PROSECUTION TEAM'S STAFF SUMMARY REPORT

INTRODUCTION

The Tentative Cleanup and Abatement Order (CAO) before the San Francisco Bay Regional Water Quality Control Board (Water Board) requires John Sweeney and Point Buckler Club, LLC (collectively, Dischargers) to clean up and abate the effects of unauthorized activities on Point Buckler Island in Suisun Bay (Site). Point Buckler Island was historically operated as managed wetlands, but reverted to tidal marsh over two decades ago. The Dischargers placed fill in the tidal marsh by, among other things, building a levee around the island and roads, all while intentionally avoiding the Clean Water Act's 401/404 Certification process. The Prosecution Team recommends that the Water Board issue the Revised Tentative CAO and require the Dischargers to clean up and abate impacts to beneficial uses of Suisun Bay and Suisun Marsh.

This document provides a brief overview of how this matter developed, articulates a few key concepts likely to be discussed at the hearing, and gives an overview of the evidence package submitted with the Tentative CAO.

BACKGROUND

The Site is located in the Sacramento-San Joaquin Delta. With the passage of the Sacramento-San Joaquin Delta Reform Act of 2009, the Legislature declared that "The Delta is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced estuary and wetland ecosystem of hemispheric importance."

When Mr. Sweeney purchased the island in 2011, the Site was fully tidal. Due to the lack of maintenance, there were seven breaches in the levee that provided daily tidal exchange between estuarine waters and the Site's interior tidal channels and interior tidal marsh. In addition, overland tidal flooding occurred during higher tides over the degraded levee and across the interior tidal marsh. The Dischargers' unauthorized construction activities began in 2012, and by October 2014, the Island had a new levee encircling it (Exhibit 12b, Exhibit 11, Appendix K). As a result, tidal exchange has effectively ceased, tidal channels are no longer accessible to fish, and critical wetlands habitat has been destroyed (Exhibit 11, Appendices G, H, and J).

When the island was fully tidal, the interior channels provided feeding grounds and refuge from predatory fish for outmigrating salmonids, and provided spawning grounds for longfin smelt. The Island's interior wetlands would have contributed to food web productivity and food export to the Bay, supporting threatened species including the Delta smelt (Exhibit 11, Appendix P).

The Water Board initially issued CAO R2-2015-0038, which included a requirement for Point Buckler Club, LLC, to investigate and describe the impacts to the environment caused by the Discharger's activities. Point Buckler Club, LLC, failed to provide an impact assessment. They did, however, provide a report titled "Conditions at Point Buckler" that is based merely on aerial photographs, statements from Mr. Sweeney, and a Site visit (Exhibit 16b, p. 1). In this report the Dischargers acknowledge that, "Recent activities at the Island has [sic] resulted in the placement of fill material into waters of the State" (Exhibit 16b, p. 4). On November 20, 2015, the Dischargers met with Water Board staff and the San Francisco

Bay Conservation and Development Commission (BCDC) staff and agreed to provide more information on habitat, topography, and construction activities, but never did (Exhibit 13.c). On January 5, 2016, Executive Officer Bruce Wolfe rescinded CAO R2-2015-0038 in order to "avoid unnecessary procedural litigation and to allow the Board members an opportunity to consider the factual and legal issues in this matter in a public hearing."

The Prosecution Team contracted with Dr. Stuart Siegel (professional wetland scientist), Dr. Peter Baye (coastal ecologist), CLE Engineering, and other experts to survey the Site and evaluate the impacts to water quality from the Dischargers' activities. Their analyses and conclusions are provided in the Point Buckler Technical Assessment of Current Conditions and Historic Reconstruction Since 1985, Siegel Environmental, May 2016 (Expert Report) (Exhibit 11), which determines Site conditions prior to unauthorized activities, documents the nature and extent of unauthorized activities, and provides an assessment of adverse effects on beneficial uses, among other pertinent information.

Prosecution Staff conclude that the Dischargers' construction activities removed approximately 29.74 acres of tidal marsh from tidal action (Exhibit 11, p. 16). Building the levee and the other unauthorized activities have unreasonably affected, and continue to adversely impact water quality at the Site by blocking tidal flows through the channels and eliminating overland tidal flooding during higher tides. Without proper interim corrective action and restoration, critical species habitat will continue to degrade and the degradation may be irreversible.

FAILURE TO OBTAIN PERMITS

Several agencies regulate and serve as stewards to Suisun Bay and its critical environmental resources, including the Water Board, US Army Corps of Engineers (Corps), and BCDC. These agencies have permitting processes which govern fill activities. The Dischargers failed to apply for any permits. These agencies, along with US EPA, have been working together to assist the Dischargers in coming into compliance, even meeting with the Dischargers as recently as June 9, 2016.

The Water Board implements the federal Clean Water Act through its section 401 certification process. The Dischargers failed to apply for a 401 Certification for the unauthorized fill at the Site, notwithstanding Mr. Sweeney's awareness of permitting processes resulting from prior unauthorized levee repairs elsewhere in the Delta (Exhibits 10b and 19a.) Had Mr. Sweeney coordinated with the Suisun Resource Conservation District (SRCD) or BCDC, he would have been reminded that the Dischargers were required to obtain a 401 Certification.

Mr. Sweeney's intention to avoid obtaining permits is corroborated with his Facebook post from February 2014 regarding 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 19b).

