

STATE OF CALIFORNIA
SAN FRANCISCO BAY CONSERVATION
AND DEVELOPMENT COMMISSION

ENFORCEMENT COMMITTEE MEETING

PORT OF SAN FRANCISCO BOARD ROOM
FERRY BUILDING
SECOND FLOOR
SAN FRANCISCO, CALIFORNIA

THURSDAY, OCTOBER 6, 2016

9:30 A.M.

Reported by:
John Cota

A P P E A R A N C E SEnforcement Committee

Greg Scharff, Chair

Geoffrey Gibbs

Marie Gilmore

Jill Techel

Office of the Attorney General

Joel Jacobs, Deputy Attorney General

BCDC Staff

Adrienne Klein, Chief of Enforcement

Marc Zeppetello, Chief Counsel

Respondent

Lawrence S. Bazel, Attorney at Law

Max Rollens, Attorney at Law

Briscoe Ivester & Bazel LLP

John D. Sweeney

Jennifer Sweeney

Also Present

Nicole C. Sasaki

Baykeeper

Dyan Whyte

San Francisco Bay Regional Water Quality Control Board

Steve Chappell

Suisun Resource Conservation District (SRCD)

Stuart Siegel, PhD

Siegel Environmental

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P R O C E E D I N G S

9:40 a.m.

1
2
3 COMMITTEE MEMBER SCHARFF: So I will call the meeting
4 of the Enforcement Committee to order.

5 Roll call, please.

6 MS. KLEIN: Marie Gilmore?

7 COMMITTEE MEMBER GILMORE: Here.

8 MS. KLEIN: Jill Techel?

9 COMMITTEE MEMBER TECHEL: Present.

10 MS. KLEIN: Greg Scharff?

11 COMMITTEE MEMBER SCHARFF: Present.

12 MS. KLEIN: Thank you.

13 COMMITTEE MEMBER SCHARFF: So the next order of
14 business is selection of a chair.

15 COMMITTEE MEMBER TECHEL: You seem to be doing a good
16 job.

17 COMMITTEE MEMBER SCHARFF: Well, thank you.

18 COMMITTEE MEMBER GILMORE: I'll second that motion.

19 COMMITTEE MEMBER SCHARFF: All right, I'll accept. I
20 guess I'll become chair by acclimation then?

21 COMMITTEE MEMBER TECHEL: Yes.

22 COMMITTEE MEMBER GILMORE: Yes.

23 COMMITTEE CHAIR SCHARFF: All right. So the next thing
24 we do is we -- let's look at this for a second.

25 MS. KLEIN: Public comment on items not related to Item

1 5.

2 COMMITTEE CHAIR SCHARFF: Yes. Do we have any public
3 comment?

4 (No response.)

5 COMMITTEE CHAIR SCHARFF: Seeing none, the next thing
6 we do then is we -- do we open the public hearing first or
7 do we have the presentation by staff?

8 MS. KLEIN: Open the public hearing followed by
9 presentation.

10 COMMITTEE CHAIR SCHARFF: Okay. So we'll open the
11 public hearing and have a presentation by staff. I'd like
12 to limit that presentation to no more than 45 minutes.

13 MR. JACOBS: Mr. Chair, I'm glad you raised the issue
14 of the time constraints. There is an issue regarding time
15 constraints this morning that the Commissioners should
16 resolve or the Chair as they see fit.

17 Under the regulations the Chair may impose time limits
18 based on the circumstances of the alleged violation, the
19 number of other items contained on the meeting agenda, the
20 number of persons who intend to speak and such other factors
21 as the Chair believes relevant.

22 In this case staff has recommended that each side have
23 a presentation not to exceed 45 minutes. The Respondent has
24 requested more time. The Respondent's position is that it
25 needs more time to present its position. Obviously the

1 Committee has written materials from everyone so it is just
2 a matter of making a determination about how much time is
3 appropriate under the circumstances and given those factors
4 that are laid out in the regulations. But it is certainly
5 within the discretion of the Chair and the Committee to
6 decide what's appropriate.

7 COMMITTEE CHAIR SCHARFF: How much time has the
8 Respondent's counsel asked for?

9 MR. BAZEL: Mr. Chair, my name is Larry Bazel, I am
10 counsel for John Sweeney and Point Buckler Club; I have with
11 me this morning John Sweeney and his wife, Jennifer Sweeney.

12 I believe my presentation -- I plan on asking
13 Mr. Sweeney some questions so you can hear him and then make
14 a PowerPoint presentation. Together I think they will take
15 about an hour and 15 minutes, maybe an hour and a half. I
16 am defending, remember, against 35 violations and I am
17 asking about for 2, 2.5 minutes per violation when you look
18 at it that way. It is not much considering that this is the
19 largest proposed penalty ever and 35 violations. The goal
20 here really should be to take as much time as necessary to
21 do justice.

22 COMMITTEE CHAIR SCHARFF: If he was to get longer would
23 staff want longer as well?

24 MR. ZEPPETELLO: We may, Your Honor. Certainly I would
25 like an opportunity to ask Mr. Sweeney questions as well if

1 he testifies.

