STATE OF CALIFORNIA
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

TENTATIVE ORDER

ADOPTION OF CLEANUP AND ABATEMENT ORDER for:

POINT BUCKLER ISLAND
SOLANO COUNTY

The California Regional Water Quality Control Board, San Francisco Bay Region (hereinafter the Water Board), finds that:

A. Purpose of Cleanup and Abatement Order

1. This Cleanup and Abatement Order (Order) identifies unauthorized activities conducted at Point Buckler Island (Site), adverse effects on beneficial uses resulting from unauthorized activities, and corrective actions that shall be implemented to clean up and abate the effects of the unauthorized activities.

B. Dischargers

2. John D. Sweeney (Mr. Sweeney) purchased the Site in 2011. He is named as a Discharger because, as the sole owner of the Site, he performed unauthorized activities, including levee construction, beginning approximately May 19, 2012. In a declaration dated December 28, 2015, Mr. Sweeney stated he was the manager of Point Buckler Club, LLC, and that:

   > In 2014, I personally did work (the "Work") to maintain and repair the levee ringing the island…I dug out material from an artificial ditch inside the levee and placed the material on the existing levee. Some material was placed where the levee had been breached and (where part of the levee had eroded away) on solid ground inside the former levee location. I repaired one of two tide gates. The Work stopped in September 2014, when the [Point Buckler Club, LLC] learned that there were regulatory objections to the Work.

   Mr. Sweeney continued unauthorized activities on the Site as president and manager of Point Buckler Club, LLC (Club), which took ownership of the Site on October 27, 2014. Construction of a portion of the levee, unauthorized placement of structures, and the removal and destruction of tidal marsh vegetation occurred during the Club's ownership. In addition, ongoing harm to beneficial uses continues to occur to the present. As the current owner of the Site, and because the Club had full knowledge of and authority over Mr. Sweeney's actions, as well as knowledge of the ongoing harm to beneficial uses, the Club is also named as a Discharger (Mr. Sweeney and the Club are referred to collectively as "Dischargers").

C. Site Description and Environmental Setting

3. The Site, also known as the Annie Mason Point Club or Club 801, is located off the western tip of Simmons Island in the Suisun Marsh, Solano County. Records from the Solano County Assessor Office (Assessor's Parcel Number 0090-020-010) identify the Site as a 51.5 acre parcel. An evaluation of the shoreline, based on comparison of aerial photographs from 1985

and 2011, determined that considerable shoreline retreat (erosion) had occurred over this time period. This evaluation determined that Point Buckler Island reduced in size from 42.9 acres in 1985 to approximately 39 acres in 2011 (Point Buckler Technical Assessment of Current Conditions and Historic Reconstruction Since 1985 (Expert Report), Appendix G, 2016). The waters to the south and east of the Site are Suisun Cutoff and Andy Mason Slough (also known as Annie Mason Slough), respectively. Grizzly Bay is located north of the Site and Suisun Bay is to the south.

4. The Site appears to have been operated as managed wetlands for duck hunting during the early 1980s. The existing levee (hereafter referred to as tidal remnant levee) degraded and breached by 1993 due to the lack of repair and maintenance. By the time Mr. Sweeney purchased the Site in 2011, a total of seven breaches (located on the south, west, and northern sections of the tidal remnant levee) provided daily tidal exchange between the Bay and the Site's interior channels, tidal remnant borrow ditch, and interior tidal marsh. In addition, the tidal remnant levee had eroded away or subsided into the underlying wetlands, resulting in direct overland tidal flooding during higher tides over the degraded tidal remnant levee and across the interior marsh surface. By the time Mr. Sweeney purchased the Site in 2011, the Site was a tidal marsh subject to unimpeded daily tidal action for 18 years through tidal channels at the levee breaches and by high tide flows directly over the marsh surface. This area subject to tidal action – that is, the area of the site below the high tide line that was also exposed to the tides—was approximately 38.3 acres in 2011 (Expert Report, Appendices G, H, and J, 2016).

5. Site conditions regarding soils, hydrology, and vegetation prior to the initiation of unauthorized activities were determined based on historical records including soil maps, vegetation classifications and maps, and aerial photographs, and field observations during Site inspections conducted on October 21, 2015, and March 2, 2016, as well as boat surveys of the Site on May 28, 2003, and February 17, 2016.

6. Soils at the Site were mapped by the U.S. Department of Agriculture Soil Conservation Service as Joice Muck and Tidal Marsh. Joice Muck soils are described as very poorly drained soils occurring in brackish marshes affected by the tides. Tidal Marsh soils are described as very poorly drained soils in areas flooded periodically by tidal water (Soil Conservation Service, 1977).

7. California Department of Fish and Wildlife (CDFW) and Department of Water Resources conducted vegetation surveys and mapping at 3-year intervals from 2000-2012. The 2000-2012 vegetation maps for the Site identify predominantly wetland vegetation including hardstem tule (*Schoenoplectus acutus*), California bulrush (*S. californicus*), saltgrass (*Distichlis spicata*), common reed (*Phragmites australis*), and cattails (*Typha* spp.). The only potential non-wetland vegetation is on the outer edge of the Site's east end, where California rose (*Rosa californica*) and coyote brush (*Baccharis pilularis*) are present (Keeler-Wolf et al., 2000; Expert Report, Appendix H, 2016).

8. A March 2, 2016, vegetation survey of the Site identifies predominantly wetland vegetation typical of Suisun tidal marshes including large stands of hardstem tule, threesquare bulrush (*S. americanus*), and cattail. These species typically occur in wetlands that are saturated or shallowly flooded for most of the growing season (Expert Report, Appendix H, 2016).

9. The March 2, 2016, vegetation survey also identifies the presence of Mason's lilaeopsis (*Lilaeopsis masonii*), a wetland plant listed by the California Native Plant Society (CNPS) as a California Rare Plant Rank 1B: Plants Rare, Threatened, or Endangered in California and Elsewhere (Expert Report, Appendix H, 2016; CNPS, 2016).

