGP 3 states that "[l]andowners are authorized to place material on the crown and backslope of the existing levees to repair damage from storms and to counteract subsidence of the levees." As described in the October 16, 2015, technical report titled *Conditions at Point Buckler* (Conditions Report), submitted by the Discharger in response to the CAO, approximately 42 percent of the reconstructed levee system was constructed outside of the footprint of the historic/remnant levee structure. The Conditions Report states that the reconstructed levee system is approximately 4,730 feet in length. Accordingly, the Discharger constructed a new levee structure approximately 1,980 feet long, including approximately 305 linear feet of levee located in the old borrow ditch footprint.¹ Construction of a new levee structure would not fall within the scope of, and could not have been authorized pursuant to, RGP 3 or the Certification.

Additionally, the Certification prohibits the discharge of soil or other earthen materials into waters of the State. Specifically, Condition No. 2 of the Certification states:

"No debris, soil, sand, cement, concrete, or washings thereof, or other construction related materials or wastes, oil or petroleum products or other organic or earthen material shall be allowed to enter into, or be placed where it may be washed by rainfall or runoff into waters of the State. When operations are completed, any excess material shall be removed from the work area and any areas adjacent to the work area where such material may be washed into waters of the State."

Accordingly, at a minimum, the approximately 1,980 linear feet of new levee structure, including the 305 linear feet of levee which was constructed in the old borrow ditch footprint, would not have met Certification Condition No. 2.

The Discharger's construction activities at the Site would also be in conflict with Certification Condition No. 3, which requires that the Site be stabilized through incorporation of appropriate

¹ Point Buckler LLC's submittal indicates that only 500 cubic yards of material was placed to reconstruct the 4,730 linear feet of levee. Based on staff's Site inspection, this amount significantly understates the volume of material that was placed to reconstruct the levees. As a point of reference, that amount of material would have raised the levees about a quarter of an inch, if placed evenly along their entire length, given an average top-of-levee width of about 12 feet. Given staff's observations that significant new work was completed along the entirety of the levee system, the estimate is not credible.

best management practices (BMPs) to prevent and control erosion and sedimentation. During our Site inspection, and as documented per the photographs we collected during the field visit, we observed that the Site was fundamentally lacking any erosion and sediment control measures; disturbed soils from levee construction activities were bare and susceptible to erosion and discharge to waters of the State.

The October 16 Letter also states that work at the Site “was identified by DWR (*Department of Water Resources*) as mitigation for Delta diversions” and that the Site “has been authorized as required mitigation for two projects: DWR’s water diversions from the Delta, and the long list of maintenance, repair, and construction activities covered by RGP 3 and the Regional Board’s certification.” We first note that even if the Site had been identified by DWR as mitigation, this would not have exempted the need to obtain appropriate permits for activities regulated by the Water Board. Nonetheless, in order to gain a better understanding of the history of this Site, we contacted Cliff Feldheim, Branch Chief of DWR’s Suisun Marsh Program. Mr. Feldheim confirmed during a telephone communication on December 3, 2015, with Regional Water Board staff that DWR has no commitments to creating, maintaining or preserving managed wetlands at Point Buckler Island. Additionally, Mr. Feldheim acknowledged that in the past DWR had agreed to provide pumps to landowners in the Marsh to help with water management on duck club properties in the Suisun Marsh, and that in 1988, the Suisun Resource Conservation District (SRCD) sent a letter asking the former property owner when and if the levees would be repaired so that DWR could install a pump. However, Mr. Feldheim said that DWR has no record of the former property owner responding to SRCD’s letter, and that DWR has no record of ever providing a pump for Point Buckler Island.

We recognize that the Site may have duck habitat at some time in the past, and that an Individual Management Plan (1984) was developed to evaluate the condition of the Site and recommend actions to operate the Site as managed wetlands. This 1984 Plan identified failing levees as a concern, as did the 1988 letter from SRCD to the former Site owner mentioned above. In fact, a 1991 Wetlands Maintenance and Management Report identified 11 locations comprising approximately 2,450 linear feet along the levee needing repair. In 1988, the SRCD sent a letter to Jim Taylor noting that inspections by DWR “several years ago indicated the levee was not up to par at that time.” In October 1989, the San Francisco Bay Conservation and Development Commission (BCDC) sent a letter notifying Mr. Taylor of an incomplete application for a Marsh Development Permit to utilize 50,000 cubic yards of material for levee work. According to BCDC staff, Mr. Taylor never responded to the incomplete application letter and no permit was issued. Furthermore, preliminary review of aerial photographs, including images from 1988, 1993, 2002, 2011, and 2012 available on Google Earth, suggests that the poor condition of the Site’s levees during the late 1980s and early 1990s continued to deteriorate up until the time the Discharger purchased the Site.

Accordingly, for the reasons described above, we conclude that: (a) much of the construction activities performed by the Discharger would not qualify for permitting under RGP 3 or the

Certification, and (b) the Site at the time it was purchased by the Discharger consisted largely of tidal marsh habitat and it was not operated as a managed wetland. Furthermore, we conclude that the Site had been exposed to significant and increasing tidal influence for a period of at least twenty-five to thirty years prior to Point Buckler Club LLC having purchased the Site. As a result of the increased tidal influence, the Site reverted to a tidal marsh system with functioning tidal channels and associated beneficial uses fully protected by State policies and laws.

If you have any questions, please contact Agnes Farres at (510) 622-2401 or agnes.farres@waterboards.ca.gov.

Sincerely,

Dyan Whyte
Assistant Executive Officer

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