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8
9 SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

10 In the matter of:

11 VIOLATION REPORT/COMPLAINT FOR THE
ADMINISTRATIVE IMPOSITION OF CIVIL
12 PENALTIES, ENFORCEMENT
INVESTIGATION NO. ER2012.038

13 POINT BUCKLER CLUB, LLC AND JOHN
14 DONNELLY SWEENEY

STATEMENT OF DEFENSE

Accompanying documents:

Declaration of Lawrence S. Bazel and
exhibits

Declaration of John D. Sweeney and
exhibits

Petition to State Water Resources Control
Board and accompanying declarations
and exhibits

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1 **I. INTRODUCTION**

2 The Suisun Marsh Preservation Act (the “Preservation Act”) calls for the protection and
3 preservation of “managed wetlands”—that is, duck clubs and their duck ponds. Ducks ponds are
4 especially valuable to waterfowl, which greatly prefer artificial duck ponds to natural tidal marsh
5 because the duck ponds grow plants that provide waterfowl with food. Efforts to restore duck ponds
6 should be encouraged, not penalized.

7 John D. Sweeney is manager of Point Buckler Club, LLC (jointly “Mr. Sweeney”), which
8 owns Point Buckler Island. The island has been a duck club, and surrounded by a levee, since at
9 least the 1940s. By 2014, however, the levee needed repair. According to BCDC staff, it had been
10 breached for 20 years. Mr. Sweeney repaired the levee in 2014. Most of the work was done in land
11 that was not tidal marsh, but rather was high and dry.

12 Mr. Sweeney intended to restore the duck ponds on the island. He brought to the island a
13 disc and roller, which should be used for discing the soil, planting duck-friendly plants, and rolling
14 the ground to cover the seed. He dug four small semi-circular ponds, and planted trees around them.
15 But before Mr. Sweeney could complete the duck-pond restoration, BCDC staff demanded that he
16 stop work.

17 Staff concedes that work performed in accordance with a certified individual management
18 plan does not require a permit. An individual management plan was prepared for Point Buckler and
19 certified by BCDC in 1984 (the “IMP”). The levee repair in 2014 was consistent with the IMP,
20 which calls for “tight levees” and refers not just to levee repairs but also to levee reconstructions.

21 Staff assert that IMP is no longer in effect. But they can point to nothing in the Preservation
22 Act or BCDC regulations that put an end date on an IMP. On the contrary, IMPs are plainly meant
23 to last in perpetuity. The Preservation Act requires BCDC to review individual management plans
24 every five years, and to recommend modifications if appropriate, but staff have not complied with
25 this requirement.

26 In a sense, it does not matter whether the IMP is still in effect. Mr. Sweeney has agreed to
27 obtain a permit for the levee repair and other work done on Point Buckler Island. Mr. Sweeney has
28 been meeting with staff from BCDC, and with staff from the California Regional Water Quality

1 Control Board, San Francisco Bay Region (“Regional Board”) and U.S. Environmental Protection
2 Agency (“EPA”), to develop a conceptual plan and proceed to submit the necessary permit
3 applications. If BCDC staff had not brought this penalty proceeding, there would be no need to talk
4 about the continuing effectiveness of the IMP.

5 This levee repair is, according to staff, the greatest violation in the history of BCDC. The
6 proposed penalty of \$952,000 is much greater than the highest previous administrative penalty,
7 which was \$220,000. Of the top ten administrative penalties ever imposed by BCDC, six have been
8 \$50,000 or less.

9 There is a good reason for that. The McAteer-Petris Act, which authorizes administrative
10 penalties, limits an administrative penalty to \$30,000 per violation. To propose a penalty of nearly
11 \$1 million, staff have had to over-count the actual number of violations. The levee repair, which
12 staff acknowledge at times to be a single violation, is counted as eleven violations. This over-
13 counting is a transparent attempt to avoid the \$30,000 maximum. In other words, staff are blatantly
14 violating the law even as they assert that Mr. Sweeney should be penalized for his violations.

15 There are seventeen reasons why no penalty should be imposed for the levee repair. Among
16 other things, BCDC staff gave another duck club owner additional time to repair a levee, even
17 though that levee had been breached for 15 years. BCDC staff should be even-handed. Staff told
18 Mr. Sweeney that Pont Buckler was outside of BCDC jurisdiction. They should not now be
19 penalizing him for not having obtained a BCDC permit.

20 Staff also propose penalties for the placement of containers at Point Buckler. But virtually
21 every duck club in the marsh has placed containers at their duck clubs. Mr. Sweeney submitted
22 approximately 67 aerial photographs showing containers at duck clubs. None of these appear to
23 have been permitted. BCDC staff has taken no enforcement action against them. In fact, BCDC
24 staff has never taken any enforcement action against any duck club owner in the marsh. A modest
25 penalty, at most, should be imposed for the containers.

26 Staff propose penalties for a variety of duck-club related activities, including the replacement
27 of a dock, the removal of a water control structure and repair of another, the digging of the small
28 semi-circular duck ponds, and the cutting of vegetation. But the dock was provided to Mr. Sweeney

1 by BCDC staff, whom he assisted with a BCDC enforcement action. The other activities are normal
2 duck-club activities, and should not be penalized.

3 Finally, staff proposes a penalty for kiteboarding. But this is double-counting, because the
4 containers and trailers are used for kiteboarding. The kiteboarding itself should not be penalized.

5 When Mr. Sweeney explained the history of the dock to staff, and showed them the
6 photographs of containers at other duck clubs, staff appeared to back off their demand that he permit
7 these activities. In February 2016, counsel for Mr. Sweeney wrote to staff and explained that Mr.
8 Sweeney remained interested in a resolution, and that there should be a way to work the differences
9 out. BCDC staff have never responded to this letter. Instead, in April they issued a cease and desist
10 order and in May they issued the “Violation Report/Complaint...No. ER2012.038” (the
11 “Complaint”), which demands nearly \$1 million in penalties. Why did staff respond with such
12 hostility to a friendly offer to compromise.

13 All but one of the top ten BCDC penalties of all time were stipulated penalties that were
14 negotiated. Why hasn't staff negotiated the penalty here?

15 The answer to these questions seems to be that BCDC staff are working with Regional Board
16 staff and EPA staff to penalize Mr. Sweeney for exercising his Constitutional rights. During 2015
17 there was no mention of penalties for the levee repair, either by BCDC staff or by Regional Board
18 staff. But in December 2015 Mr. Sweeney filed suit in Solano Superior Court to obtain a stay of an
19 order issued by Regional Board staff in September 2015. Mr. Sweeney had been meeting with
20 Regional Board staff, and had explained that if staff did not extend one of the deadlines in the order
21 Mr. Sweeney would need to go to court to obtain a stay of the order (to avoid violating it). When
22 Regional Board staff refused to extend the deadline, Mr. Sweeney went to court and asserted that the
23 Regional Board's order violated due process. The court agreed and issued the stay.

24 Regional Board staff then rescinded the order, but were looking for blood. They drafted an
25 agreement, which was signed by BCDC and EPA staff, to further their “common interest” in
26 prosecuting Mr. Sweeney. In May 2016, Regional Board staff issued an administrative penalty
27 complaint calling for a penalty of \$4.6 million, which they asserted was more than everything he
28 had. In other words, they are taking to take away everything Mr. Sweeney has. Six days later,

1 BCDC staff issued the Complaint, which calls for a penalty of nearly \$1 million. BCDC staff must
2 have been working with Regional Board staff, because the Complaint relies heavily on a technical
3 report prepared by Regional Board consultants.

4 Penalizing a person for exercising his Constitutional rights is a violation of law. Staff should
5 not be working with other agencies to penalize Mr. Sweeney for exercising his Constitutional right
6 to file suit and stay an order that violated due process.

7 Mr. Sweeney is a man of limited means. Every dollar he pays as a penalty is a dollar that
8 cannot be used to restore and improve the island and its environment to meet the preferences of
9 BCDC staff as well as the staff of the Regional Board and EPA.

10 No penalty should be imposed, or alternately a modest penalty should be imposed, stayed
11 during permit negotiations, and waived if Mr. Sweeney obtains a permit.

12 The statement of defense form is attached.

13 **II. BACKGROUND**

14 **A. The Island Has Been A Duck Club Since At Least The 1940s**

15 Duck clubs use levees to maintain control over water levels in the duck ponds. (Declaration
16 of John D. Sweeney (“Sweeney Decl.”), ¶ 2.) An aerial photo dated 1948 shows that Point Buckler
17 was ringed by a levee at that time. (Technical Report, fig. A-1.)¹ Conversations with previous
18 owners of the island confirm that it was used as a duck club back to the 1920s. (Sweeney Decl.,
19 ¶ 2.) From at least 1981 through 1996, there was a house on the northern tip of the island.
20 (Technical Report, figs. A-3 through A-12.)

21 **B. The Previous Owner Told Mr. Sweeney He Was Supposed To Repair The Levee**

22 There were ponds on the island in 1948. (*Id.*, fig. A-1.) A pond is visible in an aerial
23 photograph taken in 1981. (*Id.*, fig. A-3.) These ponds apparently silted in, perhaps when storms
24 and wave action breached the levee. After 1981, there is no sign of any pond in any aerial
25 photograph until two small ponds were dug in 2012. (*Id.*, figs. A-4 to A-25; see section III.B.2
26 below.) By the early 1980s, therefore, the island was high and dry.

27 _____
28 ¹ Point Buckler Technical Assessment [Etc.], dated May 12, 2016, prepared for the Regional Board. Included in the record by BCDC staff in the Administrative Record. Mr. Sweeney does not agree with most of the Technical Report, but does not dispute the aerial photographs it presents.

1 In 1984, as mitigation for the transfer of water from the Delta to southern California, the
2 California Department of Water Resources (“DWR”) proposed to install a pump and to maintain that
3 pump. (Bazel Decl., ex. 1 (“DWR EIR”) at 103.) Duck clubs do not generally use pumps because
4 they do not need them. (Sweeney Decl., ¶ 2.) Duck ponds are typically below high tide levels, and
5 can be filled simply by opening the tide gates. There is only one reason that a pump would have
6 been installed at Point Buckler. Because the island was high and dry, water had to be pumped up
7 onto the island. But pumping is not enough to create duck ponds. There must be a tight levee to
8 hold the water in the place. If water were pumped onto the island before the levee was repaired, it
9 would simply run off. (*Id.*)

10 DWR made clear that it would not install the pump until the levee was repaired: “The
11 pumping equipment will be built and installed when the landowner has improved the island’s levee
12 system to provide adequate protection of the island.” (Bazel Decl., ex. 1 at 103.) A letter from DWR
13 dated 1988 asserts that the pump has not yet been installed because the levee has not yet been
14 repaired. According to the previous owner, the levee was repaired in the early 1990s, and DWR
15 installed the pump. (Sweeney Decl., ¶ 2.)

16 An old pump and a generator are still there. The pump is designed to float in the open water,
17 and to draw water a few feet below the surface. There was a hose to carry the pumped water over
18 the levee and onto the island, where it would have flooded a large area that could be used as a duck
19 pond. (*Id.*)

20 By 2011, however, the levee fell into disrepair. When Mr. Sweeney purchased the island in
21 2011, the previous owner told him DWR was requiring that the levee be repaired. (*Id.*)

22 **C. BCDC Told Mr. Sweeney That Point Buckler Was Not In BCDC Territory**

23 In 2011, Mr. Sweeney was working with BCDC on another matter. (Sweeney Decl., ¶ 3.)
24 BCDC staff were implementing an enforcement action against Salt River Construction for storing
25 docks from a marina. Staff wanted the docks moved outside of BCDC jurisdiction, and suggested
26 that Salt River contact Mr. Sweeney, who at the time was managing part of Chipps Island. Salt
27 River was supposed to place the docks on Chipps Island, but never did. Instead, it left them in the
28

1 water. One got loose and was found floating far from Chipps Island; it was taken to Point Buckler,
2 where it was used to replace an aging dock. (*Id.*)

3 In 2011, Mr. Sweeney spoke with BCDC staff and was told that Point Buckler and Chipps
4 Island were not in BCDC territory. (*Id.*, ¶ 4 and ex. 1.) BCDC reported on its website that the
5 Salt River docks were taken “to Chipps Island located outside of BCDC’s jurisdiction.” (*Id.*, ex. 2 at
6 2.)

7 There must have been some confusion here, because both Chipps Island and Point Buckler
8 would appear to be within the area governed by the Suisun Marsh Preservation Act.

9 **D. The Island Was Not Tidal Marsh**

10 The Report accuses Mr. Sweeney of “draining the Site to further alter the pre-existing tidal
11 marsh hydrology”. (Complaint at 3, ¶ 2.) This accusation is incorrect. The island was not tidal
12 marsh before the levee repair, and Mr. Sweeney did not drain it.

13 The Complaint uses the term “‘tidal marsh’, as that term is defined in Section II, Exhibit C of
14 the [Suisun Marsh Management Program]”. (Complaint at 6, ¶ K.) That definition specifies that
15 “tidal marsh” is subject to “daily tidal action”:

16 Tidal marshes are defined as vegetated areas within the [Primary Management
17 Area] which are subject to *daily tidal action*.

18 (Bazel Decl., ex. 2 at C-1, emphasis added.) The interior of Point Buckler, except for the channels
19 and ditches, was not tidal marsh before the levee repair because it was not subject to daily tidal
20 action.