10. Tidal waters, tidal tributaries, and waterways are definitively "waters of the United States" under section 404 of the Clean Water Act. A March 2, 2016, topographical survey of the Site establishes the elevation and position of the high tide line and delineates tidal waters at the Site under Clean Water Act Section 404 jurisdiction. Based on the topographical survey, approximately 38.3 of the approximately 39 acres of the Site are below the high tide line, fall under Clean Water Act Section 404 jurisdiction, and therefore are waters of the State and United States (Expert Report, Appendix N, 2016).

11. Approximately 70 percent of the tidal remnant levee had subsided and degraded to high tidal marsh elevations and had been colonized by tidal marsh species (Expert Report, 2016).

12. The U.S. Fish and Wildlife Service's (USFWS) National Wetlands Inventory map identifies the Site as "estuarine intertidal emergent" or "persistent regularly flooded" (USFWS, 2016).

13. The San Francisco Estuary Institute's EcoAtlas map identifies the Site as tidal marsh with tidal drainage features (San Francisco Estuary Institute, 2016).

14. The Site is located at the southern end of Grizzly Bay and the northern end of Suisun Bay in the Suisun Marsh. The Water Board's Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan) defines the existing and potential beneficial uses for waters within the Region. The Basin Plan designates the following existing and potential beneficial uses for Suisun Bay: industrial service supply, industrial process supply, commercial and sport fishing, estuarine habitat, fish migration, preservation of rare and endangered species, fish spawning, wildlife habitat, contact and noncontact water recreation, and navigation. The Basin Plan designates similar beneficial uses to Grizzly Bay. The Basin Plan also designates beneficial uses to wetlands in the Suisun Marsh including estuarine habitat, fish migration, preservation of rare and endangered species, contact and noncontact water recreation, fish spawning, and wildlife habitat (Water Board, 2015).

15. Suisun Bay is designated critical habitat for threatened and endangered species under both the State and federal Endangered Species Acts, including Delta smelt (*Hypomesus transpacificus*), Central California Coast population segment of steelhead (*Oncorhynchus mykiss*), and the southern population segment of green sturgeon (*Acipenser medirostris*) (CA Fish & G. Code § 2050 et seq.; 16 U.S.C. § 1531 et seq.). Suisun Bay is also within the habitat range of the longfin smelt (*Spirinchus thaleichthys*) which is listed as threatened under the California Endangered Species Act (Expert Report, Appendix P, 2016; CA Fish & G. Code, *supra*).

16. Suisun Bay lies along the migratory pathway of threatened and endangered species including winter-run and spring-run Chinook salmon (*Oncorhynchus tshawytscha)*, Central Coast population of steelhead trout (*Oncorhynchus mykiss*), and green sturgeon, and is therefore critical habitat for these species (Expert Report, Appendix P, 2016).

17. Prior to unauthorized activities, wetland habitat at the Site would have provided feeding grounds for young salmonids as they migrate through San Pablo Bay on their way to the ocean. These wetland habitats would have supported aquatic invertebrates and insects that are important food sources for salmonids. Shallow wetland habitats at the Site would also have provided salmonids refuge from predation from larger predatory fish. The Site is also immediately adjacent to habitats usually occupied by Delta smelt. Interior wetlands at the Site would have contributed to food web productivity and export to the Bay in support of the recovery of this threatened species. Finally, tidal channels at the Site would have provided spawning grounds for the threatened longfin smelt (Expert Report, Appendix P, 2016).

18. The Site is also potential habitat for special status species including Ridgway's rail (*Rallus obsoletus*), black rail (*Laterallus jamaicensis coturniculus*), salt marsh yellowthroat (*Geothlypis trichas sinuosa*), Suisun song sparrow (*Melospiza melodia samuelisis*), and salt marsh harvest mouse (*Reithrodontomys raviventris*) (USFWS Biological Opinion (BO) 2013; Expert Report, 2016).

19. Suisun Marsh is identified as an impaired water body pursuant to federal Clean Water Act section 303(d) for mercury, nutrients, organic enrichment/low dissolved oxygen, and salinity/total dissolved solids/chlorides (33 U.S.C. 1313(d)).

D. Unauthorized Activities Conducted from 2012 to the Present

20. As of May 2012, Mr. Sweeney began unauthorized activities that included (1) mowing tidal marsh vegetation on the western end and through the interior of the marsh, (2) excavating trenches on the north and south ends of the site and discharging fill onto the marsh surface; and (3) installing two pilings in Andy Mason Slough (Expert Report, Appendix K (Fig. K-5), 2016).

21. As of April 2013, Mr. Sweeney installed a small boat dock, approximately 8 feet by 37 feet, in Andy Mason Slough. By February 2014, he replaced the small dock with a large dock (Expert Report, Appendix K (Fig. K-11), 2016).

22. As of March 24, 2014, Mr. Sweeney began levee construction activities including (1) excavating 1,770 feet of a new borrow/drainage ditch (hereafter referred to as borrow ditch) from tidal marsh, tidal remnant levee, and tidal waters; (2) constructing 1,825 feet of the new levee on top of tidal marsh, tidal remnant levee, and tidal waters; (3) excavating two trenches on the east and southwest of the Site and discharging spoils onto tidal marsh; and (4) mowing tidal marsh vegetation on the west end of the Site. These activities resulted in closing off two breaches (Breaches 1 and 2) and blocking tidal flow into two tidal wetland areas along the south end of the Site (Expert Report, Appendix K (Figs. K-4 and K-20), 2016).

23. As of June 5, 2014, Mr. Sweeney's levee construction activities had progressed with an additional 305 feet of borrow ditch excavated from tidal marsh and the material used to construct an additional 400 feet of new levee on top of tidal marsh and tidal waters. As a result, Breach 3 was closed, removing tidal flow into the west end of the Site (Expert Report, Appendix K (Figs. K-4 and K-23), 2016).

24. As of August 6, 2014, Mr. Sweeney had excavated an additional 1,375 feet of borrow ditch from tidal marsh and tidal waters and used the material to construct an additional 1,420 feet of new levee on top of tidal marsh, tidal remnant levee, and tidal waters. Four more breaches (Breaches 4, 5, 6, and 7) were closed as a result of levee construction, thereby closing all tidal channel connections at the Site (Expert Report, Appendix K (Figs. K-4 and K-25), 2016).