On January 30, 2015, BCDC asked the Dischargers to stop work and apply for permits (Exhibit 17). On July 28, 2015, the Water Board's Prosecution Team issued a notice of violation to Point Buckler Club, LLC, stating that "In order to avoid additional enforcement and potential penalties, you must cease and desist all activities that cause, or threaten to cause, the discharge of waste to waters of the State or create a condition of pollution or nuisance" (Exhibit 9). Unauthorized work continued after the Dischargers received these notices. The Expert Report (Exhibit 11; Figures K-39 and K-40) documents that between November 19, 2015 and February 10, 2016, the Dischargers continued to develop the Island including mowing tidal marsh and placing shipping containers and two helipads onto tidal marsh. These actions show the Dischargers' blatant disregard for regulatory programs. On April 22, 2016, BCDC subsequently issued a Cease and Desist Order to the Dischargers (Exhibit 10a).

The Prosecution Team expects the Dischargers will argue that they did not need to obtain 401 Certification because they had coverage under the Corps Regional General Permit 3 and an Individual Management Plan for Point Buckler Island, and that the Individual Management Plan required Dischargers to repair the levees (Exhibits 15c and 18a). As discussed in the Tentative CAO and the Cease and Desist Order, the Individual Management Plan no longer applied to the Site at the time of Mr. Sweeney's purchase, and the Regional General Permit 3 also did not apply to the types of work Dischargers performed (Exhibits 4 and 10a).

Dischargers may also contend that the Tentative CAO will interfere with their use and enjoyment of the Site (Exhibit 18a). The proposed uses of the island are a kite boarding facility and a duck club (Exhibit 19). In the event the Water Board issues the Tentative CAO, the restoration of tidal marsh may be compatible with the kite boarding and duck hunting activities. To date, the Water Board has taken no actions to stop the Dischargers from operating a kiteboarding club. In fact, in April 2016, Point Buckler Club hosted an open house on the Island for prospective owners interested in joining the exclusive club (Exhibit 19i). Many duck hunting facilities operate in tidal marsh areas (as opposed to managed wetlands) (Exhibit 13k). Ironically, there is no evidence that the Dischargers ever intended to manage water on the island to promote waterfowl habitat. It was not until May 2016 that Point Buckler Club modified its website to include reference to duck hunting (Exhibit 19j). And as the BCDC Cease and Desist Order describes, there is no evidence that the Dischargers attempted to follow the recommendations in the Individual Management Plan to create favorable waterfowl habitat (Exhibit 10a).

Discharging to waters of the State and United States is a privilege, not a right (Water Code § 13263, subd. (g)). The permitting program protects the public's wetland resources and the beneficial uses they provide. The Dischargers' reckless disregard for the permitting program harmed those natural resources and is an affront to the many community members and agencies striving hard to improve Suisun Bay and the Delta.

EVIDENCE OVERVIEW

The Evidence submitted with this overview substantiates each finding in the Tentative CAO. The Expert Report (Exhibit 11) documents the presence of tidal marsh on the Site, and provides an analysis of how the unauthorized activities on the Site caused, and continues to cause, detrimental impacts. The inspection warrant and Water Board staff's inspection report explain why staff needed to obtain access to the Site and what they observed during the March 2, 2016, inspection (Exhibits 6 and 7).

There are numerous documents in the evidence submittal, including those prepared by the Water Board, BCDC, Corps, and California River Watch, demonstrating progressive enforcement by the Water Board, and other parties' responses to the Dischargers' unauthorized activities (Exhibits 4-10). These exhibits cumulatively demonstrate that the Tentative CAO is an appropriate means to redress the unauthorized activities, and that the Water Board is in the best position to address the water quality impacts caused by these activities. In addition, the BCDC correspondence further supports that the Dischargers' activities were unauthorized (Exhibit 17).

The Water Board and Dischargers' correspondence and court proceedings chronicle how this matter progressed to a contested hearing before the Water Board (Exhibits 13, 15, and 18). As additional background regarding procedural matters, the Advisory Team's own correspondence is contained in Exhibit 14.

The Tentative Ruling Sustaining Demurrer dated June 23, 2016, is included as Exhibit 18 to provide a status update on the lawsuit Point Buckler Club, LLC, filed against Bruce H. Wolfe and the Water Board in Solano Court (case number FCS046410). The Prosecution Team can provide any or all of the court documents to the Advisory Team upon request.

Exhibit 4 is the Tentative CAO as it was issued on May 17, 2016. Exhibit 5 is Administrative Civil Complaint R2-2016-1008, which has been removed from the August 10, 2016, meeting agenda. The parties have agreed to move that matter to the December 14, 2016 Board meeting.

To avoid overly burdening the Board Members, Exhibits 1 through 3 are items that are incorporated by reference with web links provided. They include relevant statutes, policies, the Basin Plan, databases, and reports that support the Tentative CAO. The Prosecution Team will provide any hard copies upon request. If any additional laws, regulations, policies, or orders are discussed at hearing, the Prosecution Team reserves its right to request that the Board take official notice of such documents as needed.

CONCLUSION

Baykeeper described the Discharger's activities as "the most egregious illegal fill of tidal marshland in the Bay's recent history" (Exhibit 20a). The Dischargers' unauthorized fill of tidal marsh has blocked tidal flow to the Site, causing harm to nearly 30 acres of marsh habitat critical for threatened and endangered species in Suisun Bay, and impacting the beneficial uses identified in the Basin Plan. Harm to beneficial uses began in 2012 and continues today. Compliance with the Tentative CAO will restore the Site, protect beneficial uses, and provide mitigation to compensate for damage caused to the ecosystem.