21 Although Mr. Sweeney did not kiteboard at the time he purchased the island in 2011, he used
22 the island for kiteboarding in 2012. (*Id.*, ¶ 5.) Kiteboarding is a sport in which the rider stands on a
23 surfboard and is propelled across the water by an attached kite. In May 2012, he cut some of the
24 vegetation on the western side of the island, next to the water, to create a lawn where kites could be
25 laid out. He also cut vegetation to create pathways across the island. (*Id.*)

26 In May 2012, the vegetation on the island was generally brown and dead. (*Id.*, ¶ 6 and exs.
27 4-5.) The island was dry, except for the water in the channels and ditches. Mr. Sweeney drove
28 heavy equipment across the island, and found that the land was solid. There were no boggy areas,
and the equipment did not sink into any muck.

1 Two years later, in 2014, he began work on the levee repair. (*Id.*, ¶ 7.) While working on the
2 repairs, he was generally on the island for five days a week, for a total of about six months. During
3 this time the island was dry. He did not see water overflowing out of the channels and ditches onto
4 the dry land. He has never seen water overflowing out of the channels and ditches onto the dry land.
5 (*Id.*)

6 Staff rely on the Technical Report, which asserted that the entire island was subject to daily
7 tidal flows. But in response to Mr. Sweeney's evidence the authors of that report changed position
8 and acknowledged that the interior of the island, except for the channels and ditches, was dry except
9 for occasional situations that may have occurred only once every several months. (See section
10 VII.C.11 below.) As a result, the evidence all points in one direction: The island was not subject to
11 daily tidal action, even before the levee repair. It was therefore not tidal marsh.

12 **E. Mr. Sweeney Truly Wants To Restore The Duck Club**

13 In 2014, Mr. Sweeney repaired the levee. (*Id.*, ¶ 8.) His purpose in repairing the levee was
14 to restore the duck ponds. The levee repair was not needed for kiteboarding, which had been going
15 on since 2012 outside the levee. Mr. Sweeney understood that the old pump on the island had been
16 used to pump water into the duck ponds, and that the levees would have to be repaired in order to re-
17 create those duck ponds. Mr. Sweeney recognized that he could also recreate ponds by digging them
18 out, and that a levee would also be needed for that purpose. Without a levee, water would not
19 remain in the ponds; it would drain away during low tides. (*Id.*)

20 Mr. Sweeney understood that duck clubs can remove old vegetation by discing or burning.
21 (*Id.*, ¶ 9.) He intended to disc, seed with plants that would attract waterfowl and provide food for
22 them, and then roll the area to cover the seeds. He brought a disc and a roller onto the island for that
23 purpose. (*Id.*)

24 In 2015, Mr. Sweeney dug four small semicircular duck ponds on the island. (*Id.*, ¶ 10.)
25 These ponds have no purpose except as duck ponds. He planted trees around the ponds to improve
26 the habitat for waterfowl, but these trees died.

27 Mr. Sweeney would still like to restore one or more duck ponds on the island. (*Id.*)
28

1 **F. Staff Were Aware Of The Levee Repair, And Did Nothing To Stop It Until It**
2 **Was Complete**

3 In 2014, when he began the levee repair, Mr. Sweeney believed that Point Buckler was
4 outside BCDC jurisdiction. He was not aware that he might need a permit from BCDC, and his
5 understanding was that duck clubs in Suisun Marsh operated without obtaining permits. (*Id.*)

6 On March 19, 2014, two BCDC staff were on a tour of the Suisun Marsh. (Complaint at 8,
7 ¶ R; Declaration of Steven Chappell (attached to Complaint), ¶ 17.) They observed “excavation and
8 redeposit of excavated material” at Point Buckler. (*Id.*) The work “appeared to have as its purpose
9 the construction of a new exterior levee.” (*Id.*) Mr. Chappell was surprised by this work because he
10 believed that it needed permits that had not been issued. (*Id.*)

11 In March 2014, at the time of this observation, only a small fraction of the levee repair had
12 been done, and there was tidal flow into all the interior channels and ditches. (Technical Report, fig.
13 D-15.) If BCDC staff had taken any action at that time to inform Mr. Sweeney of their concerns in
14 March 2014, things would have been very different.

15 But BCDC staff did not take any action for seven months: from March to October 2014. By
16 October 2014, work on the levee was effectively complete, although some final touches remained to
17 be done. (Sweeney Decl., ¶ 12.) In October 2014, BCDC called Mr. Sweeney and asked for a site
18 visit. That visit took place in November 2014. During that visit, BCDC staff provided Mr. Sweeney
19 with a copy of the individual management plan for Point Bucker (the “IMP”), and told him that if his
20 work was done in accordance with the plan it was OK. (*Id.*; see Complaint at 4, ¶ C (no permit
21 required for work specified in an individual management plan).)

22 **G. Between November 2014 And January 2015, Staff Changed Position**

23 By January 30, 2015, staff were no longer saying that work done consistently with the IMP
24 was OK. In a letter on that date, staff “acknowledge[d] that certain development is exempt under the
25 [Suisun Marsh Preservation Act]”, including development specified in an individual management
26 plan such as the IMP. (Bazel Decl., ex. 3 at 2, citing Cal. Pub. Res. Code § 29501.5.) But staff
27 insisted that the IMP was no longer in effect. The IMP had never been properly implemented, staff
28 said, and the site had reverted to tidal wetland. (*Id.*)

1 Those two issues are the essence of this dispute. Is the levee repair covered by the IMP?
2 Staff assert that the IMP is no longer in effect. Mr. Sweeney argues that it is. (See section VII.C.7
3 below.) Staff assert that the island reverted to tidal wetland. But, as section II.D above makes clear,
4 the island was not tidal marsh even before the levee repair. Although these differences remain, they
5 have been superseded by Mr. Sweeney’s willingness to apply for a permit. (See section II.J below.)
6 If not for this penalty proceeding, there would be no need to continue the argument.

7 The letter of January 30, 2015 asserted five violations: (1) installation of the dock,
8 (2) placement of trailers, (3) placement of containers, (4) “reconstruction of levees”, and (5) work
9 “outside the appropriate work windows” for endangered species. (*Id.* at 3.)

10 **H. Staff Backed Off On The Container And Dock Issues**

11 In response, counsel for Mr. Sweeney noted that there were containers at virtually every
12 other duck club in the marsh, and submitted a set of 67 aerial photographs showing containers at
13 duck clubs. (Bazel Decl., ex. 4.) Mr. Sweeney also explained the dock. (See section II.C above.)
14 After that, BCDC staff appeared not to be pressing Mr. Sweeney about the containers and the dock.
15 (Sweeney Decl., ¶ 13.)

16 Staff have since acknowledged that BCDC has not taken any enforcement action against any
17 other duck club in Suisun Marsh for the placement of containers. In fact, staff have not taken
18 enforcement action against duck club owners for anything. (See section VII.A.7 below.)

19 **I. Staff Did Not Respond To A Request For Clarification Of The Legal Issue**

20 In September 2015, Mr. Sweeney changed counsel. In February 2016 the new counsel wrote
21 BCDC staff and asked for a clarification of the legal issues. Staff had been asking for information
22 about whether the island “did or did not satisfy the definition of a ‘managed wetland’ as that term is
23 defined in section 29105 of the Suisun Marsh Preservation Act.” (Bazel Decl., ex. 5 at 1.) Counsel
24 said he “was not clear on the relevance of that information.” The exemption at issue in § 29501.5
25 says nothing about a “managed wetland”. Instead, it provides that “no marsh development permit
26 shall be required for any development specified in [an individual management plan]”. Counsel
27 asked for correction if he was wrong:
28

1 As a result, it appears that the status of Point Buckler as (or not as) a managed
2 wetland is not relevant to the legal analysis of whether a permit was required.
Please correct me if I'm missing something.

3 (*Id.*)

4 The letter suggested that that the parties should work their differences out:

5 I don't see any reason why there can't be tidal wetlands on the island along
6 with duck ponds and uplands. The Club remains interested in a resolution.
There ought to be a way to work our differences out.

7 (*Id.* at 2.)

8 BCDC staff never responded to this letter. (Bazel Decl., ¶ 14.) Instead, it served
9 Mr. Sweeney with a cease and desist order in April and with the Complaint in May. (*Id.*)

10 The parties have twice stipulated to extend the deadlines in the letter. Mr. Sweeney has filed
11 suit in response to the cease and desist order, as he must to prevent the running of the statute of
12 limitations, but has not pressed the suit. (*Id.*)

13 **J. Mr. Sweeney Has Agreed To Submit A Permit Application**

14 In September 2011 the Regional Board issued a cleanup and abatement order to the Club.
15 (Bazel Decl., ¶ 7.) The Club met with Regional Board staff, tried to get the matter into a permitting
16 track, and tried to extend a deadline requiring a levee-destruction plan. When Regional Board staff
17 refused to extend the deadline, the Club filed suit. Regional Board staff had not complied with the
18 requirements of due process. The court therefore stayed the order, and Regional Board staff
19 rescinded it in January 2016. (*Id.*)

20 Regional Board staff, furious that the Club's had vindicated its Constitutional rights, came
21 back in May 2016 with a proposed cease and desist order and a complaint asserting the highest
22 penalty that the Regional Board had ever imposed: \$4.6 million. The Regional Board issued the
23 cease and desist order in August 2016, and Mr. Sweeney petitioned the State Water Resources
24 Control Board for review in September 2016.² A hearing on the penalty is scheduled for December.

25 Despite these adversarial proceedings, Mr. Sweeney has been meeting with staff from
26 BCDC, the Regional Board, and the U.S. Environmental Protection Agency ("EPA") to resolve their
27

28 ² The petition, along with its associated declarations and exhibits, are being submitted as part of this statement of defense.

1 differences. (Bazel Decl., ¶ 8.) Mr. Sweeney has agreed to submit permit applications to BCDC, the
2 Regional Board, and the U.S. Army Corps of Engineers (the “Corps”). In July, Mr. Sweeney
3 submitted a conceptual proposal in which the levee at Point Buckler would remain in place, but
4 would be breached in several places. (*Id.*, ex. 6.) A relatively small area would be developed as a
5 duck ponds, and a small area would be used for kiteboarding. Most of the island would be restored
6 to the condition it was in before the levee was repaired.

7 None of the agencies has rejected this proposal. (Bazel Decl., ¶ 8.) They have asked for
8 additional information, which Mr. Sweeney is in the process of preparing. The next meeting is being
9 scheduled for October. (*Id.*)

10 III. FACTS THAT MR. SWEENEY ADMITS

11 Mr. Sweeney admits most of the facts in paragraphs A through E of the Complaint
12 (Complaint at 4-5). These paragraphs provide background information about the Suisun Marsh
13 Protection Plan, the Suisun Marsh Management Program, Public Resources Code § 29501.5 (which
14 exempts from the permitting requirement work done in accordance with an individual management
15 plan), and the IMP for Point Buckler. Mr. Sweeney does not admit all statements in the declaration
16 of Mr. Chappell and he does not admit any misquotation of the underlying documents.

17 Mr. Sweeney admits that he purchased the site in 2011. (Complaint at 7, ¶ M.) He admits
18 that he performed the levee repair described in the background section above. (*See* Complaint at 8,
19 ¶ R.) He admits that he transferred the property to the Club in 2014, and that he began using the
20 island for kiteboarding. (*See id.* at 8-9, ¶¶ S, T.) Mr. Sweeney admits that in November 2014
21 BCDC visited the island and provided him with a copy of the IMP. (*See id.*, at 9, ¶ U.) He admits
22 that there are aerial photographs of the property, and that there were letters exchanged between
23 BCDC staff and his counsel in January and March 2015. (*See id.* at 9-10, ¶¶ V, W, X.) He admits
24 that the Regional Board issued a cease and desist order in September 2015 and then rescinded it in
25 January 2016, that there was correspondence between Mr. Sweeney’s new counsel and BCDC staff,
26 and that BCDC staff and others inspected the island in October 2015. (*See id.* at 11-13, ¶¶ V
27 through II.) He admits that consultants to the Regional Board performed a boat survey in February
28 2016 and inspected the island in March 2016, that BCDC staff issued a cease and desist order in

1 April 2016, that Regional Board staff served an administrative civil liability complaint in May 2016,
2 and that Mr. Sweeney filed suit in Solano Superior Court challenging the cease and desist order.
3 (*See id.* at 14-15, ¶¶ KK through OO.)

4 **IV. FACTS THAT MR. SWEENEY DENIES**

5 Mr. Sweeney denies all facts other than those he admits and those he has no knowledge of.
6 In particular, he denies the unsupported factual assertion that BCDC has jurisdiction over the work at
7 issue. (*See id.* at 2; see sections VIII.A and B below.) He also denies that factual assertions that the
8 island was tidal marsh before the levee repair (*see id.* at 6, ¶ K; see section II.D above, section
9 VII.C.11 below), that there was tidal “overtopping” of the levees “during about half of the high
10 tides” (*see id.* at 6-7, ¶ L; see section VII.C.1 below), that the island was never managed in
11 accordance with the IMP (*see id.* at 10, ¶ W; see section VII.C.6 below).