25. As of October 29, 2014, two days after the Club took ownership of the Site, borrow ditch excavation and new levee construction activities appear to have been completed. An additional 980 feet of borrow ditch was excavated from tidal marsh and tidal waters and an additional 1,065 feet of new levee was constructed on top of tidal marsh, tidal remnant levee, and tidal waters. From May 2012, to October 29, 2014, a total of 4,430 feet of borrow ditch was excavated from tidal marsh and tidal waters and approximately 8,586 cubic yards of material was placed on top of tidal marsh, tidal remnant levee, and tidal waters to construct the new 4,700-foot levee. As a result, both tidal channel and overland tidal flow connectivity were fully blocked (Expert Report, Appendix K (Figs. K-4 and K-29), 2016).

26. As of April 2015, unauthorized activities continued on the Site, including (1) the excavation of four crescent-shaped ponds in the interior tidal marsh, and the discharge of excavated material on the adjacent tidal marsh, (2) the discharge of fill in the borrow ditch for the west borrow ditch road crossing, (3) the discharge of fill onto tidal marsh at the Site's west end to create a road to the water's edge, (4) the mowing of tidal marsh vegetation and grading of the marsh plain for a road across the interior tidal marsh, and (5) the placement of shipping containers and trailers on tidal marsh at the Site's east and west end (Expert Report, Appendix K (Fig. K-32), 2016).

27. As of February 2016, the Club continued to conduct unauthorized activities including (1) mowing of approximately 1.5 acres of tidal marsh vegetation in the northeast portion of the Site, (2) constructing a helicopter pad on tidal marsh at the east end of the Site, and (3) constructing a second helicopter pad and three wind-break platforms on tidal marsh at the west end of the Site. The helicopter pads consisted of pairs of flat-rack shipping containers that were marked with a helicopter landing symbol (a circled "H") (Expert Report, Appendix K (Fig. K-40), 2016).

28. Water Board staff and others inspected the Site on March 2, 2016, and further documented that unauthorized activities at the Site had occurred. Water Board staff observed the features described in Finding 27 above, as well as a newly-installed gate and posts across the east borrow ditch crossing. These features were not observed at the Site during a site inspection conducted by Water Board staff and others on October 21, 2015. Further, these unauthorized activities were conducted after the Water Board issued a Notice of Violation on July 28, 2015, and a Cleanup and Abatement Order on September 11, 2015.

    Water Board staff observed on March 2, 2016, (1) cracks in the new constructed levee in response to some combination of drying (dessication), vehicular transport, and differential settlement; (2) one tide gate installed at the west end of the Site, which was closed at both ends; (3) the presence of relatively fresh tracks, consistent with the use of heavy equipment present at the Site; (4) possible toilet facilities; (5) goats in a pen located next to the east borrow ditch crossing; and (6) a second gate stored on the Site, which could potentially be used to fence the

west borrow ditch crossing to allow the goats to graze the Site's interior tidal marsh (Inspection Report, 2016).

E. Actions Taken by the Water Board and Others

29. On November 19, 2014, staff from the San Francisco Bay Conservation and Development Commission (BCDC) and CDFW inspected the Site and reported that unauthorized levee construction activities removed crucial tidal flow to the interior of the Site, thereby drying out the Site's former tidal marsh areas (BCDC, 2015).

30. On July 28, 2015, the Water Board Assistant Executive Officer issued a Notice of Violation (NOV) for filling waters of the United States and State. The NOV stated the Water Board's intent to issue a cleanup and abatement order requiring action to correct and mitigate for these violations and advised the Dischargers to cease and desist unauthorized activities.

31. On September 11, 2015, the Water Board issued Cleanup and Abatement Order No. R2-2015-0038 (Order) for unauthorized levee construction activities at the Site. The Order required the submittal of (1) a technical report describing the nature and extent of unauthorized activities and impacts resulting from these activities; (2) a description of any permits and other authorizations obtained; (3) a Corrective Action Workplan proposing corrective actions designed to restore tidal circulation to the Site; and (4) a proposal for compensatory mitigation habitat to address temporal and permanent impacts resulting from unauthorized levee construction activities.

32. In a letter to the Water Board dated September 18, 2015, Miller Starr Regalia responded to the Order on behalf of "John Sweeney, the managing member of the Point Buckler LLC" and requested a hearing before the Water Board.

33. In a September 23, 2015, email, the Water Board Prosecution Team stated that there was no action to take before the Board at this time and it would be more appropriate to schedule a meeting with Water Board staff. The email further stated that the Order could be revised in the future based on additional information received, such as technical reports required by the Order.

34. In a letter to the Water Board dated September 25, 2015, Lawrence Bazel responded to the Order on behalf of the Club. The letter (1) disputed the Water Board's authority to require cost reimbursement from the Discharger; (2) requested a hearing before the Water Board; (3) requested an explanation of how the Water Board was implementing separation of functions and the prohibition on ex-parte communications; and (4) requested that all deadlines in the Order be postponed for 60 days.

35. On October 7, 2015, Water Board staff met with Mr. Sweeney and the Club's counsel (Mr. Bazel and John Briscoe). The purpose of this meeting was to discuss unauthorized activities at the Site and regulatory approvals required for these activities. During this meeting, Mr. Bazel requested an extension for submittals required by the Order.

36. On October 11, 2015, the Club petitioned the State Water Resources Control Board (State Water Board) and requested a stay on the Order.

37. On October 15, 2015, the Water Board granted the Dischargers' request for a 60-day extension for Provision 2 of the Order, which required submittal of a Corrective Action Workplan.