2 COMMITTEE CHAIR SCHARFF: So this is scheduled until
3 12:30 and we are going to need time for deliberations as
4 well.

5 COMMITTEE MEMBER TECHEL: Yes.

6 COMMITTEE CHAIR SCHARFF: Any thoughts?

7 COMMITTEE MEMBER TECHEL: So let's go backwards and
8 figure we need to start deliberations by --

9 COMMITTEE CHAIR SCHARFF: We probably need 45 minutes
10 at the end, right?

11 COMMITTEE MEMBER TECHEL: Yes. Yes.

12 COMMITTEE MEMBER GILMORE: So 11:30.

13 COMMITTEE MEMBER TECHEL: 11:30.

14 COMMITTEE CHAIR SCHARFF: 11:30.

15 COMMITTEE MEMBER GILMORE: So if each side gets an
16 hour; that's kind of where we are.

17 COMMITTEE CHAIR SCHARFF: That's kind of where we are.

18 MR. BAZEL: Thank you. I may ask as time goes on, if
19 BCDC staff don't use all their time I may ask for a little
20 bit more. It will be difficult for me to cut things down to
21 an hour but as time gets close we'll see what I can do.

22 COMMITTEE CHAIR SCHARFF: Okay, thank you.

23 Do you want to proceed, BCDC staff?

24 MR. ZEPPETELLO: Sure.

25 Good morning, members of the Committee. My name is

1 Marc Zeppetello, Chief Counsel at BCDC.

2 Before I get into the staff's presentation, last night
3 at about 8:15 p.m. we received objections by email from the
4 Respondents' counsel and I would just like to take a few
5 minutes to respond to those. They raised a number of
6 arguments as to why they believe this proceeding violates
7 their due process rights.

8 One issue is that they claim that BCDC staff failed to
9 provide evidence and arguments in the Violation Report and
10 therefore should not be allowed to provide evidence and
11 arguments in the staff recommendation or at this hearing.

12 The bottom line from staff's position is that this
13 proceeding, both prior to the hearing and at the hearing,
14 are governed by BCDC's regulations that have been
15 promulgated in accordance with law and been on the books for
16 years. Those regulations do provide for due process to all
17 parties.

18 The regulation required staff to submit a Violation
19 Report and Complaint complying with a form in the appendix
20 to the regulations. The form required a summary of all
21 pertinent information in the form of Proposed Findings with
22 references to supporting evidence. The Violation Report and
23 Complaint complied with that requirement. There are
24 approximately 12 to 13 pages of proposed findings with
25 citations to evidence and an index of an administrative

1 record and documents that are part of the record that have
2 been posted on the website and provided.

3 The Respondents complain that there were some documents
4 provided in the staff recommendation submitted two weeks
5 ago. The regulations provide - Regulation 11326 - provide
6 that the enforcement decision shall include any rebuttal
7 evidence raised by staff to matters raised in the statement
8 of defense and also a summary and analysis of unresolved
9 issues.

10 So when Respondents in their Statement of Defense
11 submit a declaration from Mr. Sweeney reporting on a
12 conversation with Ms. Klein, it is entirely appropriate as
13 rebuttal that we submit a declaration from Ms. Klein
14 responding to that.

15 Similarly, when the Respondents claim that the experts
16 that staff relied upon have changed their position recently
17 we were entitled as part of rebuttal to submit a letter from
18 one of the experts clarifying their position.

19 And similarly, in the Violation Report we set forth
20 staff's position. One of the issues that you will hear
21 about is an Individual Management Plan and whether or not
22 that applied. We stated in our Violation Report that it did
23 not apply. They came back in the Statement of Defense with
24 four or five arguments why it did apply. It was entirely
25 appropriate and in accordance with the regs that we respond

1 to that.

2 The Respondents claim in their objections that the
3 public should not be allowed to testify at this hearing. I
4 would just point out that Regulation 11327(e) says that
5 there shall be an opportunity for other speakers to speak at
6 an enforcement proceeding.

7 And finally they make an argument regarding separation
8 of functions that because the Executive Director previously
9 issued a Cease and Desist Order and is part of the
10 prosecution team, the Executive Director should not be
11 allowed to evaluate a work plan submitted by Respondents
12 under the Order.

13 And I would submit it is a totally separate issue.
14 Mr. Goldzband is part of the prosecution team. He is not up
15 there making a decision and weighing the evidence to decide
16 whether or not to issue an Order. If the Order delegates to
17 him authority to review the adequacy of a work plan, that is
18 not a violation of separation of functions.

19 So with that I will proceed with the presentation.

20 This matter concerns alleged violations of the McAteer-
21 Petris Act and the Suisun Marsh Preservation Act at an
22 island known as Point Buckler that is located in the middle
23 of Suisun Bay and in the middle of the primary management
24 area of the Suisun Marsh. The island is shown in red on the
25 map on the wall and the inset at left shows a larger area

1 and the border around the top is the area covered by the
2 Suisun Marsh Protection Plan.

3 Respondent Mr. Sweeney purchased the island in April of
4 2011.

5 Just to provide an overview of the staff's presentation
6 I am going to go through a brief timeline of events to
7 provide some context and overview and will then address the
8 Commission's jurisdiction and permitting requirements,
9 including this issue of the Individual Management Plan for
10 managed wetlands and why it doesn't apply in the situation.

11 Ms. Klein, Chief of Enforcement, will then discuss and
12 describe the unauthorized work performed by Respondents and
13 the impacts caused by that unauthorized activity and then I
14 will summarize the key provisions of the proposed Cease and
15 Desist and Civil Penalty Order.

16 The timeline of events. As I mentioned, Mr. Sweeney
17 purchased this property in April of 2011. But it is
18 important to note that this is not the only property that
19 Mr. Sweeney owns in the marsh; he owns a number of other
20 properties. In June of 2011 he worked with the Suisun
21 Resource Conservation District and the Corps of Engineers to
22 obtain permission under a regional permit that the Corps of
23 Engineers has issued for levee repair and maintenance work
24 in the marsh pursuant to Section 404 of the Clean Water Act.