12 What should be the factual section of the Complaint is not a straightforward recitation of the
13 facts, but rather chockablock with legal conclusions that are not factual, and therefore need not be
14 denied. Mr. Sweeney disagrees with most of those legal conclusions.

15 **V. FACTS THAT MR. SWEENEY HAS NO PERSONAL KNOWLEDGE OF**

16 The Complaint assumes as true statements in documents that neither Mr. Sweeney nor BCDC
17 staff have any personal knowledge of, and draws many conclusions from aerial photographs taken
18 when neither Mr. Sweeney nor BCDC staff were present (*see id.* at 4-12, ¶¶A-HH).

19 **VI. OTHER FACTS THAT MAY EXONERATE OR MITIGATE**

20 Staff are at least partly responsible for the problems that have arisen at Point Buckler Island.
21 They provided the dock at issue, made statements about jurisdiction, and did not object to the levee
22 repair while it was going on. The proposed penalty is wholly out of proportion to the alleged
23 violations, and unlike any other penalty ever imposed by BCDC. Staff have not considered the
24 factors that must be considered before imposing a penalty, and these factors weigh heavily in favor
25 of Mr. Sweeney. BCDC is working with Regional Board staff and EPA staff to penalize Mr.
26 Sweeney for challenging the Regional Board in court.

27 These and other exonerating facts are set out in section II above, and in sections VII and VIII
28 below.

1 **VII. ADDITIONAL STATEMENTS BY MR. SWEENEY**

2 In this section, Mr. Sweeney argues that the proposed penalty is wholly out of proportion,
3 that what money Mr. Sweeney has should go to protecting and enhancing the environment rather
4 than to penalties, and that at most a modest penalty should be imposed. In the next section below,
5 Mr. Sweeney makes several additional arguments about why no penalty should be imposed.

6 **A. The Proposed Penalty Is Wholly Out Of Proportion**

7 Staff are demanding an astonishing \$952,000 in this case. (Complaint at 16.) This amount is
8 far greater than any previous penalty. It is based on an artificially inflated count of violations, in an
9 obvious attempt by staff to avoid the statutory maximum (and thereby violate the law). In yet
10 another violation of law, staff have not considered the factors they are required to consider. They
11 have not negotiated these penalties with Mr. Sweeney, and are part of a concerted effort to penalize
12 him for exercising his Constitutional rights.

13 **1. The Proposed Penalty Is Far Greater Than Any Previous Penalty**

14 In response to a Public Records Act request, BCDC staff provided copies of the top ten
15 penalties imposed by BCDC. (Bazel Decl., ex. 7 (PRA request), ex. 8 (letter response from staff),
16 ex. 9 (summarizing penalties), exs. 10 through 19 (penalty documents).) The highest penalty ever
17 imposed was \$220,000—less than a quarter of the \$952,000 being demanded here. Six of the ten
18 highest penalties were \$50,000 or less. (*Id.*) In two cases, there was no penalty if an order was
19 complied with, and in another two more than half the penalty was waived if the order was complied
20 with. (*Id.*)

21 The penalty being demanded here is almost as much as the total of all administrative civil
22 penalties collected by BCDC in the *ten years* between 2001 and 2010. (Bazel Decl., ex. 20 at 2.)
23 That total was \$1,015,974, i.e. slightly more than \$1 million and only \$64,000 more than the penalty
24 being demand here. (*Id.*) Somehow, staff believe that this single case is as serious as *all* the
25 administrative civil penalty cases during those ten years.

26 Staff have not acknowledged that the demand far exceeds any other penalty, and amounts to
27 ten years' worth of penalties. Nor have they provided any reason why the penalty should be so high.

1 **2. Administrative Penalties Are Limited To \$30,000 Per Violation**

2 Staff proposed a penalty “under Section 66641.5(e) of the McAteer-Petris Act”. (Complaint
3 at 16.) That section limits administrative penalties to a \$30,000 per violation:

4 Civil liability may be administrative imposed...in an amount...[not] more
5 than two thousand dollars (\$2,000), for each day in which that violation
6 occurs or persists, but the commission may not administratively impose a fine
7 of more than thirty thousand dollars (\$30,000) for a single violation.

8 As the statute makes clear, this \$30,000 limit applies to a violation no matter how long it persists.

9 **3. Staff Has Improperly Counted The Violations**

10 In an obvious attempt to run up the penalty number, staff have counted each asserted
11 violation as many violations. Staff acknowledge that when they toured the site in November 2014,
12 they observed only five violations. (Complaint at 9, ¶ U.) In staff’s letter of January 30, 2015, staff
13 asserted just five violations, and it has dropped the last of those. (Bazel Decl., ex. 3 at 3.) That
14 leaves four asserted violations: (1) the dock, (2) the trailers, (3) the containers, and (4) the
15 “reconstruction of levees”. (*Id.*)

16 Consider the last of these. The levee was repaired by removing dirt and peat from a ditch
17 just inside the levee (known as a “borrow ditch”) and placing the dirt and peat on the levee. In the
18 Complaint, staff count the levee repair as eleven violations: seven violations for “clos[ing] each of
19 seven tidal breaches of remnant levee”, one violation for “construct[ing] new levees around Site”,
20 one violation for “excavat[ing] ditch interior to levee”, plus two additional violations for
21 “construct[ing] land bridges over...interior ditch”.

22 If the levee repair is a violation, it is a single violation. The Legislature could not have
23 intended that the maximum could be invalidated simply by counting a single violation as a series of
24 violations. It would be contrary to the Legislative intent, for example, to count a levee repair as
25 thousands of violations, one for each bucket of material placed. Nor can it properly be counted as
26 eight violations (one general and seven for each place in which the old levee had breached), or as
27 eleven violations (eight plus three for the borrow ditch).

28 By counting a single asserted violation as eleven violations, staff are violating the very act
that they are supposed to be enforcing. They should not be allowed to do so.

1 **4. The Proposed Penalties Do Not Account For The Statutory Factors**

2 The Legislature has required BCDC, when imposing a penalty, to consider specified factors:

3 In determining the amount of administrative civil liability, the commission
4 shall take into consideration the nature, circumstance, extent, and gravity of
5 the violation or violations, whether the violation is susceptible to removal or
6 resolution, the cost to the state in pursuing the enforcement action, and with
7 respect to the violator, the ability to pay, the effect on ability to continue in
8 business, any voluntary removal or resolution efforts undertaken, any prior
9 history of violations, the degree of culpability, economic savings, if any,
10 resulting from the violation, and such other matters as justice may require.

11 (Gov. Code § 66641.9.) Here the Complaint does not include any consideration of these factors.

12 For this reason alone, the Complaint fails to meet statutory requirements, and must be sent back to
13 staff for compliance.³

14 If staff had considered the “nature, circumstance, extent, and gravity of the violation or
15 violations”, they would have had to concede that these factors weigh heavily in favor of a minimal
16 penalty or none at all. The work at issue here is the repair of a duck-club levee that has surrounded
17 the island since at least the 1940s. Duck clubs and their associated duck ponds are to be protected
18 and preserved in accordance with the Suisun Marsh Preservation Act and the Suisun Marsh
19 Protection Plan, as explained in detail in section VII.C.13 below. DWR was demanding the levee
20 repair. BCDC staff could have stopped the levee repair in March 2014, when it was just beginning,
21 but instead waited until October to call and ask for a site tour. And when in November 2014 staff
22 toured the island, they told Mr. Sweeney that if his work was in compliance with his IMP it was OK.
23 (See section II.F above.) Plainly, staff themselves were uncertain about whether the work was in
24 violation. If the legal position of Mr. Sweeney is correct, and the IMP remains effective, there was
25 no violation. But even if the legal position of staff prevails, the penalty should be small because the
26 nature of the violation was so legally uncertain.

27 Moreover, the gravity of the harm was small. BCDC staff insist that the levee repair dried
28 out tidal marsh, but they are wrong. The island was high and dry before the levee repair. (See
section II.D above and section VII.C.11 below.)

³ This omission cannot be cured by a supplemental report. BCDC regulations do not provide for a supplemental report, or for a response to any supplemental report by Mr. Sweeney, who has a due-process right to respond to staff’s accusations. (See section VIII.C below.)

1 If staff had considered “whether the violation is susceptible to removal or resolution”, they
2 would have had to admit that it is indeed susceptible to resolution. Mr. Sweeney is working with
3 staff from BCDC, the Regional Board, and EPA on permit applications, and expects to be reaching
4 agreement with the agencies and submitting permit applications in the not-too-distant future. (See
5 section II.J above.)

6 If staff had considered “the cost to the state in pursuing the enforcement action”, it would
7 have admitted that the cost has been minimal. BCDC staff have not commissioned any special
8 consultant work. They have simply been doing their jobs.

9 If staff had considered “with respect to the violator, the ability to pay, the effect on ability to
10 continue in business”, it would have concluded that there should be no penalty. Mr. Sweeney cannot
11 afford to pay the proposed penalty, or any substantial penalty. Regional Board staff are demanding a
12 penalty of \$4.6 million, and a hearing on that penalty is set for December. Regional Board staff
13 plainly mean to bankrupt Mr. Sweeney. They calculated his assets at \$4.2 million—\$400,000 *less*
14 than the proposed penalty—and they made errors in their calculation. (*See* Bazel Decl., ex. 21 at
15 A10 to A 11 (calculation of assets), A14 (proposed penalty).) Regional Board staff concluded that
16 Mr. Sweeney owned real property in Marin, which they valued at \$2.1 million (i.e. half of his total
17 assets). (*Id.* at A.10.) But Mr. Sweeney sold his house in Marin three years ago, and has used the
18 cash mainly for Point Buckler. (Sweeney Decl., ¶ 14.) Another quarter of his net worth is attributed
19 to Point Buckler, which Regional Board staff value at \$1.2 million. (Bazel Decl., ex. 21 at A10.)
20 But they neglected to deduct the liabilities associated with Point Buckler, even though they assert
21 that the costs of obtaining a permit from the Regional Board would have been \$1.1 million. (*Id.* at
22 A12.) If this estimate is accurate, the costs of permitting plus construction plus monitoring of the
23 remediation work will be substantially greater than \$1.1 million, which would give the island a
24 negative value. Finally, Regional Board staff attribute one quarter of Mr. Sweeney’s wealth to a
25 landing craft that is on sale for \$895,000. (*Id.* at A10.) But this craft has not sold. (Sweeney Decl.,
26 ¶ 14.) Mr. Sweeney will need the cash from this sale to restore Point Buckler Island. The proposed
27 penalty, therefore, would exceed Mr. Sweeney’s ability to pay and prevent him from remaining in
28 business.

1 If staff had considered “any voluntary removal or resolution efforts undertaken”, it would
2 have had to acknowledge that Mr. Sweeney has been trying to resolve these issues. (See section II.J
3 above.)

4 If staff had considered “any prior history of violations”, they would have admitted that
5 Mr. Sweeney has no history of BCDC violations. He assisted BCDC in the efforts of BCDC staff to
6 remove the Salt River docks from BCDC jurisdiction. (See section II.C above.)

7 If staff had considered “the degree of culpability”, it would have concluded that the degree is
8 relatively low. Mr. Sweeney had been informed that Point Buckler was outside of BCDC
9 jurisdiction, and he was not aware of any need for BCDC permits. He was told DWR was
10 demanding that the levee be repaired.

11 If staff had considered “economic savings, if any”, they would have conceded that there will
12 not be any economic savings. Mr. Sweeney will have to apply for a permit as though he was
13 applying in 2011, and will have to go through the full permit process. Because staff are so hostile,
14 the cost of permitting will undoubtedly be greater than it would be if he had applied in 2011.

15 If staff had considered “such other matters as justice may require”, they would have
16 acknowledged that their behavior has contributed to the problems here. They made statements about
17 their jurisdiction that appear to be incorrect. They could have avoided much of the problem with the
18 simple expedient of a phone call, or e-mail, or letter to Mr. Sweeney when they discovered he was
19 repairing the levee, but they waited until the levee repair was effectively complete before contacting
20 him. Moreover, BCDC staff are part of a concerted effort to penalize Mr. Sweeney for filing a
21 successful suit against the Regional Board, which had violated the due process requirements of the
22 Constitutions of the United States and California. (See sections VIII.C.1 and VIII.C.2 below.)
23 When an agency behaves vindictively toward a person who has exercised his legal rights, that too is
24 a violation of the Constitution. (*Id.*) BCDC should not be acting vindictively or violating the
25 Constitution.

26 Staff have not, in short, analyzed the statutory factors as they are required to, and their
27 omission invalidates this penalty proceeding. If they had considered the statutory factors, they
28 would have concluded that any penalty should be little or nothing.

1 **5. Staff Has Not Negotiated**

2 Nine of the ten highest BCDC penalties were stipulated. (Bazel Decl., exs. 9-19.) Yet in this
3 case BCDC has refused to negotiate. In February 2016, counsel for Mr. Sweeney suggested that the
4 parties should work their differences out:

5 I don't see any reason why there can't be tidal wetlands on the island along
6 with duck ponds and uplands. The Club remains interested in a resolution.
7 There ought to be a way to work our differences out.

8 (Bazel Decl., ex. 5 at 2.) BCDC staff did not respond to this proposal with a phone call or offer to
9 negotiate. (*Id.*, ¶ 14.) Instead, staff responded in April with a cease and desist order and in May
10 with a demand for the highest penalty BCDC has ever imposed. (Complaint at 1; see section VII.A
11 above.) Although there have been meetings and telephone calls since, at no time has BCDC staff
12 offered to negotiate a stipulated penalty. (Bazel Decl., ¶ 14.)