38. On October 16, 2015, the Club submitted documents required by Provision 1 of the Order. This submittal included: (1) an amended petition and request for stay to the State Water Board; (2) a copy of the Site's 1984 Individual Management Plan; (3) a 1984 aerial photo; (4) a copy of the lease retroactively issued by State Lands Commission for the floating boat dock, wood pilings, gangway and walkway; (5) a letter report to Bruce Wolfe; and (6) a report titled *Conditions at Point Buckler* (Conditions Report) prepared by Applied Water Resources, dated October 16, 2015. The Conditions Report states that "recent activities at the Island has resulted in the placement of fill material into waters of the State" and that the hydrology of the Site prior to the Dischargers' activities consisted of "tidally influenced portions of some channels and some old ditches." The Water Board Assistant Executive Officer responded to this submittal in a letter dated December 23, 2015 (see Finding E.44, below).

39. On October 21, 2015, Water Board staff inspected the Site, along with staff from BCDC, U.S. Environmental Protection Agency (U.S. EPA), U.S. Army Corps of Engineers (Corps), and Dr. Stuart Siegel, (professional wetland scientist). The purpose of the site inspection was to observe site conditions and to better understand (1) the nature and extent of construction activities, including the volume of fill placed for construction of the levee, and (2) the extent of waters of the State and United States, including tidal marsh habitat that was adversely impacted by levee construction activities. Based on the results of the site inspection, Water Board staff concluded that a topographical survey and wetland delineation were necessary to determine the extent of impacts to waters of the State and United States.

    During this site inspection, BCDC staff observed additional work performed since their November 14, 2014, site inspection including (1) fill placed to construct a crossing over the borrow ditch on the Site's east and west end; (2) a road constructed across the Site interior; (3) four crescent-shaped ponds excavated in the Site interior; (4) a new water control structure installed on the Site's west end; (5) two additional storage containers; (6) a goat pen installed with a number of goats brought to the Site; (7) tidal marsh vegetation removed, mowed and/or flattened throughout Site interior; and (8) approximately 14 trees planted on the Site, all dead, "apparently due to high salinity levels" (BCDC, 2016).

40. On November 20, 2015, Water Board staff met with Mr. Sweeney, Mr. Bazel, and Mr. Briscoe, along with staff from BCDC. The purpose of this meeting was to (1) discuss the October 16, 2015, submittal required by Provision 1 of the Order, (2) discuss results of the October 21, 2015, site inspection, and (3) request additional information, including a topographical survey and wetland delineation. During this meeting, Mr. Bazel agreed to provide the additional information and requested a second extension for submittal of the Corrective Action Workplan required by Provision 2 of the Order.

41. In a letter to Bruce Wolfe dated December 1, 2015, the Club requested an extension of the Order's Provision 2 deadline from January 1, 2016, to April 30, 2016, and proposed to submit additional information agreed upon during the November 20, 2015, meeting with Water Board staff.

42. In a letter to the Dischargers dated December 9, 2015, the Water Board declined the second request for an extension due to a lack of technical justification.

43. In a letter to the Dischargers also dated December 9, 2015, the Water Board Assistant Executive Officer requested the submittal of additional information that had been agreed to during the November 20, 2015, meeting and proposed by the Club in their December 1, 2015, letter, including: (1) a forensic wetland delineation characterizing the extent of wetlands and other waters of the State before and after levee construction activities, (2) a topographical survey, (3) a description of current and intended future activities at the Site, (4) the date(s) excavation of the borrow ditch and levee construction began, (5) documentation of the Site's operation as a managed wetland from 1984 until the Discharger purchased the Site, and (6) documentation of any use of the Site as mitigation. The letter requested the submittal of this information by February 15, 2016. The Water Board has not received this information to date.

44. In a letter to the Dischargers dated December 23, 2015, the Water Board Assistant Executive Officer discussed the permitting requirements the Dischargers failed to satisfy and responded to the Dischargers' assertions regarding authorization under the Corps' Regional General Permit 3 (RGP 3) and associated Clean Water Act Section 401 water quality certification (Certification) issued by the Water Board. The letter concluded that (1) much of the levee construction activities done at the Site were not authorized under RGP 3 and associated Certification, and (2) the Site at the time it was purchased by Mr. Sweeney consisted largely of tidal marsh habitat and had been subject to tidal influence for a significant period of time.

45. On December 27, 2015, the Water Board received notice of an Ex Parte Hearing scheduled for December 29, 2015, at the Solano County Superior Court. The Club applied for a stay of the Water Board's Order, or, alternately, a temporary restraining order enjoining the Water Board from enforcing the Order. The Court issued a stay of the Water Board's Order.

46. In a memo to the Water Board Executive Officer dated January 4, 2016, the Water Board Prosecution Team recommended (1) rescinding the Order to address the Club's procedural due process claims; and (2) a hearing by the Water Board on a revised Order.

47. In a letter dated January 5, 2016, the Water Board Executive Officer rescinded the Order. The rescission was "without prejudice to Regional [Water] Board staff's ability to propose, or the Board's ability to issue, a [Cleanup and Abatement Order] and/or other orders or permits covering the subject matter of [the Order]." The rescission specifically noted the intent to "avoid unnecessary procedural litigation and to allow Board members an opportunity to consider the factual and legal issues in this matter in a public hearing."

48. On January 14, 2016, California River Watch issued a Notice of Violation and Intent to File Suit under the Endangered Species Act Section 11(g), 16 U.S.C. § 1540 (g) to the Dischargers. The notice alleged harm to and unauthorized take of threatened and/or endangered species in the Suisun Bay Conservation Area including Delta smelt, Central California steelhead, green sturgeon, Sacramento winter-run and Central Valley spring-run Chinook salmon, salt marsh harvest mouse, and Ridgway's rail.

49. In a series of emails beginning on January 22, 2016, Water Board staff requested permission from Mr. Sweeney to access the Site in early February 2016 to delineate habitats, survey topography, and document the nature and extent of construction activities. In a February 10, 2016, email to Mr. Bazel, Water Board staff noted that informal access to the island had not been granted or denied for the fourth time and expressed the urgency to visit the island during the proposed dates due to tides and seasonal changes in vegetation and a need to confirm and augment existing data (Application for Inspection Warrant, 2016).