25 Mr. Sweeney contacted those agencies, got permission to

1 do a levee repair at Chipps Island, another property he owns
2 in the Marsh and in the primary management area and got
3 authorization. And then in the course of the work that he
4 did the Corps found that he did not comply with the terms of
5 the permit; there was an illegal discharge of fill that
6 resulted in a Notice of Violation in October of 2011.

7 And staff understands that prior to Chipps Island
8 Mr. Sweeney obtained authorization from the Corps under the
9 Regional General Permit for some levee work at another site,
10 Spinner Island, I believe.

11 Be that as it may, in May 2012, according to analysis
12 of the aerial photographs, Mr. Sweeney began unauthorized
13 work at Point Buckler. He contemplated a much bigger
14 project than mere repair of a levee; he contemplated
15 building a levee around the entire perimeter of the island
16 and excavating a ditch around the entire perimeter of the
17 island, yet he chose not to consult with Suisun Resource
18 Conservation District or BCDC or the Corps of Engineers.
19 Staff believes that this was a knowing and intentional
20 decision on his part to avoid the regulatory requirements
21 and the time delay in the processing of a permit and to get
22 the work done that he wanted to get done so that he could
23 develop his island for recreational purposes and perhaps
24 deal with the consequences later.

25 In March 2014 BCDC staff and SRCD staff observed from

1 the mainland, not from Point Buckler, they observed heavy
2 machinery on the island and it looked like apparent levee
3 construction work was happening.

4 After that BCDC staff consulted with other agencies and
5 conducted research to try to determine whether or not this
6 work was part of some authorized habitat restoration
7 project; that consultation included consulting with the
8 Regional Board and SRCD. When it was determined that there
9 was no record of this work or authorization, staff
10 ultimately contacted Mr. Sweeney in October and requested a
11 site visit, which he granted.

12 (Committee Member Gibbs joined the meeting.)

13 And so in November BCDC staff inspected the site,
14 together with Mr. Sweeney. At that time BCDC staff provided
15 Mr. Sweeney with a copy of the Individual Management Plan
16 for managed wetlands that had been certified for this site
17 back in 1984. And just as a point relevant to that,
18 Mr. Sweeney claims now that the work he did and has done was
19 consistent with in implementing the Individual Management
20 Plan, but by the time he obtained a copy in November of
21 2014, he had already completed the levee construction and
22 ditch excavation. And although work continued after that,
23 the major work was already done.

24 Following that site visit, on January 30th of 2015,
25 BCDC sent a letter to Mr. Sweeney identifying a number of

1 violations of law in terms of the unauthorized work,
2 advising him to stop work and to apply for a permit and also
3 stating the reasons why in staff's view the Individual
4 Management Plan did not apply.

5 BCDC had been coordinating with and consulting with the
6 Regional Board and in July the Regional Board issued a
7 Notice of Violation to Mr. Sweeney for violations of the
8 Porter-Cologne Act.

9 The Regional Board subsequently issued a Cleanup and
10 Abatement Order, the Executive Officer of the Regional
11 Board. The order was rescinded after Respondents filed a
12 lawsuit challenging the order and after, my understanding,
13 the Regional Board determined that it would be appropriate
14 to rescind an order that was issued by the Executive Officer
15 and notice the matter for a public hearing and for
16 consideration by the full board.

17 In October of 2015 there was a multi-agency site visit,
18 which again Mr. Sweeney granted. The Water Board, BCDC, the
19 EPA and the Corps of Engineers. Part of the reason for the
20 site visit was that the Water Board had wanted to collect
21 some further information and had retained some experts
22 including a wildlife biologist, wetlands experts and
23 surveyors. And they wanted to collect some information on
24 the site, information that had been required of Respondents
25 under that now rescinded Cleanup and Abatement Order, that

1 Respondents declined to perform themselves, so the Water
2 Board elected to collect that evidence itself.

3 Throughout 2015 and 2016, Respondents continued to do
4 unauthorized work at the site, even after receiving BCDC's
5 letter that they stop and apply for a permit. As I said
6 earlier, most of the levee construction and excavation work
7 had been done but the unauthorized work continued in terms
8 of excavating some ponds and placing containers. Adrienne
9 will comment further on the details of that work.

10 In April of this year the Executive Director of BCDC
11 issued a Cease and Desist Order, which was essentially a
12 Stop Work Order that Respondents have stipulated -- that was
13 a 90 day Cease and Desist Order, but we have agreed to
14 continue that Order through November 17th until this matter
15 may be heard by this Committee and then by the full
16 Commission on November 17th.

17 On August 10th the Water Board, after a public-noticed
18 hearing before the Board, issued a Cleanup and Abatement
19 Order that requires Respondents to prepare a restoration
20 plan and a mitigation plan. The Water Board has also issued
21 a complaint for civil liability for a proposed penalty here.
22 That matter has been deferred. The hearing on that matter
23 has been deferred, I believe until December of this year,
24 December 10th if I've got the date right.

25 I would like to speak about the Commission's

1 jurisdiction here. It is important to note - that
2 jurisdiction with respect to this proposed order needs to be
3 determined as of the time Mr. Sweeney purchased the property
4 or before he began the unauthorized work.

5 It is not relevant what the jurisdiction might have
6 been in the '80s or whether there was a Management Plan that
7 applied here in the '80s and it is not determinative what
8 the jurisdiction is today.

9 In April 2011 this island was tidal marsh. It was
10 undeveloped tidal marsh and it was under the Commission's
11 jurisdiction under the McAteer-Petris Act under Government
12 Code Section 66610(a) as part of the waters of San Francisco
13 Bay subject to tidal action, which includes tidelands
14 between mean high tide and mean low tide and also where
15 marsh vegetation is present from mean sea level up to an
16 elevation of five feet above mean sea level.