13 **6. Penalties Should Be Waived Or Stayed As Long As Permitting Is Proceeding**

14 Of the top ten penalties ever imposed by BCDC, five provided for a full or partial waiver of
15 the penalty if the violator complied with specified provisions. (Bazel Decl., ex. 9.) Here, any
16 penalty imposed should be waived if Mr. Sweeney obtains a permit.

17 They also provided for stays of the penalty as long as a specified process was proceeding.
18 (*Id.*) Here, any penalty imposed should be stayed as long as the permit process, including
19 negotiations, is proceeding.

20 **7. Other Duck Clubs Have Never Been Penalized**

21 BCDC staff have never imposed any penalties on any other duck clubs in Suisun Marsh.
22 (Bazel Decl., ex. 8 at 2-3.)

23 **B. Every Dollar Spent On Penalties Is A Dollar That Cannot Be Spent On Restoration**

24 Mr. Sweeney is an individual with limited assets. The Regional Board asserted that
25 Mr. Sweeney has \$4.2 million in assets, but \$3.3 million of that is attributable to a mistaken belief
26 that Mr. Sweeney owns a house he sold years ago, and to an overvaluing of Point Buckler Island.
27 (See section VII.A.4 above.) The remaining \$900,000 or so is attributable to a landing craft that is
28 for sale, but has not sold. (*Id.*)

1 Plainly, the best use of Mr. Sweeney’s money is to obtain permits from BCDC, the Regional
2 Board, and the Corps, and to restore and improve the island to a condition acceptable to these
3 agencies. Because Mr. Sweeney’s assets are limited, every dollar he has to spend on penalties—or
4 on legal fees fighting those penalties—is a dollar he does not have to spend to protect or improve the
5 environment.

6 **1. Permitting, Mitigation, And Restoration Costs Will Be Penalty Enough**

7 Regional Board staff estimate that it would have cost Mr. Sweeney \$1.1 million if he had
8 obtained a permit from the Regional Board. (See section VII.A.4 above.) The cost of the restoration
9 will necessarily be greater than the cost of permitting the levee, because it will include the cost of
10 obtain permits from BCDC and the Corps as well as the Regional Board, the cost of additional
11 mitigation for asserted loss of use, the cost of constructing the restoration, and the cost of monitoring
12 the restoration. All of these costs are likely to be higher than they would otherwise have been,
13 because the agencies have developed a personal hostility to Mr. Sweeney. (See section VIII.C
14 below.) That should be enough.

15 **2. BCDC Should Not Force Mr. Sweeney Into Bankruptcy**

16 If BCDC issues a penalty, Mr. Sweeney will have 30 days to challenge that penalty in court
17 or lose his right forever. (Gov. Code § 66641.7.) As a practical matter, Mr. Sweeney will have to
18 file suit. He will also have to spend money on lawyers to oppose the \$4.6 million penalty being
19 demanded by the Regional Board. If that penalty is imposed, he will have to petition the State Water
20 Resources Control Board and file suit to protect his rights. All these action impose legal fees that
21 leave even less money to obtain permits and restore Point Buckler to the conditions the agencies
22 want. It is best to spend what money there is on protecting and improving the environment, rather
23 than on forcing Mr. Sweeney into bankruptcy and giving the Bankruptcy Court control of the island
24 (and of agency actions over the island).

25 **C. No Penalty Should Be Imposed For The Levee Repair**

26 No penalty should be imposed on the levee repair for seventeen reasons. These reasons fall
27 into several categories, including legal requirements, contributory and inconsistent behavior by
28

1 BCDC staff, the protection to duck clubs provided by the Suisun Marsh Preservation Act and Suisun
2 Marsh Protection Plan, and the behavior of Mr. Sweeney.

3 **1. The Levee Repair Is At Most A Single Violation**

4 In staff's letter of January 30, 2015, and on page 9 of the Complaint, the levee repair was
5 counted as a single violation. On pages 16-17 of the Complaint, it was counted as eleven violations.
6 (See section VII.A.3 above.) But staff plainly are trying to run up the numbers and avoid the
7 statutory maximum. The levee repair is at most a single violation.

8 **2. Staff Gave Another Duck Club Extra Time To Repair A Levee That Had
9 Been Breached For Fifteen Years**

10 BCDC staff have not been even-handed and consistent in how they respond to repairs of
11 breaches in levees. In 2010 staff wrote to an owner of a duck club on Chipps Island. (Bazel Decl.,
12 ex. 22.) Staff noted that "the levee has been breached for some time (possibly since 1995)." (*Id.*) In
13 other words, the levee had breached for as long as 15 years. Nevertheless, the letter provided an
14 extension of six months "to complete repairs to the levee". (*Id.*) There was no assertion that the
15 individual management plan for the duck club had become inapplicable. (*Id.*)

16 Here, the Complaint asserts that "[o]ver an approximately 20-year period...the levees and
17 water control structure at the site were not maintained" and "[f]or these reasons, the [IMP] no longer
18 applied to the Site". (Complaint at 7, ¶ O.) If BCDC staff can give a six-month extension of time to
19 a duck club that has not repaired a breach in its levee for 15 years, it can certainly allow a levee
20 repair after 20 years.

21 If the IMP for Point Buckler expired during those 20 years of breach, then the individual
22 management plan for the duck club on Chipps Island must have expired during the 15 years of
23 breach.

24 There is no reason to penalize Point Buckler for behavior that staff accepted at another duck
25 club.

26 **3. Staff Acknowledges The Work Specified In An Individual Management Plan
27 Is Exempt From The Permitting Requirement**

28 The Suisun Marsh Preservation Act gives the Suisun Resource Conservation District
("SRCD") "primary local responsibility for regulating and improving water management practices"

1 at duck clubs within Suisun Marsh. (PRC § 9962(a).) The Preservation Act requires SRCD to
2 prepare a water management program for each duck club. (PRC § 29412.5.) These documents have
3 come to be known as “individual management plans”. The plans were submitted to BCDC, which
4 was required to certify them if they met specified requirements. (PRC § 29415.)

5 In the 1980s individual management plans were developed and certified for each duck club:

6 Individual management plans were developed for each waterfowl hunting club
7 in the 1980s, and were reviewed by the California Department of Fish and
8 Game and certified by the San Francisco Bay Conservation and Development
9 Commission. Land managers can conduct ongoing management activities
described in the plans, such as maintenance, repairs, and enhancements,
without having to apply for separate permits from the Commission for each
activity.

10 (Bazel Decl., ex. 23 (Suisun Marsh Protection Plan) at 34 (Land Use and Marsh Management
11 Finding 3).) These plans allow duck clubs to implement repairs and “enhancements” without a
12 permit from BCDC:

13 Land managers can conduct ongoing management activities described in the
14 plans, such as maintenance, repairs, and enhancements, without having to
apply for separate permits from the Commission for each activity.

15 (*Id.*) The Complaint acknowledges that a permit is not required for work specified in an IMP.
16 (Complaint at 4, ¶ C.)

17 **4. The Levee Repair Was Consistent With The IMP**

18 By 1980 or so, SRCD had prepared the IMP for Point Buckler, which was then called “Annie
19 Mason Point Club” or Club 801. (Bazel Decl., ex. 24 at 1 (cover page dated 1980), 4 (BCDC
20 received the plan in 1984).⁴) BCDC staff acknowledges that, in accordance with the statute, the plan
21 was certified. (Complaint at 4, ¶ D.) The Club Plan includes a map identifying “levee repair” in
22 several locations, and notes that levee problems from the 1970s had been resolved: “the situation
23 has greatly improved and the club reports that it now has the water control structures and tight levees
24 necessary for proper water management.” (Bazel Decl., ex. 24 at 16 (map), 4 (text).) “Proper water
25 control”, according to the Club Plan, “necessitates inspection and maintenance of levees, ditches,
26 and water control structures.” (*Id.*, ex. 24 at 5.) The plan also refers to a standard list of

27 _____
28 ⁴ The IMP attached as ex. 4 contains a page dated 1990, which could not have been part of the
original plan. (*See id.* at 15-16.) Those pages appear to identify the levee repairs done in the early
1990s, when the pump was installed. (See section II.B above.)

1 recommendations “for more information on the maintenance and repair of water control facilities.”
2 (*Id.*) This reference appears to be to the Management Program, which includes “Suisun Marsh
3 Levee Specifications”. (*Id.*, ex. 2 at C-11 through C-17.) The Management Program requires that
4 “renovation, restoration, repair and maintenance of existing levees” must conform with these
5 specifications. (*Id.*, ex. 2 at C-6.) The Club Plan, in short, (1) specifies that “tight levees” are
6 “necessary for proper water management”, (2) calls for “maintenance of levees”, and (3) refers to
7 specifications for the “restoration” and “repair” of levees.

8 The Club Plan also refers to the cleaning out of ditches and to the removal or burning of
9 vegetation. “Ditches need to be kept clear of vegetation blockages or silt build-ups to allow
10 circulation and drainage.” (*Id.*, ex. 24 at 5.) “The dense growth of undesirable vegetation in the
11 pond needs to be reduced by burning and/or discing”. (*Id.*) “Removing the old vegetation and
12 turning over the soil provides a seed bed for the establishment of new vegetation which is more
13 preferred by waterfowl.” (*Id.*)

14 In 2014, Mr. Sweeney repaired the levee. (Sweeney Decl., ¶ 8.) He dug out material from an
15 artificial ditch inside the levee and placed the material on the existing levee. (*Id.*) Some material
16 was placed where the levee had been breached, and (where part of the levee had eroded away) on
17 solid ground inside the former levee location. (*Id.*) He repaired one of two tide gates. (*Id.*) Details
18 were provided in a technical report prepared by Applied Water Resources and submitted to the
19 Regional Board in October 2015. (Bazel Decl., ex. 25.)

20 The Work was consistent with the “tight levees” called for by the Club Plan, with levee
21 “restoration” referred to in the Management Program, and with the overarching concept in both:
22 levees and other water control structures should be maintained and repaired in perpetuity so that
23 duck ponds could provide food and habitat for waterfowl.

24 Staff assert that the levee repair was not consistent with the IMP because “the IMP
25 authorized the ‘inspection and maintenance’ of existing levees, not the construction of an entirely
26 new levee”. (Complaint at 8, ¶ Q.) This assertion misreads the purpose and text of the IMP, as well
27 as the work done at the island. There was no construction of a “whole new levee”, but rather the
28 repair and restoration of an existing levee. There can be no doubt that the island was surrounded by

1 a levee, because the IMP includes a diagram showing the island surrounded by a levee. (Bazel
2 Decl., ex. 24 at 16.) Because the IMP calls for “tight levees”, which it describes as being
3 “necessary” for proper water management, there should be no doubt that the IMP calls for repair of
4 any breaches of the levee.

5 Nor should there be any doubt that it provides for “restoration” as well as “repair” of the
6 levee. As explained above, the IMP refers to the Management Program, which includes “Suisun
7 Marsh Levee Specifications”. (*Id.*, ex. 3 at C-11 through C-17.) The Management Program requires
8 that “renovation, restoration, repair and maintenance of existing levees” must conform with these
9 specifications. (*Id.*, ex. 3 at C-6.) Because the IMP refers to the Management Program, and the
10 Management Program provides for the renovation and restoration of levees as well as their repair
11 and maintenance, there can be no doubt that the restoration of the levee at Point Buckler was called
12 for.

13 Moreover, the Suisun Marsh Protection Plan specifies that the permit exemption also applies
14 to “enhancements”: “[I]and managers can conduct ongoing management activities described in the
15 plans, such as maintenance, repairs, and *enhancements*, without having to apply for separate permits
16 from the Commission for each activity.” (Bazel Decl., ex. 23 at 34 (Land Use and Marsh
17 Management Finding 3) (emphasis added).)

18 **5. Staff Have Not Performed The Required 5-Year Reviews Of Individual**
19 **Management Plans, And Have Not Used The Statutory Procedures For**
20 **Modifying The IMP**

21 BCDC is required to review individual management plans every 5 years:

22 The Commission shall, from time-to-time, but at least once every five years
23 after certification, review the certified local protection program, and each
24 component thereof, to determine whether such program is being effectively
25 implemented in conformity with the policies of this division.

26 (PRC§ 29422(a).) BCDC staff has never conducted any of these five-year reviews. (Bazel Decl.,
27 ex. 8 at 1.)

28 If during these five-year reviews, BCDC determines that “the certified local protection
program, or any component thereof, is not being carried out in conformity with this division or the
protection plan”, BCDC is required to submit “recommendations of corrective actions that should be
taken”. (PRC§ 29422(a).) Through this mechanism, BCDC should have recommended the

1 rescission or modification of the IMP, assuming BCDC staff through rescission or modification was
2 warranted.

3 In fact, the Club plan has never been modified. (Bazel Decl., ¶ 17.)

4 **6. Staff Have No Evidence To Support Their Assertion That The IMP Was**
5 **Never Implemented**

6 BCDC staff assert that “the Site had never been managed in accordance with the Annie
7 Mason IMP”. (Complaint at 10, ¶ W.) Staff have no evidence to support this statement, and have
8 provided evidence to the contrary. Staff acknowledge that the island had tight levees in 1985.
9 (Complaint at 6, ¶ I.) The IMP itself says that since 1978 “the situation has greatly improved and the
10 club reports that it now has the water control structures and tight levees necessary for proper water
11 management”. (Bazel Decl., ex. 24 at 4.)