50. On February 17, 2016, Water Board staff and Dr. Stuart Siegel conducted a boat survey around the Site to assess whether vegetation growth would obscure visual observation of the ground surface in tidal areas. Water Board staff determined that continued vegetation growth would impede visual observations of Site conditions and that Site access before March was imperative. Water Board staff also observed recent unauthorized activities that were not observed during the October 21, 2015, site inspection, including (1) grading to repair the levee on the Site's east end, and (2) two mobile helicopter landing pads installed on top of tidal marsh (Application for Inspection Warrant, 2016).

51. On February 19, 2016, Water Board staff submitted an application for an inspection warrant of the Site to the Solano County Superior Court. The Court issued the inspection warrant on February 24, 2016.

52. On March 2, 2016, Water Board staff conducted an inspection of the Site. They were accompanied by Dr. Stuart Siegel, Dr. Peter Baye (coastal ecologist/botanist), a topographical survey crew from CLE Engineering, Inc., Don Tanner (National Oceanic and Atmospheric Administration), and Paul Jones (U.S. EPA Life Scientist). The purpose of the inspection was to assess conditions at the Site resulting from unauthorized construction of the levee and placement of fill into waters of the State and United States. The inspection objectives included (1) investigate water quality, (2) survey topography and map the extent of fill material, (3) document site activities, (4) collect wetland jurisdiction data on soils, vegetation, and hydrology, and (5) observe ecological conditions including condition of vegetation communities and occurrence of listed or special status plant, fish, or wildlife species.

53. In a letter to the Dischargers dated March 28, 2016, the Corps: (1) confirmed the unauthorized discharge of fill material into jurisdictional tidal waters of the United States during an October 21, 2015, site visit; (2) stated that the Dischargers may be subject to administrative and/or legal actions for unauthorized work; (3) identified the potential for penalties for violations of the Clean Water Act; (4) stated that U.S. EPA would be the lead enforcement agency to determine the appropriate enforcement response; and (5) required that the Dischargers cease any further dredge or fill activities.

54. On March 28, 2016, on behalf of the Club, Mr. Bazel provided the Water Board and the Attorney General's office with a *Notice of Motion and Motion for Determination and Preliminary Injunction* filed with the Solano County Superior Court. The motion asked the Court to make a determination that the Executive Officer and the Water Board had "acted in excess of their jurisdiction in issuing a cleanup and abatement order" and asked the Court for a "preliminary injunction prohibiting [the Water Board] from re-issuing the cleanup and abatement order, from issuing a cleanup and abatement order requiring the Club to remove or

destroy any part of the levee at Point Buckler Island, or otherwise issuing another cleanup and abatement order against the Club for work done at Point Buckler Island in excess of their jurisdiction."

55. On April 8, 2016, the Water Board Assistant Executive Officer sent an email to Mr. Bazel, stating that, "Our inspection of Point Buckler Island on March 2, 2016, confirmed that the Section 401 Clean Water Act violations cited in our July 28, 2015, Notice of Violation still exist. The prior observations concerning the degradation of tidal wetlands and habitat were validated, and we note that the degraded conditions may potentially be exacerbated by the presence of grazing animals, recent mowing, and lack of restored tidal flow to the island." The Assistant Executive Officer suggested meeting to discuss resolution of the violations.

56. Water Board staff documented the results of the March 2, 2016, site inspection in an Inspection Report dated April 19, 2016. The Inspection Report provided a summary of inspection activities performed, water quality sampling methodology and results, staff observations of Site conditions, and photographs taken during the inspection.

57. On April 22, 2016, BCDC issued Cease and Desist Order (CDO) No. ECD2016.01 to the Dischargers. The CDO ordered the Dischargers to cease and desist all activity in violation of the Suisun Marsh Preservation Act (SMPA) and the McAteer-Petris Act (MPA). The CDO concluded that the Dischargers violated and continue to violate the SMPA and MPA by conducting unpermitted development at the Site and required the Dischargers to apply for a permit "for the placement of fill, substantial change in use, and/or development activities" no later than June 21, 2016. The permit application "shall include a proposed plan and schedule to restore tidal action to and tidal marsh vegetation at the Site". The CDO also provided notice of a public hearing before the Commission scheduled for July 21, 2016.

58. Technical experts contracted by the Water Board prepared the *Point Buckler Technical Assessment of Current Conditions and Historic Reconstruction Since 1985* (Expert Report) dated May 12, 2016. The purpose of this report is to (1) determine Site conditions prior to unauthorized activities; (2) document the nature and extent of unauthorized activities; (3) identify State and federal agency jurisdictional areas; and (4) assess the impacts resulting from unauthorized activities. Data and analyses presented in the technical report are based on site visits on October 21, 2015 and March 2, 2016 and boat tours around the Site on May 28, 2003, and February 17, 2016; new aerial photographs flown on February 10, 2016; historical aerial photographs; a topographical survey conducted on March 2, 2016; and literature reviews. Report preparers include Dr. Stuart Siegel, Dr. Peter Baye, Dan Gillenwater (wetland scientist), and Dr. Bruce Herbold (fisheries ecologist).

F. Harm Caused by Unauthorized Activities

59. Construction of the new levee resulted in unauthorized placement of fill in approximately 2.6 acres of waters of the State and United States consisting of tidal marsh, tidal channels, and tidal remnant levee. Construction of a road to the water's edge on the Site's west end, placement of spoils, and installation of structures resulted in unauthorized placement of fill in an additional 0.63 acres of waters of the State and United States (total fill placed in approximately 3.23 acres of waters of the State and United States). Approximately 5.8 acres of tidal marsh vegetation

were mowed or destroyed as a result of unauthorized activities. Finally, construction of the new levee blocked tidal channels and overland tidal flow into 27.18 acres of the Site's interior tidal marsh (Expert Report, Appendices K and Q, 2016).

60. Unauthorized activities adversely impacted beneficial uses at the Site including estuarine habitat, fish migration, preservation of rare and endangered species, fish spawning, wildlife habitat, and commercial and sport fishing (Basin Plan, 2015).

61. Unauthorized activities at the Site have unreasonably affected and continue to adversely impact water quality and beneficial uses by blocking tidal flows through the tidal channels and eliminating direct overland tidal flooding during higher tides (Expert Report, 2016).