17 And given that jurisdiction under the McAteer-Petris
18 Act, permits are required from the Commission to place fill,
19 extract materials, or for substantial change in use.

20 That is an aerial photograph of the island in April
21 2011 at the time it was purchased and as you can see it is
22 undeveloped. There are tidal channels extending from the
23 exterior, inland. There are a number of breaches where --
24 this, I believe, is the former borrow ditch and/or levee
25 that go around and there are places where the island has

1 eroded and there's tidal entry access points here, here,
2 down here. There were seven tidal breaches of the island at
3 that time.

4 The experts retained by the Regional Board prepared
5 this figure that is in the record. The island is mostly in
6 blue but the border is actually the yellow and black line.
7 The blue is the tidal tidelands and marshland acreage, which
8 is approximately 33 acres, I believe, out of a total of 38.
9 Actually I think it's closer to 38 acres, most of the
10 island. The vast majority except for the area down along
11 the southeast and east side, which is possible upland
12 outside the Commission's jurisdiction.

13 Under the Suisun Marsh Preservation Act the island is
14 under the Commission's jurisdiction because it is in the
15 Primary Management Area of the marsh.

16 And under the Marsh Act, permits are required from the
17 Commission for any development, as that term is very broadly
18 defined in the Marsh Act, any development in the Primary
19 Management Area requires a permit from the Commission.

20 There is an exemption in the Act from the permit
21 requirement for any development specified in the Suisun
22 Resource Conservation District's component of the Local
23 Protection Plan. I believe there is a typo there, LPP it
24 should be.

25 The SRCD's component of the LPP, which was certified by

1 the Commission, includes Individual Management Plans for
2 Managed Wetlands. In 1984, the Commission certified
3 approximately 165 Individual Management Plans for managed
4 wetlands at different locations in the marsh, including an
5 IMP for this site.

6 The definition of Managed Wetlands in the Marsh Act and
7 in the Suisun Resource Conservation District's component is,
8 it is important to note, and it is paraphrased there, that
9 it is a diked area in which water inflow and outflow is
10 artificially controlled, or, in which waterfowl plants are
11 cultivated, or both, to enhance habitat conditions for
12 waterfowl. Although Respondents commonly use the words
13 "duck clubs," duck clubs is not synonymous with managed
14 wetlands. In order to have a managed wetlands there must be
15 active water control and/or cultivation of waterfowl plants.

16 Although an IMP was certified for this site - it's
17 called the Annie Mason IMP and back in the '80s the site was
18 called the Annie Mason Club or Point Club - the IMP calls
19 for frequent inspection and maintenance of the levees and
20 notes that that is very important and necessary for proper
21 water control.

22 Despite that mandate in the management plan, there is
23 substantial evidence in the record that this site was never
24 managed in accordance with the IMP. It was never operated
25 as a managed wetland.

1 There are a number of lines of evidence to support
2 this. There is a letter from the Department of Water
3 Resources, or rather a plan document in 1984, where they
4 note the levees on the site are not in good repair.

5 In 1989 a former owner of the site applied to BCDC for
6 a permit to place 50,000 cubic yards of fill on the island.
7 BCDC staff found the application was incomplete, asked for
8 further information, which was never provided. The permit
9 was never issued, no evidence that the work was ever done.

10 I referred earlier to the Regional General Permit
11 issued by the Corps of Engineers. There have been Regional
12 General Permits going back decades. Since 1994 when
13 Mr. Steve Chappell, who is here today, became the Executive
14 Director, there are no records of any reports under the
15 Regional General Permit submitted by property owners for any
16 work requested or authorized at this island.

17 So what happened over a 20 year period, at least from
18 the mid-'80s to 2011, 25 years, is that this site out in the
19 middle of Suisun Bay, exposed to the west winds and the
20 tides and the waves, the island eroded, the levees eroded,
21 the tide breached the levees in seven different locations.
22 The site, whether it was a managed wetlands in the mid-'80s
23 or not, it reverted to tidal marsh. Undeveloped, no
24 management of water, no control of water, no cultivation of
25 wetland plants. It became a tidal marsh.

1 When Mr. Sweeney purchased the site the Individual
2 Management did not apply and he was required to apply for a
3 permit, as he should have known and did know based on his
4 experience at other sites.

5 The Respondents have made a number of arguments as to
6 why the IMP continued to apply. We responded to those in
7 our staff recommendation and I may want to respond further
8 in rebuttal, but I will note that just as a general matter
9 if the Committee considers it, under the McAtteer-Petris Act
10 as I mentioned earlier, this is a part -- in 2011, part of
11 San Francisco Bay as an area subject to tidal action. But
12 if it had ever been a managed wetlands in the '80s or '70s,
13 it would have fallen under the McAtteer-Petris Act
14 jurisdiction as a managed wetland. But the jurisdiction
15 changed. The jurisdiction changed with site conditions and
16 with time and with the lack of management.

17 And similarly, under the Suisun Marsh Preservation Act,
18 while the IMP may have provided a permit exemption at a time
19 when the levees, if they ever were intact or certainly when
20 the IMP was certified, when the site was not managed
21 pursuant to the IMP, conditions changed and the exemption
22 from permitting requirements went away. The IMP was not
23 immutable and did not give a shield to subsequent property
24 owners who acquired a vastly different property than the
25 site may have been in 1984 to go forward with a massive fill

1 and excavation project with complete disregard of regulatory
2 requirements.