12 Staff incorrectly assert that “an analysis performed in 1984” by DWR determined that the
13 levees were not in good repair. (Complaint at 6, ¶ I.) But there was no analysis. The document
14 referred to, DWR’s “Plan of Protection for the Suisun Marsh” (Chappell Decl., ¶ 12) was published
15 in 1984, but it was an EIR that undoubtedly took years to prepare. The statement about Annie
16 Mason must have been written before the club’s levees were repaired.

17 Mr. Chappell has no percipient knowledge of any relevant fact before 1994, when he was
18 first employed by SRCD. (See Chappell Decl., ¶ 1.) He professes no percipient knowledge of about
19 Point Buckler at any time before 2014. (*Id.*, ¶ 17.) Staff have therefore presented no one with any
20 percipient knowledge of what happened on the island at any time before 2014.⁵

21 In any case, these assertions are all irrelevant. Staff admit that the IMP was prepared and
22 certified in accordance with the statute. For the purpose of the exemption in PRC § 29501.5, that is
23 all that matters.
24
25

26 _____
27 ⁵ Mr. Sweeney objects to the declaration of Mr. Chappell, other than ¶ 17, on the grounds that he
28 professes no percipient knowledge of any fact asserted. Almost all of the declaration consists of
legal argument or expert opinion on the meaning and legal consequences of various documents. Mr.
Sweeney objects to this opinion on the ground that Mr. Chappell has not qualified himself as a
lawyer or legal expert.

1 **7. Staff Are Wrong When They Assert That The IMP Is No Longer In Effect**

2 Staff assert that because the levees had been breached, and the island no longer contained
3 managed wetlands when Mr. Sweeney purchased the site, “the Annie Mason IMP no longer applies
4 to the Site”. (Complaint at 7, ¶ O.) But staff provide no statutory or other legal authority for this
5 proposition.

6 Underlying staff’s assertion is the following logic: (1) IMPs were to be prepared only for
7 managed wetlands, (2) at some point before 2011 the island stopped being a managed wetland, and
8 (3) therefore, the IMP no longer applied. But it is up to the Legislature, not to BCDC staff, to say
9 when the IMP no longer applies. And the Legislature *has not* said that an IMP is no longer effective
10 when an island stops being a managed wetland.

11 In fact, the Suisun Marsh Preservation Act does not put any expiration date on the individual
12 management plans. They exist in perpetuity, subject to modification during the five-year review.
13 (See section VII.C.5 above.)

14 What happens if a duck club stops implementing its individual management plan? BCDC
15 and SRCD have authority to require compliance. The Preservation Act requires SRCD to “issue
16 regulations requiring compliance with any water management plan or program for privately owned
17 lands”. (PRC § 9962(a).) The Legislature, therefore, intended that an individual management plan
18 would be prepared for each duck club, and that each duck club would comply with its plan.

19 The compliance obligation of each duck club runs with the land. In the words of SRCD’s
20 Suisun Marsh Management Program (the “Management Program”):

21 Each private managed wetland ownership...shall be managed in conformity
22 with the provisions and recommendations of the individual management
23 program.... If there is a change in land ownership, the new landowner
24 assumes this responsibility.

25 (Bazel Decl., ex. 2 at 18; *see* PRC § 29401(d) (requiring management program).)

26 An individual management plan, in other words, does more than give a duck-club owner the
27 right to implement the plan without a permit. It creates an obligation in each owner to comply with
28 the requirements of the plan. This obligation makes perfect sense. After all, the goal of the Suisun
Marsh Preservation Act is to *preserve* the marsh, including all its duck clubs.

1 Staff may not like duck clubs, but they are bound by the preferences of the Legislature, as
2 expressed in the Preservation Act. If they want to change the IMP, they should change it through the
3 five-year review process.

4 **8. Staff's Position Is Inconsistent With BCDC Regulations**

5 BCDC regulations define "substantial change in use" to include "abandonment" of a
6 "managed wetland". (14 CCR § 10125.) Consistent to this definition, a duck-club owner cannot
7 legally abandon a managed wetland without a permit from BCDC.

8 Here, BCDC has never issued a permit authorizing Point Buckler, or any of the island's
9 previous owners, to abandon its managed wetlands. Therefore, if BCDC's regulation were to be
10 applied, staff would have to conclude that the island is still a managed wetland legally, even if it is
11 not a managed wetland factually. Because the island is still a managed wetland legally, then the
12 IMP must still apply.

13 By taking the opposite position, staff are acting inconsistently with BCDC regulations.

14 **9. If The Levee Repair Was The Greatest Violation In The History Of BCDC, 15 Why Did Staff Allow It To Proceed To Completion?**

16 Because the proposed penalty amount is so much higher than any other penalty, the levee
17 repair at Point Buckler must be the greatest violation in the history of BCDC. And yet, when staff
18 became aware of the levee repair in March 2014, they took no action. They did not even call until
19 October 2014, and did not visit the island until November, when they told Mr. Sweeney that if the
20 work was consistent with the IMP it was OK. (See section II.F above.) Only in January 2015 did
21 they conclude that the levee repair was a violation.

22 If it took ten months for staff to determine that there was a violation, the levee repair cannot
23 be the greatest violation in BCDC's history. The penalty is much too high.

24 **10. BCDC Staff Made Misleading Statements About BCDC Jurisdiction**

25 If repairing the levee without a permit was a violation, it was caused in part by staff's
26 statements that BCDC's jurisdiction did not extend to Chipps Island and Point Buckler. (See section
27 II.C above.)
28

1 **11. The Island Was Not Tidal Marsh**

2 The Complaint asserts that “areas of the Site formerly consisting of managed wetlands began
3 reverting to ‘tidal marsh’, as that term is defined in Section II, Exhibit C of the [Suisun Marsh
4 Protection Plan]”. (Complaint at 6, ¶ K.) As noted above, the definition of “tidal marsh” requires
5 that the land be subject to “daily tidal action”. (See section II.D above.) Here the interior of the
6 island was not subject to “daily tidal action” at any relevant time, except for the channels and
7 ditches. (*Id.*) The Complaint relies on the Regional Board’s Technical Report. (Complaint at 6, ¶
8 K.) But the Regional Board’s consultants relied on erroneous topographical information in that
9 report, as discussed below. After they became aware that the island remained high and dry while
10 Mr. Sweeney was working on it, the Regional Board’s consultants changed position and
11 acknowledged that the interior of the island *was not* subject to daily tidal action. Because staff rely
12 only on the Regional Board’s consultants, and because these consultants now agree that the interior
13 of the island was not subject to daily tidal inundation, staff have nothing to support their contention
14 that “areas of the Site formerly consisting of managed wetlands began reverting to ‘tidal marsh’”.
15 (Complaint at 6, ¶ K.)

16 The Regional Board’s Technical Report asserted that “Point Buckler was subject to daily
17 tidal inundation to the...island interior”, and that almost the entire island was tidal marsh.
18 (Technical Report at 5, fig. 4; *see* fig. 8 (nearly all of island subject to tidal action).) In order to
19 reach this conclusion, however, the Technical Report ignored powerful on-the-ground evidence
20 leaving no doubt that the interior *was not* tidal marsh.

21 Four lines of evidence lead directly to the conclusion that the island and its interior were dry
22 before the levee repairs were done.

23 First, there is the evidence of the white debris line at the island. High tides tend to float
24 debris, which settles as the tide recedes. Debris lines (sometimes called “wreck lines”) are useful in
25 determining how high the tide has reached. A Corps regulation specifies that “the high tide line may
26 be determined...by...a more or less continuous deposit of... debris”. (Technical Report at I-1,
27 quoting 33 CFR §328.3(d).) Aerial photographs show that there was a “more or less continuous”
28 line of debris along the edge of the island *before* the levee was repaired.

1 Figures D-10 and D-11 in the Technical Report, which are aerial photographs of the island
2 taken in September and October 2013—well before the levee repair started in 2014—show a “more
3 or less” continuous white line at the edge of the island. (Figures reproduced as Bazel Decl. exs. 26-
4 27; enlargements of parts of these figures provided as ex. 28.) The line can plainly be seen along the
5 southern edge of the island, and it continues along the northwestern side. (*Id.*) The eastern side is
6 too steep and vegetated to have a clear debris line. (Sweeney Decl., ¶ 15.)

7 The white line along the shore of the island consists of debris, including dead vegetation and
8 whitened wood, along with some other detritus including styrofoam. (Sweeney Decl., ¶ 16 and
9 ex. 5.)

10 A debris line around the edge of the island means that the high tide did not overtop the old
11 levee and flow into the center of the island. The Complaint is therefore wrong when it asserts that
12 “portions of the Site interior to the levees were subject to...‘overtopping’ of the levees”. (Complaint
13 at 6-7, ¶ L.) The Complaint relies on the Regional Board’s Technical Report for this assertion, but
14 the authors of that report have since recanted.

15 Moreover, if the tides had overtopped the levee, there would be debris evident in the interior
16 of Point Buckler. The rising tide would have lifted the debris that forms the white debris line and
17 carried them up over the old levee into the center of the island. But the white debris line *was not*
18 carried up and over the old levee into the interior of the island. No debris was found in the center of
19 the island. Debris can be seen in aerial photographs of the interior of a neighboring island. (Bazel
20 Decl., exs. 29-30.) But no debris was found in the interior of Point Buckler.

21 Second, there is the fact that Mr. Sweeney was present on the island for much of 2014.
22 (Sweeney Decl., ¶ 7.) He often worked on the levee repairs five days per week. (*Id.*) The work
23 extended over perhaps six months. (*Id.*) If the Technical Report is right, then Mr. Sweeney must
24 have observed nearly the entire island being flooded nearly every day. At times, he must have
25 worked in water more than a foot deep.

26 But, during all of the time he was repairing the levee, Mr. Sweeney never saw the island
27 under water. (*Id.*) Nor has he seen it under water before or since. (*Id.*) During the time he was
28

1 working on the island, he did not see water rise up over the top of the interior channels and ditches
2 and spread over the land. (*Id.*)

3 Before the levee was repaired, Mr. Sweeney cut vegetation on the island. (*Id.*, ¶ 6 and ex. 3.)
4 When he was cutting the vegetation, the island was dry. (*Id.*) He drove a bulldozer across the island
5 to create several roads and paths. (*Id.*, ex. 5.) When he drove the bulldozer across the island, the
6 island was dry. (*Id.*) To repair the levee, he used an excavator that weighs about 60,000 pounds.
7 (*Id.*) If the island had been tidal marsh, the excavator would have gotten stuck in the muck, but the
8 island was not tidal marsh and the excavator never got stuck. (*Id.*) This eyewitness testimony
9 confirms that the island was not tidal marsh.

10 Third, Mr. Sweeney's testimony is perfectly corroborated by the aerial photographs, which
11 show no sign that the interior of the island was subject to tidal action. Perhaps the clearest evidence
12 comes from the Google Earth photo taken on May 19, 2012. (Technical Report, fig. D-1.) That
13 photograph was taken shortly after cleared vegetation on the western tip of the island for
14 kiteboarding. (Sweeney Decl., ¶ 6.) He also cleared the vegetation to create several roads, and
15 excavated two duck ponds, one near the northern tip of the island and one near the southeastern tip.
16 (*Id.*) The aerial photograph clearly shows water in the duck ponds. It also shows that the western
17 side of the island and all the roads are *completely dry*.

18 If the Technical Report were right, there would be signs of water ponding on the roads and
19 the western part of the island. Even assuming that the photograph was taken at the lowest low tide
20 of the day, there would have been a high tide six hours earlier, and a higher high tide within the last
21 eighteen hours. These tides should have covered the island with a half foot or more of water. When
22 the tide retreated, it should have left ponds in the low areas of the island and large puddles or ponds
23 on the cleared areas. The fact that there are no ponds, or even puddles, once again shows that the
24 Technical Report is wrong.

25 The Technical Report itself provides strong evidence that the island was dry. It includes a
26 series of aerial photographs of the island, beginning in 1948. (Technical Report, Appendix A.) The
27 1948 aerial photo shows clear evidence of ponds on the island. (*Id.*, fig. A-1.) The 1981 aerial
28 photograph also appears to show a pond. (*Id.*, fig A-3.) Between 1988 and 2011 there do not appear

1 to be any ponds on the island. (*Id.*, figs A-7 through A-25.) The first photo showing cut vegetation
2 is the Google Earth photo dated May 19, 2012. (*Id.*, fig. D-1.) This photograph, as discussed above,
3 shows several roads or pathways across the island, all dry. The following thirteen aerial photographs
4 show the same thing: no ponding or water on the island other than in the channels and ditches and
5 the two small ponds dug by Mr. Sweeney. (*Id.*, figs D-2 to D-14.)

6 If the island were subject to *daily* inundation by the tides, there should be some evidence of
7 this inundation in at least one of these photographs. After all, the odds of having a random aerial
8 photograph taken within 1 hour of high tide is 1 in 6, and the Technical Report includes 33
9 photographs between 1988 and 2013. The absence of any visible ponding on the island in aerial
10 photographs during this time is therefore powerful evidence that the island *was not* subject to daily
11 tidal inundation.