62. By blocking tidal action, the Site has been deprived of estuarine waters and is draining and drying out. This has resulted in the mass dieback of previously dominant tidal marsh species, such as tule, bulrush, and cattail that thrive in permanently flooded or saturated soils. Instead, perennial pepperweed (*Lepidium latifolium*) now dominates over most of the diked interior marsh. Perennial pepperweed, which is intolerant of prolonged, deep seasonal flooding, is one of the most problematic invasive species in the Suisun Marsh (Expert Report, Appendix L, 2016; Conceptual Model for Managed Wetlands in Suisun Marsh, 2007).

63. Water quality data collected by Water Board staff show that blocking tidal action and ongoing drainage of the Site has resulted in increased salinity, particularly in water samples taken from the Site's interior channels and from test pits dug in the interior marsh. Elevated groundwater salinity exceeded the salt tolerance of the previously dominant tidal marsh species at the Site such as tule, bulrush, and cattail, and likely contributed to the mass dieback of these species (Expert Report, Appendices L and Q, 2016; Conceptual Model for Managed Wetlands in Suisun Marsh, 2007).

64. Mason's lilaeopsis, a special status wetland plant, was observed near the outboard edge of the tidal marsh along both sides of a constructed road to the water's edge on the Site's west end during the March 2, 2016 vegetation survey. Construction of the road to the water's edge likely destroyed colonies of Mason's lilaeopsis, resulting in adverse impacts on the beneficial use of preservation of rare and endangered species (Expert Report, Appendix Q, 2016).

65. Blocking tidal action eliminated tidal sedimentation that contributes to marsh accretion. Marsh accretion by tidal sediment deposition is essential if tidal marsh substrate elevations are to keep pace with sea level rise. Therefore, unauthorized activities reduced, and will continue to reduce, the Site's resilience to accelerated sea level rise (Expert Report, Appendix Q, 2016).

66. Blocking tidal channels at the Site likely prevented, and will continue to prevent, young salmonids from accessing feeding grounds. In addition, it exposes, and will continue to expose, young salmonids to a higher risk of predation by blocking their access to a shallow water refuge as they migrate through San Pablo Bay on their way to the ocean. Therefore, unauthorized activities led to long-term restrictions on beneficial uses such as fish migration and the preservation of rare and endangered species (Expert Report, Appendix P, 2016).

67. Blocking the hydraulic connection between the Site and adjacent open water habitats occupied by Delta smelt likely prevented, and will continue to prevent, the export of food material from interior wetlands at the Site that could support the growth and survival of this threatened species. Therefore, unauthorized activities led to long-term restrictions on beneficial uses such as estuarine habitat and preservation of rare and endangered species (Expert Report, Appendix P, 2016).

68. Blocking tidal channels at the Site likely prevented, and will continue to prevent, longfin smelt from accessing spawning grounds. Therefore, unauthorized activities led to long-term restrictions on the beneficial use of fish spawning (Expert Report, Appendix P, 2016).

69. The Suisun Marsh Habitat Management, Preservation, and Restoration Plan (May 2013) establishes restrictions on the timing of construction activities to avoid and minimize impacts to threatened and endangered species including Delta smelt, Chinook salmon, steelhead, green sturgeon, longfin smelt, Ridgway's rail, and California least tern. These restrictions require that landside work occur between July and September, and in-water activities occur between August and November. Because unauthorized levee construction activities were performed outside these work windows, unauthorized activities likely resulted in adverse impacts to these threatened and endangered species.

70. The degradation of tidal marsh vegetation, including mass dieback of marsh vegetation and spread of invasive perennial pepperweed, likely resulted in degraded wildlife habitat for waterfowl, passerines birds, and mammals, including river otters. Therefore, unauthorized activities led to long-term restrictions on the beneficial use of wildlife habitat (Expert Report, Appendix Q, 2016).

71. A California Environmental Quality Act (CEQA) assessment was not performed for unauthorized activities at the Site because the Dischargers failed to obtain required permits and authorizations. Consequently, there was no analysis of potential environmental impacts, evaluation of project alternatives, or consideration of ways to avoid, minimize, or mitigate for potential impacts resulting from the unauthorized activities.

G. Violations

72. The Dischargers' unauthorized activities at the Site violate the Basin Plan and Clean Water Act sections 301 and 401 as described below:

    a. Chapter 4, Table 4-1 of the Basin Plan, Discharge 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 Dischargers' unauthorized activities have resulted in the discharge of fill into 3.23 acres of waters of the State and United States. The fill remains in waters of the State and United States, blocking tidal action to the Site and contributing to the ongoing degradation of 27.18 acres of the Site's interior tidal marsh. Accordingly, the Dischargers' unauthorized activities at the Site are in violation of the Basin Plan.

b. Clean Water Act section 301 prohibits the discharge of any pollutant by any person.

c. Clean Water Act section 404 requires a permit before dredged or fill material may be discharged into waters of the United States, unless the activity is exempt from section 404 regulations. Section 10 of the Rivers and Harbors Act prohibits building any dock without authorization from the Corps. For both of these activities, Clean Water Act section 401 requires the applicant to obtain a related certification from the state in which the discharge originates or construction occurs, certifying (with or without additional conditions) that the activity is consistent with a number of specifically identified Clean Water Act provisions. Title 23 of the California Code of Regulations, section 3855, requires that "an application for water quality certification shall be filed with the regional board executive officer." Neither Discharger has filed an application for a Clean Water Act section 401 Water Quality Certification for the unauthorized activities that resulted in a discharge of fill to waters of the State and United States. Accordingly, the Dischargers are in violation of Clean Water Act section 401.

73. The Dischargers claim to have acted in compliance with the 2013 Regional General Permit No. 3 (RGP 3) and the associated conditional water quality certification. RGP 3, however, only authorizes maintenance activities within non-tidal seasonal and perennial wetlands and uplands of Suisun Marsh duck clubs. Work performed by the Dischargers, including construction of a new levee, road, and borrow ditch, was not maintenance and occurred in tidal areas and therefore was not work permitted or permittable under RGP 3 and its associated water quality certification.