3 And with that I will turn it over to Adrienne. Thank
4 you.

5 MS. KLEIN: Thank you. Good morning.

6 The next six slides are from a technical report which
7 is part of the public record and your administrative record.
8 This report was prepared for the Regional Water Quality
9 Control Board proceedings. It was prepared by Stuart Siegel
10 of Siegel Environmental and it is dated May 12, 2016.

11 This image shows the extent of tidal marsh at Point
12 Buckler Island in 2011 before Respondents started diking and
13 draining the island.

14 The dark green band that forms the perimeter of the
15 island and the red line to the east of the island represent
16 the former levee. The dark green represents more degraded
17 levee, the most severely degraded levee. The levee to the
18 right is more intact because that side of the island is
19 adjacent to the slough channel.

20 Blue represents the channels and ditches that
21 experienced the daily ebb and flow of the tides through the
22 seven levee breaches mentioned by Mr. Zeppetello.

23 The first breach occurred 28 years ago in 1988 at the
24 north.

25 Breaches 2 through 5 occurred between 26 and 23 years

1 ago.

2 And Breach 7 occurred 13 years ago. Excuse me,
3 Breaches 6 and 7 occurred 13 years ago in 2003.

4 The light green represents the 38 acres of tidal marsh
5 surface that also experienced tidal flooding, but less often
6 than daily.

7 Tidal marsh is present outboard of the old levee and
8 inboard of the old levee because tidal marsh reformed within
9 the island after the levees failed.

10 The higher high tides reached the marsh surface through
11 the channels and through flooding over the remnant levees.
12 When flooding of tidal marsh occurred at the peak of the
13 higher high tides, it lasted briefly, at most two to three
14 hours each time, and shallowly, mostly under one foot.

15 The next two slides will zoom into the locations here
16 and here. First here, the 1990 breach and next the '90 and
17 '93 breaches.

18 Together, these two images show the tidal marsh around
19 Breach 2 and the placement of the new levee to the interior
20 of the old levee.

21 The top image is dated from April 2011 - in the top
22 left hand corner, not terribly visible - shortly before the
23 Respondents purchased the island.

24 The bottom image is from February 2016, more than a
25 year after Respondents completed the new levee. Looking

1 back and forth between the two images illustrates two key
2 points:

3 First, that until construction of the new levee in
4 2014, the island had no barrier to tidal connectivity and
5 the vegetation in and outside of the old levee location was
6 the same tidal marsh vegetation.

7 Second, that the new levee was constructed to the
8 interior of the old levee and atop tidal marsh. The
9 Respondents did not rebuild the old levee in all locations.

10 The red lines and the orange fill inside the red lines
11 in the lower image are the location of the old levee. The
12 orange area is the breach from 1990.

13 Looking only at the lower image, compare the color of
14 the tidal water with the color of the water in the new
15 ditch, in the new borrow ditch located inside the new 2014
16 levee. That water is green with algae, an indication of the
17 absence of tidal exchange.

18 Here we show the area around Breaches 6 and 7 in the
19 northeast, again comparing the 2011 and 2016 images. The
20 island was tidal, now it is not tidal.

21 Again, the new levee is located inland of the old
22 levee, atop tidal marsh.

23 What is unique about showing you this location is that
24 Stuart Siegel of Siegel Environmental, the primary author of
25 the technical assessment, as mentioned, visited the site in

1 2003 with a group of researchers to see whether they wanted
2 to use Point Buckler as a tidal marsh study site.

3 Mr. Siegel took the photograph in the lower right looking
4 into Breach 7. The presence of tidal marsh channels and
5 vegetation in the island interior is unmistakable as is the
6 presence of tidal marsh vegetation on the old levee to the
7 left and right of the breach.

8 This image shows the 1985 levee alignment in red
9 outline and the location of the new levee alignment in solid
10 yellow. Eighty percent of the new levee was in a new
11 location placed on tidal marsh and 20 percent of the new
12 levee, shown in solid red, was placed in the original
13 alignment on top of the remnant levee. The unauthorized
14 levee work is clearly inconsistent with the IMP, if it were
15 in place, and requires review under the McAteer-Petris Act
16 and the Suisun Marsh Preservation Act.

17 This slide shows that more than 90 percent of the
18 Respondents' borrow ditch, in blue, is located in a new
19 alignment, where marsh vegetation was present, and that only
20 7 percent -- there is only a 7 percent overlap of the old
21 and new ditch locations.

22 This image shows the locations of the seven levee
23 breaches on the left when they were all open and on the
24 right when they had all been closed.

25 I will now show you a series of photographs taken by

1 staff on October 21st, 2015 during a site visit and three
2 images from the Point Buckler Island Facebook page to
3 illustrate the development close up.

4 Respondents have violated and continue to violate the
5 McAteer-Petris Act by conducting the unpermitted activities
6 consisting of: Placing fill in waters of San Francisco Bay,
7 including tidal marsh, by constructing and rebuilding
8 levees. We're looking south, Mount Diablo is in the
9 background.

10 By excavating ditches and placing numerous containers,
11 trailers, roads and other structures and two helicopter pads
12 on tidal marsh. Here are three -- you can see the
13 containers in the background. I will now show you an
14 overview.

15 This is an aerial from the Facebook page of the Club
16 and it shows the vegetation mowing, the shipping containers
17 and the kitesurfing layout area.

18 This is one of two helicopter pads.

19 This is inside one of the clubhouse areas.

20 The Respondents have excavated four crescent ponds.
21 Note that the foreground shows that this crescent pond is
22 connected to one of the -- to the interior end of one of the
23 former tidal channels; so in the foreground of the
24 photograph.