12 Fourth, the white debris line, percipient-witness testimony, and aerial photographs are
13 consistent with an infrared aerial photograph obtained from NOAA and submitted to staff in October
14 2015 on behalf of the Club. (Bazel Decl., ex. 25, next-to-last page (entitled “NOAA 2013 MHW”).)
15 This aerial photograph was taken at mean high water. (*Id.*) It shows water staying within the
16 channels and ditches, and not spreading out over the interior of the island. (*Id.*)

17 The Technical Report arrived at its incorrect conclusion partly because it relied on elevations
18 from a topographical study. But these elevations must be wrong. A single photograph demonstrates
19 that the elevations must be off by several feet.

20 The Regional Board’s consultants conducted a boat tour around the island in February 17,
21 2016. (Technical Report at 1, I-1.) According to the Technical Report, high tide at Port Chicago,
22 the nearest NOAA monitoring station, was 7.04 feet on February 17. (*Id.*, figure I-1 (all elevations
23 are based on NAVD 88).) Based on one data point, the Technical Report asserted that this figure
24 should be increased to 7.3 feet. (*Id.*) Staff and their consultants revised this number in a document
25 entitled “Experts’ Response to July 11, 2016 Evidence Package”. (Bazel Decl., ex. 31
26 (“Response”).) They asserted that NOAA established a multiplier of 1.12 to convert Port Chicago
27 water levels to Point Buckler water levels. (*Id.* at 9.) Multiplying the high tide of 7.04 times 1.12
28 gives an elevation of 7.8848 feet, which to be conservative can be rounded down to 7.8 feet.

1 The Regional Board’s consultants included, in their Response, a photograph taken on
2 February 17, when according to staff the water level at the island was at 7.8 feet. (Bazel Decl., ex.
3 32, ex. 33 (Mr. Sweeney’s presentation to the Regional Board), slide 64.) This photograph shows
4 that the water level had not reached the base of the levee. Although vegetation obscures the base of
5 the levee in much of the photograph, the base can clearly be seen at the right of the photograph. The
6 Regional Board provided an exhibit showing the levee and where this photograph was taken. (Bazel
7 Decl., ex. 34.)

8 According to the topographic survey in the Technical Report, the height of the levee at that
9 location is about 2.5 feet, and that seems reasonable. (Bazel Decl., ex. 35 (showing elevations
10 obtained by the Regional Board’s consultants overlaid on an aerial photograph of the island).) The
11 base of the levee is above the water level in the photograph by perhaps 1 to 1.5 feet. From these
12 figures, the height at the top of the levee can be calculated: 7.8 feet (the water level) plus 1-1.5 feet
13 (elevation change between the water and the base of the levee) plus 2.5 feet (height of the levee).
14 This calculation puts the top of the levee at about 11.3-11.8 feet.

15 Here’s the problem. According to the topographic data collected by the Regional Board’s
16 consultants, the top of the levee at that location is only about 7.8 feet—the exact same height as the
17 water. (*Id.*, ex. 35 (top of levee is about 7.5-8 feet, depending on exact location).) But, as the
18 photograph shows, the water level *is not* at the top of the levee. It is not even to the base of the
19 levee. The difference in elevation between the two is about 3.5-4 feet. Plainly, something is wrong.
20 It is possible that NOAA’s water elevations are wrong, but it seems more likely that the elevations
21 taken by the Regional Board’s consultants are wrong.

22 In their Response, the Regional Board’s consultants withdrew their assertion that the interior
23 of the island was subject to daily tidal inundation. They conceded that the interior of the island was
24 dry most of the time, except for the channels and ditches. The channels and ditches overflowed
25 infrequency, they said: “as much as a few times per month to none for several months”. (Bazel
26 Decl., ex. 33, slide 44.) These overflows, they said, lasted briefly and were fairly shallow. (*Id.*)
27 Except for channels and ditches, the interior of the island was depicted as *not* being subject to daily
28 tidal flows. (*Id.*, ex. 33, slide 43.)

1 As a result, there is no doubt that the interior of the island, except for the channels and
2 ditches, was almost always dry. It was certainly not subject to daily tidal inundation. BCDC staff,
3 therefore, have no evidence to support their assertion that the island was tidal marsh.⁶

4 **12. Mr. Sweeney Did Not Drain The Island**

5 The Complaint accuses Mr. Sweeney of “draining the Site to further alter the pre-existing
6 tidal marsh hydrology”. (Complaint at 3, ¶ 2.) Elsewhere in the Complaint, staff assert that during
7 their November 2014 site visit “it appeared from the extent of the levee construction that
8 SWEENEY was in the process of draining this once tidally active marshland in order to convert the
9 Site to upland”. (*Id.* at 9, ¶ U.) These accusations are incorrect.

10 There was no need to drain the island, because it was high and dry before the levee repair.
11 (See section II.D above.) Photographs taken on the island in May 2012, two years before the levee
12 repair, show that Mr. Sweeney was walking on solid ground. (Sweeney Decl., exs. 3-4.) His heavy
13 equipment did not get stuck in any muck. (See section II.D above.)⁷

14 Aerial photographs show that there has been water in the borrow ditch at all times since the
15 levee repair. (Technical Report, figs. D-26 through D-36.) If the island were truly to be drained,
16 water in the borrow ditch would have to be removed.

17 Nor has there been any significant change in vegetation. As the aerial photographs (both
18 before and after the levee repair) show, the island is sometimes brown, and sometimes green. It has
19 been brown during much of the recent drought, but was green in May. (Sweeney Decl., ex. 17.)

20 In short, there is no evidence to support staff’s accusation that Mr. Sweeney is draining the
21 island.

22 **13. The Suisun Marsh Protection Plan Emphasizes The Importance Of Duck 23 Ponds, Which Waterfowl Prefer Over Natural Marsh**

24 In 1974, the California Legislature enacted the Nejedly-Bagley-Z’berg Suisun Marsh
25 Preservation Act of 1974, which directed BCDC and the Department of Fish and Game to prepare

26 ⁶ For a more detailed review of the Technical Report, see Mr. Sweeney’s petition for review, filed
27 with the State Water Resources Control Board.

28 ⁷ The vegetation at that time was mostly brown and dead, a not uncommon occurrence on the island.
For more information about the intervals of brown and green vegetation, see the petition to the State
Board and its accompanying declarations and exhibits.

1 the Suisun Marsh Protection Plan “to preserve the integrity and assure continued wildlife use” of the
2 Suisun Marsh. (Bazel Decl., ex. 23 (Suisun Marsh Protection Plan) at 9.)

3 The Suisun Marsh Protection Plan (the “Protection Plan”), which was published in 1976 and
4 updated in 2007, emphasizes the importance of duck clubs to the Suisun Marsh. Duck clubs, which
5 “encourage production of preferred waterfowl food plants”, “are a vital component of the wintering
6 habitat for waterfowl migrating south”:

7 In the Suisun Marsh, about 50,700 acres of managed wetlands are currently
8 maintained as private waterfowl hunting clubs and on publicly-owned wildlife
9 management areas and refuges. Because of their extent, location and the use
10 of management techniques to encourage production of preferred waterfowl
11 food plants, managed wetlands of the Suisun Marsh are a vital component of
12 the wintering habitat for waterfowl migrating south on the Pacific Flyway, and
13 also provide cover, foraging and nesting opportunities for resident waterfowl.
14 Managed wetlands also provide habitat for a diversity of other resident and
15 migratory species, including other waterbirds, shorebirds, raptors, amphibians,
16 and mammals. Managed wetlands can protect upland areas by retaining flood
17 waters and also provide an opportunity for needed space for adjacent wetlands
18 to migrate landward as sea level rises.

19 (*Id.* at 12 (Environment Finding 5).) Duck clubs “have made considerable contributions to the
20 improvement of the Marsh habitats for waterfowl”:

21 The Marsh is well known for waterfowl hunting in California.

22 The recreational values of the Marsh, particularly for duck hunting, have been
23 a significant factor in its preservation. Private duck clubs...have made
24 considerable contributions to the improvement of the Marsh habitats for
25 waterfowl as well as other wildlife.

26 (*Id.* at 28.) Duck clubs “have worked to maintain the area’s habitat value and to protect the natural
27 resources of the Marsh”:

28 Market hunting of waterfowl began in the Suisun Marsh in the late 1850s, and
the first private waterfowl sport hunting clubs were established in the early
1880s. Generations of hunting club owners and members have worked to
maintain the area’s habitat value and to protect the natural resources of the
Marsh. Today, waterfowl hunting is the major recreational activity in the
Suisun Marsh...

(*Id.* (Recreation and Access Finding 2).)

The Protection Plan establishes, as its first recreational policy, an encouragement of duck
clubs:

Continued recreational use of privately-owned managed wetlands should be
encouraged.

1 (*Id.* at 29 (Recreation and Access Policy 1).)

2 Under “Land Use and Marsh Management”, the Protection Plan once again emphasizes the
3 importance of duck clubs:

4 Within [the primary management] area, existing land uses should continue,
5 and land and water areas should be managed so as to achieve the following
6 objectives: ...

- 6 • Provision of habitat attractive to waterfowl
- 7 • Improvement of water distribution and levee systems ...

8 (*Id.* at 33.) These concepts are reinforced by the findings in this section, which emphasize the
9 importance of managing to “to enhance the habitat through the encouragement of preferred food
10 plant species”:

11 The managed wetlands are a unique resource for waterfowl and other Marsh
12 wildlife, and their value as such is increased substantially by the management
13 programs used by waterfowl hunting clubs and public agencies to enhance the
14 habitat through the encouragement of preferred food plant species.

13 (*Id.* at 34 (Land Use and Marsh Management Finding 2).)

14 Duck clubs, in short, “enhance the habitat” for waterfowl by growing “preferred food plant
15 species” that do not occur naturally.

16 Recent scientific work reveals that waterfowl populations in the marsh are declining. (Bazel
17 Decl., 36 (page from U.S. Geological Survey website).) Current waterfowl abundance is below the
18 population objective for 300,000 ducks wintering in Suisun Basin, and well below the nearly
19 370,000 waterfowl that wintered there during the 1950s. (*Id.*, ex. 37 (book chapter written by USGS
20 employee) at 21.)

21 Waterfowl continue to prefer managed wetlands to unmanaged tidal marsh. “Dabbling
22 ducks...account for 90% of wintering waterfowl in Suisun Marsh...[and] strongly select managed
23 wetland habitats and avoid tidal marshes, bays, and sloughs”. (*Id.*) “Suisun Marsh also supports
24 among the highest densities of breeding ducks in California.” (*Id.*) “Maintaining the present, if not
25 historic, diversity and abundance of waterfowl in the Marsh likely will depend on active wetland
26 management for higher yielding seed plants, which increase the carrying capacity of the few
27 remaining wetlands.” (*Id.* at 22.)

1 The current preference for tidal marsh over duck ponds threatens waterfowl. Scientist
2 question whether this preference will reduce the food supply to waterfowl: “If a portion of Suisun
3 Marsh is restored to tidal marsh, will there be enough food to maintain the present size of waterfowl
4 populations?” (*Id.* at 15.) They conclude that “having a marsh mosaic that includes managed
5 wetlands with their higher productivity, and tidal marsh with their more natural state, may be the
6 only way to both restore tidal marsh habitat and maintain the diversity and abundance of animals that
7 once used these habitats.” (*Id.* at 20.)

8 Because of the importance of managed wetlands, both ecologically and legally, Mr. Sweeney
9 should not be punished for his efforts to restore the managed wetlands at Point Buckler.

10 **14. It Would Be Inappropriate To Impose A Penalty When Staff Refused To**
11 **Discuss A Resolution**

12 In February 2016, counsel for Mr. Sweeney offered to discuss a resolution in which there
13 were both tidal wetlands and duck ponds:

14 I don't see any reason why there can't be tidal wetlands on the island along
15 with duck ponds and uplands. The Club remains interested in a resolution.
16 There ought to be a way to work our differences out.

17 BCDC staff responded to this friendly proposal with hostility.

18 Staff should not refuse to talk about a resolution, and should not demand penalties until it is
19 clear that resolution cannot be achieved.

20 **15. Mr. Sweeney Has Agreed To Apply For A Permit And Restore Tidal Flows**
21 **To The Channels And Ditches**

22 Penalties are also inappropriate because Mr. Sweeney followed up on his interest in a
23 resolution by agreeing to apply for permits, and to restore most of the island to the condition it was
24 in before the levee repair.

25 It would be inappropriate to penalize Mr. Sweeney when he is agreeing to apply for a permit,
26 notwithstanding his legally correct position that no permit is required.

27 **16. Mr. Sweeney Should Not Be Penalized For Exercising His**
28 **Constitutional Rights**

 In September 2015, Regional Board staff issued a cleanup and abatement order to
Mr. Sweeney without complying with the requirements of due process. (See section VIII.C below.)

1 When Regional Board staff refused to extend a deadline, Mr. Sweeney filed suit in Solano Superior
2 Court and obtained a stay of the order. Regional Board staff rescinded the order in January 2016.