74. California Water Code section 13304 requires any person who has discharged or discharges waste into waters of the State in violation of any waste discharge requirement or other order or prohibition issued by a Regional Water Board or the State Water Resources Control Board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into waters of the State and creates, or threatens to create, a condition of pollution or nuisance, shall, upon order of the Regional Water Board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.

75. Based upon the above findings, the Water Board finds that the Dischargers have caused or permitted waste to be discharged or deposited where it has been discharged into waters of the State and United States, and created or threatens to create a condition of pollution. As such, pursuant to Water Code sections 13267 and 13304, this Order requires the Dischargers to submit technical reports and undertake corrective action to clean up the waste discharged and abate its effects. The burden of preparing technical reports required pursuant to section 13267, including costs, bears a reasonable relationship to the need for the reports and the benefits to be obtained from the reports, namely the restoration of beneficial uses at the Site.

76. The Water Board, in a public meeting, heard and considered all comments pertaining to this Order.

77. Issuance of this Order is an action to enforce the laws and regulations administered by the Water Board and for the protection of the environment. As such, this action is categorically exempt from CEQA (Public Resources Code section 21000 *et seq*.), pursuant to section 15321, subdivision (a)(2), of title 14 of the California Code of Regulations. This Order generally requires the Dischargers to submit plans for approval prior to implementation of cleanup activities at the Site. Mere submittal of plans is exempt from CEQA as submittal will not cause a direct or indirect physical change in the environment or is an activity that cannot possibly have a significant effect on the environment. CEQA review at this time would be premature and speculative, as there is not enough information concerning the Dischargers' proposed remedial activities and possible associated environmental impacts. If the Water Board determines that implementation of any plan required by this Order will have a significant effect on the environment, the Water Board will conduct the necessary and appropriate environmental review prior to the Executive Officer's approval of the applicable plan. The Dischargers will bear the costs, including the Water Board's costs, of determining whether implementing any plan required by this Order will have a significant effect on the environment, and, if so, in preparing and handling any documents necessary for environmental review. If necessary, the Dischargers and a consultant acceptable to the Water Board shall enter into a memorandum of understanding with the Water Board regarding such costs prior to undertaking any environmental review.

78. Pursuant to California Water Code section 13304, the Dischargers are hereby notified that the Water Board is entitled to, and may seek reimbursement for, all reasonable costs actually incurred by the Water Board to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action, required by this Order.

IT IS HEREBY ORDERED, pursuant to Water Code sections 13267 and 13304, that the Dischargers shall submit the required technical reports and clean up the waste discharged, abate its effects, and take other remedial actions as follows:

H. Prohibitions

1. The discharge of fill material ~~that will degrade, or threaten to degrade, water quality, or adversely affect, or threaten to adversely affect existing or potential beneficial uses of waters of the State~~ is prohibited except as allowed by plans accepted by the Executive Officer or approved by the Water Board pursuant to this Order, or through permits (e.g., Waste Discharge Requirements or Water Quality Certification) issued by the Water Board subsequent to the adoption of this Order for the placement of fill into waters of the State or the United States. Further, the discharge of fill is prohibited without an appropriate consultation and/or Clean Water Act permit authorization from the Corps.

~~2. Placement of fill material anywhere at the Site is prohibited, except as allowed by plans accepted by the Executive Officer or approved by the Water Board pursuant to this Order, or through permits (e.g., Waste Discharge Requirements or Water Quality Certification) issued by the Water Board subsequent to the adoption of this Order for the placement of fill into waters of the State or the United States.~~

3. Removal or destruction of tidal marsh vegetation in a manner that adversely impacts or threatens to adversely impact water quality or beneficial uses in any water of the State is prohibited.

4. This Order does not allow for the take, or incidental take, of any special status species. The Dischargers shall use the appropriate protocols, as approved by CDFW, USFWS, and the National Marine Fisheries Service, to ensure that activities do not impact the beneficial use of preservation of rare and endangered species or violate the California or federal Endangered Species Acts.

I. Provisions

1. **No later than November 10, 2016, the Dischargers shall submit an Interim Corrective Action Plan, acceptable to the Water Board Executive Officer, that includes the following:**

   a. An Interim Corrective Action Plan (ICAP) designed to prepare the Site for tidal restoration. The ICAP shall include measures that will be taken to manage water at the Site to (1) control the spread of perennial pepperweed, (2) reduce soil salinity, and (3) reverse soil acidification and peat decomposition. The ICAP shall include triggers or criteria that will be used to evaluate whether the Site has been sufficiently rehabilitated and is ready for tidal restoration. The ICAP shall include an implementation time schedule. The Dischargers shall initiate implementation in accordance with the accepted implementation time schedule within 60 days of written acceptance of the ICAP by the Executive Officer.

2. **No later than February 10, 2017, the Dischargers shall submit a Point Buckler Restoration Plan, acceptable to the Water Board Executive Officer, that includes the following:**

   a. A Restoration Plan describing corrective actions designed to (1) restore tidal flow into all seven breaches that existed prior to the Dischargers' unauthorized activities; (2) restore tidal circulation throughout the interior of the Site; and (3) restore overland tidal connection to the Site's interior marsh during higher tides. The Restoration Plan shall include a workplan and implementation time schedule. The workplan shall identify all necessary permits and approvals and a process to obtain them. The Dischargers shall initiate implementation in accordance with the approved implementation time schedule within 60 days of written acceptance of the Point Buckler Restoration Plan by the Executive Officer

   b. A Restoration Monitoring Plan (RMP) shall include monitoring methods and performance criteria designed to monitor and evaluate the success of the implemented restoration actions. Performance criteria shall include targets for water quality, soil and hydrologic conditions, and vegetation composition including invasive species control. The RMP shall monitor the success of the restoration actions until performance criteria have been successfully achieved, and for at least five years following completion of the restoration actions.