25 Respondents have installed a new dock in Anne Mason

1 Slough.

2 Mowed vegetation. You can see the mower equipment on
3 the far side of the ditch and constructed land bridges
4 across the ditch.

5 And finally, this image shows the equipment used for
6 construction.

7 The island is located within critical habitat for
8 threatened and endangered species including Delta smelt,
9 steelhead, and green sturgeon. It lies along the migratory
10 pathway of threatened and endangered species, including
11 Chinook salmon and steelhead trout.

12 The Suisun Marsh provides habitat for special status
13 species including black rail, salt marsh yellowthroat and
14 Suisun song sparrow. Many special status plants are also
15 found in the Marsh including the Suisun thistle, the Mason's
16 lilaeopsis, which was observed on the island during an
17 inspection.

18 Respondents have made substantial changes in the use of
19 the Commission's jurisdiction by:

20 Closing all the tidal breaches that existed in 2011;
21 installing a new water control structure in the western
22 portion of the site; draining the site to further alter the
23 preexisting tidal marsh hydrology; developing and operating
24 the site for intensive recreational uses including but not
25 necessarily limited to kiteboarding.

1 In summary, the unauthorized diking and draining
2 removed nearly 30 acres from tidal action, shown in yellow
3 on the bottom left, through a combination of direct fill on
4 tidal marsh and the termination of tidal connectivity to the
5 island interior.

6 As Marc Zeppetello mentioned, the Respondents continued
7 work after receiving BCDC's Stop Work letter.

8 That letter was issued on January 30th, 2015.

9 It stated that the work that had occurred was likely
10 not retroactively approvable.

11 It stated that as a result the restoration of the site
12 was a very likely future outcome.

13 It identified work windows to protect species.

14 Following receipt of that letter Respondents placed
15 shipping containers, helicopter pads, built a fourth
16 crescent pond, mowed vegetation and constructed road bridges
17 over the ditch. They also disregarded the work windows and
18 installed goats on the island.

19 I will now turn the presentation back to
20 Mr. Zeppetello.

21 MR. ZEPPETELLO: Thank you.

22 I'd like to summarize the key terms of the Proposed
23 Order that is before you. The order has two components, a
24 Cease and Desist component and a Civil Penalty component.

25 The Cease and Desist component includes a general cease

1 and desist provision to cease and desist from further
2 violations of the McAteer-Petris Act or the Suisun Marsh
3 Preservation Act at the site.

4 And then there are two requirements that are
5 essentially identical to requirements in the Regional
6 Board's recently-issued Cleanup and Abatement Order. One is
7 to submit by February 10th of next year a Restoration Plan
8 to restore tidal flow and circulation to the island. The
9 Restoration Plan must include a work plan and an
10 implementation schedule as well as a monitoring plan.

11 And then the second component is to submit by February
12 10th, 2017 a Mitigation Monitoring Plan to propose
13 compensatory mitigation for the impacts to the site, both
14 temporal and permanent.

15 I mentioned that these requirements are taken from the
16 Regional Board's Cleanup and Abatement Order. We thought
17 that they were important to include in our order as well but
18 we did so in a way that we made sure that there are not
19 inconsistent requirements imposed on the Respondents and so
20 we have coordinated with the Regional Board. And to address
21 a point that Respondents make: We have shared data, we have
22 talked about possible approvable work and mitigation issues,
23 but we have not consulted or spoken with the Regional Board
24 about penalties or what is appropriate under their law or
25 ours, or rather yours.

1 The Cease and Desist Order also requires Respondents to
2 submit a permit application to BCDC. There is a typo in the
3 Order, the date. It says by "March 2017," it should say by
4 "March 3rd" to apply for authorization -- to request
5 authorization for work that they have performed since
6 Mr. Sweeney purchased the property and also to apply for a
7 permit in the future for any proposed development work.

8 I would note that the Executive Director's Cease and
9 Desist Order had a requirement that they apply for a permit
10 for after-the-fact authorization. At Respondents' request
11 we extended that deadline twice and then we agreed to
12 suspend the requirement with the thought, at least from
13 staff's point of view, that we would address it in the order
14 to be issued by the Commission. And we put the permit
15 requirement, in terms of scheduling, put it after the
16 restoration requirement because we think that addressing the
17 restoration is a priority and should come first in time.

18 And finally, the cease and desist component of the
19 Order has just narratives that they should cease and desist
20 from further actions to destroy tidal marsh vegetation or to
21 drain the surface water or groundwater at the site.

22 The civil penalty component. The Commission may
23 administratively impose civil penalties under the McAteer-
24 Petris Act but not under the Suisun Marsh Act; and we have
25 proposed penalties in the staff recommendation solely under

1 the McAteer-Petris Act.

2 The code authorizes penalties of not less than \$10 nor
3 more than \$2,000 for each day in which a violation occurs or
4 persists but not more than \$30,000 per violation.

5 In determining the amount of the penalty, Government
6 Code Section 66641.9(a) specifies the factors that this
7 Committee and the Commission should consider.

8 The violation report -- rather the violation report and
9 complaint for imposition of penalties proposes a penalty of
10 \$952,000 for 35 discrete and separate violations of the
11 McAteer-Petris Act.

12 The next couple of slides, I am not going to go through
13 them in detail and they are probably difficult to read.
14 This is taken directly from two pages in the Complaint. I
15 believe staff handed out copies so that you may have copies
16 at your desk. What I wanted to point out here is that we,
17 staff, carefully considered the penalty factors and the
18 range authorized and for some of the violations, such as
19 illegal fill, we proposed violations at the maximum end of
20 the range, \$2,000 per day, but others at \$1,500 per day or
21 \$1,000 per day, \$500 per day and \$100 per day.