3 Since then, Regional Board staff and BCDC staff have joined together to impose on Mr.
4 Sweeney the largest fines ever imposed on anyone by the two agencies. (*Id.*)

5 BCDC staff should not be penalizing Mr. Sweeney for exercising his Constitutional rights.

6 **17. Mr. Sweeney Did What He Thought He Was Supposed To Do**

7 Mr. Sweeney obviously loves Suisun Marsh, and he did not purchase the island with any evil
8 intent. He was told that DWR was demanding that the levee be repaired. (See section II.B above.)
9 It would be improper to penalize Mr. Sweeney for performing repairs being demanded by an agency
10 of the State of California.

11 Mr. Sweeney was also told, by BCDC, that BCDC did not have jurisdiction over the island.
12 Given that conversation, it can hardly be surprising that he did not apply for a BCDC permit.

13 Mr. Sweeney has not acted unreasonably since BCDC asserted jurisdiction. He has stopped
14 working on the levee, which he understood to be the main issue. If he proceed to place additional
15 containers on the island, it was because it understood staff to have acknowledged that virtually every
16 duck club has unpermitted containers, and that BCDC does not insist that they be permitted.

17 Mr. Sweeney invited staff out for a site visit in October 2015, and proudly showed them
18 around the island. He was open and honest about what he had done. Although staff became
19 exercised over such things as his bringing pet goats to the island (Complaint at 12, ¶ EE.6) and over
20 his planting trees on the island (*id.*, ¶ EE.8), staff never informed him that these actions could be
21 problematical. The goats have since been removed, and the trees have died.

22 Mr. Sweeney, despite his strong legal position on the continuing validity of the IMP, is
23 willing to go through the permit process and restore most of the island to the way it was. That
24 should be enough. No penalty should be imposed.

25 **D. A Token Penalty, At Most, Should Be Imposed For The Trailers And Containers**

26 Staff proposes a penalty of \$262,000 for twelve violations related to containers, including
27 two trailers and four flat-rack containers. (Complaint at 17.) Once again, this is over-counting. The
28

1 containers and trailers are all associated with a clubhouse, including storage, windbrakes, and
2 helicopter-landing pads. (*Id.*) They should all be counted, if at all, as a single clubhouse violation.

3 **1. BCDC Does Not Penalize Any Other Duck Club For Containers**

4 In response to staff’s assertion that the trailers and shipping containers on the island required
5 a permit, counsel for Mr. Sweeney submitted approximately 67 aerial photographs showing that
6 virtually every duck club in the Marsh were using shipping containers. (Bazel Decl., ex. 4 (letter
7 and photographs).)

8 In response to a Public Records Act request, staff have confirmed that BCDC has not taken
9 any enforcement action against any of these clubs for their shipping containers.

10 It is clear that Mr. Sweeney is being singled out. Staff want to penalize him for reasons other
11 than the containers.

12 **2. The Containers Did No Harm**

13 The containers did no harm to the island or the environment. They are sitting on dry land,
14 and are covering only a small area. They are all portable structures, and will be removed or
15 permitted as part of the permitting process.

16 **3. Staff Appeared To Back Off The Container Issue**

17 In response to Mr. Sweeney’s submission of aerial photographs, staff appeared to back off
18 from the container issue. (See section II.H above.)

19 **E. No Penalty Should Be Imposed For Kiteboarding**

20 Staff propose a \$30,000 penalty for “[d]eveloping and using Site for water-oriented
21 recreational activities including but not limited to kiting”. (Complaint at 17.) Once again, this is
22 over-counting. The clubhouse and associated facilities have already been counted.

23 **F. No Penalty Should Be Imposed For The Dock**

24 Staff propose a \$60,000 penalty for the dock. This is also over-counting, because there is
25 only one dock. It was cut to conform to the existing pilings. (Sweeney Decl., ¶ 18.)

26 **1. BCDC Staff Provided The Dock**

27 As explained above, Mr. Sweeney agreed to take the dock that is now at Point Buckler (along
28 with other docks) from Salt River Construction because BCDC wanted them out of BCDC

1 jurisdiction. (See section II.C above.) Salt River was supposed to place the docks on Chipps Island,
2 but never did. Instead, it left them in the water at Chipps Island. One got loose and was found
3 floating far from Chipps Island. It was taken to Point Buckler, where it was used to replace an aging
4 dock. (*Id.*)

5 **2. It Was Reasonable To Take The Dock To Point Buckler**

6 Rather than return the dock to Chipps Island, it made sense to take the dock to Point Buckler,
7 where it could do some good.

8 **3. The Dock Replaced An Existing Dock**

9 Staff acknowledge that the dock was a “replacement dock”. (Complaint at 16.)

10 **4. Mr. Sweeney Obtained A State Lands Lease For The Dock**

11 When Mr. Sweeney learned that a State Lands lease was required, he applied for an obtained
12 a lease. (Bazel Decl., ex. 38.)

13 **5. Staff Appeared To Back Off The Dock Issue**

14 He could also have obtained a permit from BCDC. But when he explained that he had taken
15 the dock at the request of BCDC staff, staff appeared to back away from their demand that he obtain
16 a permit. (See section II.H above.)

17 **G. No Penalty Should Be Imposed For The Four Crescent Ponds**

18 Staff propose a penalty of \$120,000 for the four crescent ponds. (Complaint at 16.)
19 Mr. Sweeney excavated these small ponds in the hope of attracting ducks. He planted trees around
20 them and placed decoys in them. (Sweeney Decl., ¶ 10.) Staff’s demand for \$120,000 in penalties is
21 both over-counting and overreaching.

22 **1. The Ponds Are Consistent With The IMP**

23 The four small ponds are duck ponds, and the IMP calls for duck ponds at the island.
24 Mr. Sweeney brought a disc and roller to the island, so that he could plant vegetation preferred by
25 waterfowl. (Sweeney Decl., ¶ 9.) Although he did not proceed to completion of the duck ponds,
26 they are plainly consistent with the IMP. Because the IMP is still in effect, no permit is required for
27 duck ponds. (See section VIII.C.7 above.)
28

1 **2. In Any Case, Duck Ponds Are Favored By The Suisun Marsh Preservation**
2 **Act and Suisun Marsh Protection Plan**

3 Even if a permit were technically required, it would be inappropriate to penalize anyone who
4 wants to create duck ponds, owing to their protected status under the Preservation Act and Protection
5 Plan, as well as their importance to waterfowl. (See section VIII.C.13 above.)

6 **3. The Ponds Did No Harm**

7 The duck ponds did not come at the expensive of tidal marsh, since they were dug in dry land
8 that was not tidal. (See section II.D above.)

9 **H. The Complaint Is Incorrect When It Refers To Road Fill**

10 Staff propose \$60,000 in penalties for “fill...to construct road to support vehicles in
11 northwestern portion of Site” and for “fill...to construct road to support vehicles across the entire
12 Site”. (Complaint at 16.) Staff are mistaken. Staff appear to believe that fill was used to make the
13 pathways that were used in 2012, and are now used, to walk or drive across the island. These
14 pathways were made by cutting vegetation, not by placing fill. (Sweeney Decl., ¶ 19.)

15 Because there was no fill, no permit was required, and there was no violation.

16 **I. No Penalty Should Be Imposed For Cutting Vegetation**

17 Staff propose a penalty of \$30,000 for “[r]emoving, mowing, and/or destroying tidal marsh
18 vegetation” on the grounds that it was a substantial change of use. (Complaint at 17.) But cutting
19 vegetation on the island is not a substantial change in use. The vegetation simply grows back. An
20 aerial photograph taken in May 2012, for example, shows cutting of several pathways across the
21 island. (Technical Report, fig. D-1.) By August, three months later, the pathways are already being
22 obscured by growing vegetation. (*Id.*, fig D-3.) By June 2013, there is almost no sign of them. (*Id.*,
23 fig D-9.)

24 **J. The Complaint Is Incorrect When It Refers To The Installation Of A New Water**
25 **Control Structure**

26 Staff propose a penalty of \$30,000 for the installation of a new water-control structure at the
27 island. (Complaint at 16.) But no new water-control structure was installed. The existing structure
28 was serviceable and left in place, although new flaps were installed at the ends. (Sweeney Decl.,
¶ .)

1 Because there was no new structure installed, there is no violation and no penalty should be
2 imposed.

3 **K. No Penalty Should Be Imposed For The Removal Of A Non-Functional Water**
4 **Control Structure**

5 Staff propose a penalty of \$30,000 for the removal of a non-functional water control
6 structure. This is over-counting. The structure was removed as part of the levee repair. It makes no
7 difference whether the structure was removed, as opposed to having been left in place and buried.

8 No additional penalty should be imposed for the removal of this structure.

9 **L. Mr. Sweeney Is Trying In Good Faith To Restore A Duck Club**

10 Duck clubs and managed wetlands are important to waterfowl in the marsh, and are protected
11 by the Preservation Act and Protection Plan. (See section VIII.C.13 above.) A man who wants to
12 restore duck ponds should be encouraged, especially when he wants to restore them on land that is
13 high and dry.

14 Staff should be working with Mr. Sweeney and helping him to restore the duck club,
15 especially since he is now willing to create new tidal marsh.

16 A modest penalty, at most, should be imposed for the containers. No penalty should be
17 imposed for the levee repair, the dock, the crescent ponds, the nonexistent road fill, the water control
18 structures, or the cutting of vegetation.

19 **VIII. ADDITIONAL LEGAL ARGUMENTS**

20 **A. BCDC Lacks Authority To Impose Administrative Penalties For Violations Of The**
21 **Suisun Marsh Preservation Act**

22 BCDC staff assert that Mr. Sweeney “has violated and continues to violate” the Suisun
23 Marsh Preservation Act. (Complaint at 3.) But staff have admitted that BCDC lacks authority to
24 impose administrative penalties for violations of the Suisun Marsh Preservation Act. In a memo
dated May 26, 201, the Executive Director and Chief of Enforcement explained that:

25 The Suisun Marsh Preservation Act (SMPA) does not provide the
26 Commission with the authority to impose administrative civil penalties and,
27 therefore, the above-described use of administrative penalties to resolve
28 violations is unavailable for violations that occur within the jurisdiction of the
SMPA.

1 (Bazel Decl., ex. 20 at 5.) Given this admission, it is improper to include in the Complaint any
2 mention of any alleged violation of the Preservation Act. By mentioning the Preservation Act, staff
3 appear to be trying to impose administrative penalties that BCDC does not have authority to impose.

4 The Complaint should be sent back to staff for the removal of all asserted violations of the
5 Preservation Act.

6 **B. Staff Have Not Established Jurisdiction Under The McAteer-Petris Act**

7 Staff assert that BCDC has jurisdiction over the island because it is within the definition of
8 “San Francisco Bay” in Gov. Code § 66610(a.) (Complaint at 2.) But staff have not made any
9 effort to provide the evidence necessary to establish this jurisdiction. BCDC therefore lacks
10 jurisdiction to impose the penalty.

11 The definition gives BCDC jurisdiction over “the marshlands lying between mean high tide
12 and five feet above mean sea level”. (Gov. Code § 66610(a).) But staff have not argued, much less
13 presented evidence, that the alleged violations took place between mean sea level and five feet above
14 mean sea level.

15 Although staff cites to the Regional Board’s Technical Report in support of other issues, it
16 does not cite to that report to establish jurisdiction. In any case, the elevations in that report are
17 wrong. (See section VIII.C.11 above.)

18 The McAteer-Petris Act also provides for jurisdiction within a 100-foot “shoreline band”.
19 (Gov. Code § 66610(b).) But staff do not assert jurisdiction under subsection (b). In any case, staff
20 have not argued, much less established, that any of the violations are within the 100-foot band. Most
21 of the asserted violations are well back from the water.

22 Because staff have not established jurisdiction, no penalties can be imposed.

23 It is too late for staff to cure this oversight. ““The fundamental requirement of due process is
24 the opportunity to be heard at a meaningful time and in a meaningful manner.”” (*People v. Litmon*
25 (2008) 162 Cal.App.4th 383, 395, quoting *Mathews v. Eldridge*, 424 U.S. at 333, citations and
26 quotation marks omitted.) Because BCDC regulations effectively limit Mr. Sweeney’s right to
27 present evidence to this statement of defense, staff cannot now introduce new evidence that
28

1 Mr. Sweeney does not have an opportunity to respond to. The proper procedure is for staff to
2 withdraw the Complaint and begin the process again.

3 **C. The Proposed Penalties Violate Constitutional Protections**

4 **1. First Amendment Retaliation**

5 To bring a First Amendment retaliation claim, a person must allege that:

6 (1) it engaged in constitutionally protected activity; (2) the defendant's
7 actions would “chill a person of ordinary firmness” from continuing to engage
8 in the protected activity; and (3) the protected activity was a substantial
motivating factor in the defendant's conduct—i.e., that there was a nexus
between the defendant’s actions and an intent to chill speech.

9 (*Ariz. Students’ Ass’n v. Ariz. Bd. of Regents* (9th Cir. 2016) 824 F.3d 858, 867, citations omitted.)

10 All three elements are met here.

11 The first element is satisfied because Mr. Sweeney engaged in speech and conduct protected
12 by the First Amendment. In December 2015 he filed suit against the Regional Board and its staff
13 alleging that staff violated his Constitutional due process rights. (Bazel Decl., ex. 39.) Beginning in
14 2015, Mr. Sweeney also met with journalists and reporters who published Sweeney’s opinions, many
15 of which were critical of the Regional Board. (Sweeney Decl., ¶ 20.) These activities are
16 indisputably protected by the First Amendment.