3. **No later than February 10, 2017, the Dischargers shall submit a Mitigation and Monitoring Plan, acceptable to the Water Board Executive Officer, that includes the following:**

a. A proposal to provide compensatory mitigation to compensate for any temporal and permanent impacts to wetlands and other waters of the State that resulted from unauthorized activities at the Site. The Mitigation and Monitoring Plan (MMP) shall (1) describe existing site conditions at the proposed mitigation site; (2) describe implementation methods used to provide compensatory mitigation; (3) include monitoring that will be implemented and performance criteria that will be used to evaluate the success of the compensatory mitigation; and (4) include an implementation schedule. The Dischargers shall initiate implementation in accordance with the accepted implementation time schedule within 60 days of written acceptance of the MMP by the Executive Officer.

   Compensatory mitigation shall comply with the State's No Net Loss Policy, which has been incorporated into the Basin Plan. The primary goal of this policy is to ensure no overall net loss and to achieve a long-term net gain in the quantity, quality, and permanence of wetlands acreage and values.

   When wetlands are lost, compensatory mitigation for that loss is determined, in part, based on the functions and areal extent of the lost wetlands. Each site is reviewed on a case-by-case basis, and no pre-determined set of ratios is used to determine mitigation, though a minimum of 1 acre gained for each acre lost is typically required when that mitigation is in-kind, on-site, complete, and fully established at the time the impact occurs. For mitigation that is in-kind and on-site, and constructed at the same time as impacts occur, a typical amount of mitigation is approximately twice the amount of wetlands impacted (e.g., a minimum of 2 acres of compensatory mitigation for each acre of fill) due to the limited temporal loss. Factors leading to requirements for additional mitigation include:

   - Temporal losses, which are defined as functions lost due to the passage of time between loss of the impacted wetland and creation/restoration of the full-functioning mitigation wetland;

   - Indirect impacts to wetlands, including loss of or impacts to adjacent lands that influence the beneficial uses of the wetlands. Such impacts can include, but are not limited to, loss of upland buffers and adjacent supporting habitats, and the introduction of other activities, such as regular human disturbance, in adjacent areas;

   - Loss of or impacts to medium to high quality habitat;

   - Loss of or impacts to special status species and their associated habitats;

   - The period of time required for full development of created/restored tidal marsh;

   - Delays in the construction/restoration of mitigation wetlands, relative to when tidal marsh at the Site was filled (e.g. fill impacts began in 2012, but compensatory mitigation for the fill has not yet been provided);

   - Uncertainty associated with the construction/restoration of tidal marsh; and

- Mitigation located off-site or the creation/restoration of out-of-kind wetlands (e.g. creation/restoration of wetlands other than tidal marsh, when impacts are to tidal marsh). Typically, the further off-site, and the more out-of-kind the mitigation is, the greater the amount of mitigation required.

4. No later than January 31 of each year following initiation of the corrective actions and continuing until the corrective actions are successfully achieved, the Dischargers shall submit annual monitoring reports, acceptable to the Executive Officer, describing the progress reached toward achieving the restoration activities' approved performance criteria.

5. The Dischargers shall submit with the final monitoring report a Notice of Completion, acceptable to the Executive Officer, demonstrating that the Restoration Plan, as approved, has been successfully completed.

6. If the Dischargers are delayed, interrupted, or prevented from meeting the work completion or report submittal deadlines specified in this Order, the Dischargers shall promptly notify the Executive Officer in writing with recommended revised completion or report submittal deadlines. Any extensions of the time deadlines specified in this Order must be approved in writing by the Executive Officer. The Executive Officer may consider revisions to this Order.

7. Water Board staff shall be permitted reasonable access to the Site as necessary to oversee compliance with this Order.

8. The Water Board, pursuant to Water Code section 13267, subsection (b)(1), requires the Dischargers to include a perjury statement in all reports submitted under this Order. The perjury statement shall be signed by a senior authorized representative of the Discharger(s) (not by a consultant). The perjury statement shall be in the following format:

   I, [NAME], certify under penalty of law that this document and all attachments were prepared by me, or under my direction or supervision, in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

9. The Dischargers shall provide documentation that plans and reports required under this Order are prepared under the direction of appropriately qualified professionals. California Business and Professions Code sections 6735, 7835, and 7835.1 require that engineering and geologic evaluations and judgements be performed by or under the direction of registered professionals. A statement of qualifications and registration numbers of the responsible lead professionals shall be included in all plans and reports submitted by the Dischargers. The lead professional shall sign and affix their registration stamp to the report, plan, or document.

10. No later than 14 days from the date of this Order, the Discharger is required to acknowledge in writing its intent to reimburse the State for cleanup oversight work as described in the Reimbursement Process for Regulatory Oversight fact sheet provided to the Dischargers with this Order, by filling out and returning the Acknowledgement of Receipt of Oversight Cost Reimbursement Account Letter or its equivalent, also provided with this Order.

11. As described in finding 78 above, upon receipt of a billing statement for costs incurred pursuant to Water Code section 13304, the Dischargers shall reimburse the Water Board.

12. None of the obligations imposed by this Order on the Dischargers are intended to constitute a debt, damage claim, penalty, or other civil action that should be limited or discharged in a bankruptcy proceeding. All obligations are imposed pursuant to the police powers of the State of California intended to protect the public health, safety, welfare, and environment.

Failure to comply with the provisions of this Order may result in the imposition of civil liabilities, imposed either administratively by the Water Board or judicially by the Superior Court in accordance with Water Code sections 13268, 13304, 13308, 13350, and/or 13385, and/or referral to the Attorney General of the State of California for injunctive relief or civil or criminal liability. Failure to submit, late or inadequate submittal of technical reports and workplan proposals, or falsifying information therein, is a misdemeanor and may subject the Dischargers to additional civil liabilities. This Order does not preclude or otherwise limit in any way the Water Board's ability to take appropriate enforcement action for the Dischargers' violations of applicable laws, including, but not limited to, discharging without a permit and failing to comply with applicable requirements. The Water Board reserves its rights to take any enforcement action authorized by law.

I, Bruce H. Wolfe, Executive Officer, do hereby certify that the foregoing is a full, complete and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Francisco Bay Region on <INSERT DATE>.

_____ _____

Bruce H. Wolfe Date
Executive Officer

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