22 Many, or most I would say, of the violations max out at
23 the \$30,000 limit under the Code because of the duration of
24 the violations, as much as two years. I would note also
25 that this penalty calculation was done as of April, so the

1 violations have continued for another six months. We have
2 not proposed to increase the penalties at all,
3 notwithstanding the fact that they have persisted for
4 another six months.

5 So the violations, again, I don't think I will take the
6 time to go through them in detail, but they go to the points
7 that Adrienne mentioned and I have mentioned, placement of
8 fill, excavation of materials, excavation of ponds,
9 placement of shipping containers, placement of helicopter
10 pads on tidal marsh, construction of roads, change of use
11 from an undeveloped island to an island used for intensive
12 recreational purposes.

13 I'd like to just briefly go through the statutory
14 factors that the Committee and the Commission are required
15 to consider.

16 On the bullet points here, these are just staff's
17 proposals in the proposed order but certainly this Committee
18 or the Commission, you have the discretion to disregard
19 these findings or make your own or modify them or add
20 additional findings.

21 The first factor is the nature, circumstances, extent
22 and gravity of the violation. In staff's view this weighs
23 heavily towards a substantial penalty. The placement of
24 fill and the excavation of ditches physically destroyed
25 tidal marsh and the harm to tidal marsh habitat was and is

1 substantial and is continuing.

2 The work, some of it at least was conducted outside of
3 work windows that were established to protect species and it
4 is likely that there was illegal take of endangered and
5 threatened species. The experts retained by the Regional
6 Board calculated that of the tidal, the small tidal marsh
7 channels in the marsh suitable for habitat for longfin
8 smelt, 5 percent of them were lost as a result of this work
9 at Point Buckler.

10 A second factor is whether the violations are
11 susceptible to removal. They likely are susceptible to
12 removal, although some of the damage that has been done may
13 be permanent. But the point is that Respondents have taken
14 no action to remove the unauthorized work or to restore
15 tidal action, notwithstanding that from BCDC staff's point
16 of view, they have been on notice since at least January of
17 2015 that they have compliance issues here.

18 Another factor is cost to the state in pursuing
19 enforcement. We didn't quantify this number but the staff
20 has spent a considerable amount of time in several site
21 visits, in meetings with Respondents, in meetings with other
22 agencies and in preparing the violation report and the
23 recommended decision.

24 Another factor is Respondents' ability to pay and
25 effects on their ability to continue in business.

1 As I mentioned, the Regional Board has proposed a
2 complaint for civil liability and as part of that their
3 staff investigated and analyzed Respondents' financial
4 resources; their report is in the record.

5 The Regional Board determined that the Respondents have
6 an ability to pay a substantial penalty. Respondents claim
7 there are numerous errors in that analysis. But they are
8 the ones with the information and they have elected not to
9 provide any evidence of their assets to us, so we can only
10 conclude that they have the ability to pay and they have
11 elected not to provide the information.

12 Voluntary efforts to remove or restore is another
13 penalty factor. As mentioned, not only have they taken no
14 action, but they continued work to develop the site for
15 kiteboarding after they received our letter in January of
16 2015.

17 They claim that they intend to apply for a permit.
18 Again, we asked them to apply for a permit over 20 months
19 ago. The Executive Director's Cease and Desist Order
20 ordered them to apply for a permit; they asked to extend
21 that. They have been meeting with the agencies and we are
22 discussing these issues but that is no reason not to move
23 forward with this order or the penalty because we are
24 nowhere near resolution through those discussions at this
25 point.

1 Another factor is prior history of violations and
2 degree of culpability. And again, we believe that this is a
3 factor weighing heavily in favor of a substantial penalty.

4 As I mentioned at the outset, before commencing
5 unauthorized work here Mr. Sweeney had experience working
6 with SRCD and the Corps of Engineers to get authorization to
7 do work in the marsh.

8 He knew that there were regulatory requirements and
9 permit requirements here and he chose to disregard them and
10 to proceed, either knowingly and intentionally or at a
11 minimum in willful disregard of regulatory requirements
12 designed to protect marsh habitat and endangered species.

13 Economic savings resulting from the violations is
14 another factor here.

15 The Respondents avoided the costs of obtaining a permit
16 from BCDC, likely an individual Clean Water Act permit from
17 the Corps of Engineers, a water quality certification from
18 the Board. They avoided the costs of complying with
19 biological opinions and other requirements of resource
20 agencies to protect endangered species.

21 They avoided the costs, at least to date, of providing
22 mitigation for the impacts of the fill and the excavation
23 and other activities.

24 And they benefited economically by being able to
25 develop the island for their kiteboarding operation and to

1 operate it over the past two years without having their
2 infrastructure damaged or disrupted as a result of the tides
3 that would have overtopped the remnant levee and flowed in
4 from the tidal breaches.

5 The final factor for penalties is such other matters as
6 justice may require. We haven't identified any particular
7 matters there; I'm sure Respondents' counsel will name a
8 few.

9 In conclusion, the staff's recommendation is that the
10 Enforcement Committee adopt the proposed Commission Cease
11 and Desist and Civil Penalty Order that was distributed with
12 the staff's recommended decision a few weeks ago.

13 Staff is available to answer any questions either now
14 or later and I would also mention that there are a couple of
15 people in the audience that are available if there are
16 questions, at the appropriate time. As I mentioned earlier,
17 Steve Chappell, the Executive Director of the SRCD is here,
18 Stuart Siegel, the primary author of the technical report is
19 also here, Dyan Whyte, the Assistant Executive Officer of
20 the Regional Board is here, I believe she has submitted a
21 speaker card.