17 The second element is satisfied because BCDC and Regional Board staff have colluded to
18 impose penalties of a total of nearly \$5.6 million and thereby take away everything he has. (See
19 section VII.A.4 above.) The threat of losing everything would indisputably chill a person of
20 ordinary firmness from continuing to speak out and assert his Constitutional rights. (*See Bd. of Cty.*
21 *Comm’rs v. Umbehr* (1996) 518 U.S. 668, 674 (government impermissibly interferes with speech by
22 threatening or causing pecuniary harm).)

23 The third element—a nexus between the agency actions and an intent to chill speech—is
24 established by the sequence of events and the magnitude of the penalties demanded. In October and
25 November 2015 counsel for Mr. Sweeney told Regional Board staff that if a deadline were not
26 extended he would have to go to court and obtain a stay of the Regional Board’s order on the
27 grounds that it violated due process. (Bazel Decl., ¶ 33.) On December 1, 2015, Regional Board
28 staff denied Mr. Sweeney’s request for an extension of that deadline. Following that denial,

1 Mr. Sweeney filed suit and in Solano Superior Court and applied for a stay on the grounds that
2 Regional Board staff violated due process. The stay was granted. In early January 2016, Regional
3 Board staff rescinded the order. (*Id.*)

4 Since then, Regional Board staff, along with BCDC staff and EPA staff, have been out for
5 Mr. Sweeney's blood. Staff from the three agencies entered into a joint offense agreement with
6 BCDC and EPA memorializing their "common interest" in the investigation of and enforcement
7 against Mr. Sweeney. (*Id.*, ex. 40.) On May 17, 2016, Regional Board staff issued a complaint
8 demanding \$4.8 million in penalties from Mr. Sweeney, while concluding that the sum of all his
9 assets was only \$4.2 million. (See section VII.A.4 above.) Just six days later, on May 23, 2016,
10 BCDC staff issued the Complaint and demanded \$952,000 in penalties. The Complaint relies
11 heavily on the Regional Board's Technical Report, a 500-page report that was released to Mr.
12 Sweeney on May 17. Plainly, BCDC staff obtained a copy of the report well before May 17, and
13 were working together with Regional Board staff to coordinate their attack.

14 The hostile nature of the coordinated attack can also be ascertained from the refusal of
15 BCDC staff to respond to a letter from counsel to Mr. Sweeney suggesting that the parties should
16 work out their differences. (See section II.I above.)

17 Most recently, the nature of the coordinated attack on Mr. Sweeney was confirmed when, on
18 September 1, 2016 the Corps sent Mr. Sweeney a notice of violation for an issue unrelated to Point
19 Buckler. (Bazel Decl., ¶ 35.) The letter referred to an issue that had been resolved. (Sweeney Decl.,
20 ¶ 21.) That letter, dated September 1, was provided to counsel for Mr. Sweeney by Regional Board
21 staff on September 2, and by BCDC staff on September 7. (Bazel Decl., ¶ 35.) And yet Mr.
22 Sweeney has not yet received the letter through the mail. (Sweeney Decl., ¶ 21.) Plainly, the Corps
23 letter was immediately provided to Regional Board and BCDC staff, no doubt by EPA (which has
24 taken over the Point Buckler enforcement issue from the Corps). This most recent letter leaves no
25 doubt that the three agencies are in cahoots, and that they will do everything they can get Mr.
26 Sweeney for having the audacity to assert his legal rights.

27 All three elements of a First Amendment retaliation claim are therefore established.
28

1 The State Board Water Resources Control Board imposes a strict separation between the
2 members of the prosecution and advisory teams:

3 The hearing officer and the other [State] Board members treat the enforcement team “like
4 any other party.” Agency employees assigned to the enforcement team are screened from
5 inappropriate contact with Board members and other agency staff through strict application
6 of the state Administrative Procedure Act’s rules governing ex parte communications. (Gov.
7 Code, § 11430.10 et seq.) “In addition, there is a physical separation of offices, support staff,
8 computers, printers, telephones, facsimile machines, copying machines, and rest rooms
9 between the hearing officer and the enforcement team (as well as the hearing team),”
10 according to the Whitney declaration.

11 (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731,
12 735-736.)

13 BCDC’s regulations, and the procedure used in this penalty proceeding, violate the
14 requirement for separation of functions. The BCDC Executive Director issued the Complaint. That
15 makes him a member of the prosecution team in this matter. But BCDC regulations call for him to
16 prepare a “recommended enforcement decision” (14 Cal. Code. Regs. §§ 11324, 11326), which is
17 the province of the advisory team and the decision-makers.

18 Because the Executive Director is given this special role, he is not being treated “like any
19 other party”. (*Morongo* at 735.) He is given the role of a special (and esteemed) advisor to the
20 enforcement committee. Because the enforcement committee members will be inclined to follow the
21 recommendation of the Executive Officer, a member of the prosecution team, the regulation violates
22 the requirement for separation of functions and deprives Mr. Sweeney of a fair trial.
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1 **IX. CONCLUSION**

2 No penalty should be imposed. At most, a modest penalty should be imposed, stayed while
3 permitting proceedings are pending, and waived if Mr. Sweeney obtains a permit.

4
5 DATED: September 12, 2016

6 BRISCOE IVESTER & BAZEL LLP

7
8 

9 By: _____

10 Lawrence Bazel
11 Attorneys for John Donnelly Sweeney and
12 Point Buckler Club, LLC
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Statement of Defense Form

Enforcement Investigation ER2012.038

Point Buckler Club, LLC and John Donnelly Sweeney

FAILURE (1) TO COMPLETE THIS FORM, (2) TO INCLUDE WITH THE COMPLETED FORM ALL DOCUMENTS, DECLARATIONS UNDER PENALTY OF PERJURY, AND OTHER EVIDENCE YOU WANT PLACED IN THE RECORD AND TO BE CONSIDERED BY THE COMMISSION, (3) TO LIST ANY WITNESSES WHOSE DECLARATION IS PART OF THE STAFF'S CASE AS IDENTIFIED IN THE VIOLATION REPORT THAT YOU WISH TO CROSS-EXAMINE, THE AREA OF KNOWLEDGE ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE WITNESS, AND THE INFORMATION YOU HOPE TO ELICIT BY CROSS-EXAMINATION, AND (4) TO RETURN THE COMPLETED FORM AND ALL INCLUDED MATERIALS TO THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION STAFF OR TO CONTACT **MARC ZEPPELLO** OF THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION ENFORCEMENT STAFF BY **JUNE 27, 2016** MEANS THAT THE COMMISSION CAN REFUSE TO CONSIDER SUCH STATEMENTS AND EVIDENCE WHEN THE COMMISSION HEARS THIS MATTER.

DEPENDING ON THE OUTCOME OF FURTHER DISCUSSIONS THAT OCCUR WITH THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION ENFORCEMENT STAFF AFTER YOU HAVE COMPLETED AND RETURNED THIS FORM, ADMINISTRATIVE OR LEGAL ENFORCEMENT PROCEEDINGS MAY NEVERTHELESS BE INITIATED AGAINST YOU, IF THAT OCCURS, ANY STATEMENTS THAT YOU MAKE ON THIS FORM WILL BECOME PART OF THE ENFORCEMENT RECORD AND MAY BE USED AGAINST YOU.

YOU MAY WISH TO CONSULT WITH OR RETAIN AN ATTORNEY BEFORE YOU COMPLETE THIS FORM OR OTHERWISE CONTACT THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION ENFORCEMENT STAFF.

This form is enclosed with a violation report. The violation report indicates that you may be responsible for or in some way involved in either a violation of the Commission's laws, a Commission permit, or a Commission cease and desist order. The violation report summarizes what the possible violation involves, who may be responsible for it, where and when it occurred, if the Commission staff is proposing any civil penalty and, if so, how much, and other pertinent information concerning the possible violation.

This form requires you to respond to the alleged facts contained in the violation report, to raise any affirmative defenses that you believe apply, to request any cross-examination that you believe necessary, and to inform the staff of all facts that you believe may exonerate you of any legal responsibility for the possible violation or may mitigate your responsibility. This form also requires you to enclose with the completed statement of defense form copies of all written documents, such as letters, photographs, maps drawings, etc. and written declarations under penalty of perjury that you want the Commission to consider as part of this enforcement hearing. This form also requires you to identify by name any person whom you may want to cross-examine prior to the enforcement hearing on this matter, the area of knowledge that you want to cover in the cross-examination, the nature of the testimony that you hope to elicit, and the reasons that you believe other means of producing this evidence are unsatisfactory. Finally, if the staff is only proposing a civil penalty, i.e., no issuance of either a cease or desist order or a permit revocation order, this form allows you alternatively to pay the proposed fine without contesting the matter subject to ratification of the amount by the Commission.

IF YOU WANT TO CROSS-EXAMINE ANY PERSON ON WHOSE TESTIMONY THE STAFF HAS RELIED IN THE VIOLATION REPORT, YOU MUST COMPLETE PARAGRAPH SEVEN TO THIS STATEMENT OF DEFENSE FORM. THIS PARAGRAPH REQUIRES YOU TO SET OUT (1) THE NAME(S) OF THE PERSON(S) YOU WANT TO CROSS-EXAMINE, (2) REFERENCES TO ANY DOCUMENTS ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE PERSON, (3) THE AREA OF KNOWLEDGE ABOUT WHICH YOU WANT TO CROSS-EXAMINE THE PERSON, (4) THE INFORMATION THAT YOU BELIEVE CAN BE ELICITED BY CROSS-EXAMINATION, AND (5) THE REASON WHY YOU BELIEVE THIS INFORMATION CANNOT BE PRESENTED BY DECLARATION OR OTHER DOCUMENT.

You should complete the form as fully and accurately as you can as quickly as you can and return it no later than 35 days after its having been mailed to you to the Commission's enforcement staff at the address:

**San Francisco Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600
San Francisco, California 94102**

If you believe that you have good cause for not being able to complete this form within 35 days of its having been mailed, please complete it to the extent that you can and within 35 days of the mailing of the violation report send the statement of defense form completed as much as possible with a written explanation of what additional information you need to complete the form in its entirety, how long it will take to obtain the additional information needed to complete the form, and why it will take longer than 35 days to obtain the additional information, send all of this to the Commission's staff at the above address. Following this procedure does not mean that the Executive Director will automatically allow you to take the additional time to complete the form. Only if the Executive Director determines that you have shown good cause for the delay and have otherwise complete the form as much as is currently possible will be grant an extension to complete the form.

If the staff violation report/complaint that accompanied this statement of defense form included a proposed civil penalty, you may, if you wish, resolve the civil penalty aspect of the alleged violation by simply providing to the staff a certified cashier's check in the amount of the proposed fine within the 35-day time period. If you choose to follow this alternative, the Executive Director will cash your check and place a brief summary of the violation and proposed penalty along with a notation that you are choosing to pay the penalty rather than contesting it on an administrative permit listing. If no Commissioner objects to the amount of the penalty, your payment will resolve the civil penalty portion of the alleged violation. If a Commissioner objects to the proposed payment of the penalty, the Commission shall determine by a majority of those present and voting whether to let the proposed penalty stand. If such a majority votes to let the proposed penalty stand, your payment will resolve the civil penalty portion of the alleged violation. If such a majority does not let the proposed penalty stand, the Commission shall direct the staff to return the money paid to you and shall direct you to file your completed statement of defense form and all supporting documents within 35 days of the Commission's action. Of course, you also have the opportunity of contesting the fine from the outset by completing this form and filing it and all supporting documents within 35 days of its having been mailed to you.

If you have any questions, please contact as soon as possible **MARC ZEPPELLO** of the Commission Enforcement Staff at telephone number **415-352-3600**.

1. Facts or allegations contained in the violation report that you admit (with specific reference to the paragraph number in the violation report):

See section III above.

2. Facts or allegations contained in the violation report that you deny (with specific reference to paragraph number in the violation report):

See section IV above.

3. Facts or allegations contained in the violation report of which you have no personal knowledge (with specific reference to paragraph number in the violation report):

See section V above.

4. Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any documents, photographs, maps, letters, or other evidence that you believe are relevant, please identify it by name, date, type, and any other identifying information and provide the original or a copy if you can):

See section VI above.

5. Any other information, statement, etc. that you want to make:

See sections VII and VIII above.

6. Documents, exhibits, declarations under penalty of perjury or other materials that you have attached to this statement to support your answers or that you want to be made part of the administrative record for this enforcement proceeding (Please list in chronological order by date, author, title and enclose a copy with this completed form):

Declaration of Lawrence S. Bazel and accompanying exhibits.

Declaration of John D. Sweeney and accompanying exhibits.

Petition to State Water Resources Control Board (for CAO R2-2016-0038)

and accompanying declarations and exhibits.

7. Name of any person whose declaration under penalty of perjury was listed in the violation report as being part of the staff's case who the respondent wants to cross-examine, all documents about which you want to cross-examine the person, area or areas of information about which the respondent wants to cross-examine the witness, information that the respondent hopes to elicit in cross-examination, and the reason(s) why some other method of proving this information is unsatisfactory:

Staff submitted only the declaration of Steven Chappell.

Mr. Sweeney does not need to cross-examine Mr. Chappell.