22 So with that I'll close. Thank you very much.

23 COMMITTEE CHAIR SCHARFF: Now, Mr. Briscoe, if you
24 would like to proceed.

25 MR. BAZEL: Larry Bazel.

1 COMMITTEE CHAIR SCHARFF: Mr. Bazel.

2 MR. BAZEL: I would like to start by asking Mr. Sweeney
3 a few questions. Mr. Sweeney, would you go up to the
4 podium.

5 MR. JACOBS: Commissioners, since there is some
6 testimony that is being offered I would like to remind the
7 Commissioners of the rules regarding live testimony at this
8 proceeding. Under the regulations, obviously there is
9 evidence that was submitted in writing. The Commissioners
10 have discretion to allow oral testimony. The regulation
11 provides that the Committee and the Commission shall not
12 allow oral testimony unless the Committee and Commission
13 believes that such testimony is essential to resolve any
14 factual issues that remain unresolved after reviewing the
15 existing written record and whose resolution is essential to
16 determining whether a violation has occurred or to
17 determining what remedy is appropriate.

18 So at this juncture the Commissioners should decide
19 whether given the evidence in writing, including a
20 declaration from Mr. Sweeney, is sufficient along with
21 whatever argument may be presented today, or whether having
22 oral testimony now in addition to those written materials is
23 essential to resolving this matter.

24 MR. BAZEL: May I speak on that? Staff have made quite
25 a few assertions about what Mr. Sweeney did and why he did

1 it and you should actually hear from him about what he did
2 and why he did it. Those facts are very much in dispute and
3 there is nothing better than hearing from the person to
4 resolve them.

5 COMMITTEE CHAIR SCHARFF: I'm inclined to allow it.
6 Does anyone have any objection?

7 COMMITTEE MEMBER GILMORE: I don't necessarily have an
8 objection, I just want to know if the subject of his
9 testimony is going to be different than the documentation.
10 I believe it was his affidavit that he submitted. I mean,
11 is it new information?

12 MR. BAZEL: I think it is new because I think it goes
13 more to intent. Certainly the questions that I have here
14 are not -- ones that I don't believe he specifically
15 answered in his declaration, they are more focused on what
16 we have heard from staff.

17 COMMITTEE CHAIR SCHARFF: Okay, why don't you proceed.

18 MR. SWEENEY: Thank you.

19 DIRECT EXAMINATION

20 BY MR. BAZEL:

21 Q Mr. Sweeney, why did you repair the levee at Point
22 Buckler?

23 A I repaired the levee at Point Buckler to create a
24 duck club.

25 Q Why did you need the levee for a duck club?

1 A The property has a super high elevation so to
2 retain water at the club we required a levee and water
3 control structures.

4 Q Would you explain that?

5 A Yeah. The island at Point Buckler is a super high
6 elevation. I do own other duck clubs in the marsh and this
7 is a unique situation where the island cannot hold water so
8 you either need to have a pump -- you need to have a levee
9 system to trap the water to have duck ponds and you need to
10 have flood gates to allow the water to circulate. So the
11 property is very high so if you put water on the property,
12 at low tide the water would drain off and it would be gone
13 and it wouldn't come back.

14 Q You said you own other duck clubs. Have you sold
15 those other duck clubs?

16 A I have, yes.

17 Q So that's the past tense, you owned other duck
18 clubs.

19 A Correct.

20 Q Okay. Before buying the property did you talk to
21 any - meaning Point Buckler - did you talk to any previous
22 owners of the property?

23 A Yes, I talked to three previous owners of Point
24 Buckler.

25 Q Who were they?

1 A The Seeno family, Cynthia Torres who sold it to me
2 and Jim Taylor.

3 Q Did Ms. Torres tell you anything about the levee?

4 A Yeah, she said that she was required by DWR to
5 repair the levee.

6 Q Did Mr. Taylor tell you anything about the levee?

7 A Yeah, he said that he last repaired it in 1990 and
8 that's the last time he had fixed it.

9 MR. JACOBS: My apologies, Commissioners. There was an
10 oversight which is that the regulations provide that all
11 testimony shall be sworn; so Mr. Sweeney should take an oath
12 before giving further testimony and after taking the oath
13 should confirm his testimony so far.

14 COMMITTEE CHAIR SCHARFF: Who administers the oath?

15 MR. JACOBS: The regulations don't specify.

16 COMMITTEE CHAIR SCHARFF: Mr. Sweeney, can you raise
17 your hand?

18 MR. SWEENEY: Yes. This one?

19 COMMITTEE CHAIR SCHARFF: Do you promise to tell the
20 truth, the whole truth?

21 MR. SWEENEY: I do.

22 COMMITTEE CHAIR SCHARFF: Under penalty of perjury?

23 MR. SWEENEY: I do.

24 COMMITTEE CHAIR SCHARFF: Is that sufficient?

25 MR. JACOBS: I think that's sufficient for future

1 testimony. I would simply suggest that Mr. Sweeney confirm
2 that the oath applies to the testimony he has given so far.

3 MR. SWEENEY: Certainly. The previous statements are
4 under oath and truthful.

5 MR. JACOBS: Thank you.

6 COMMITTEE CHAIR SCHARFF: Thank you.

7 MR. SWEENEY: Thank you.

8 MR. JACOBS: My apologies for not raising that earlier.

9 BY MR. BAZEL:

10 Q Did Mr. Taylor tell you anything about a pump
11 related to Point Buckler?

12 A Yes, he said there was a pump that was provided in
13 the '90s after he completed the levee repair by DWR.

14 Q Is there a pump at the island now, at least an old
15 pump?

16 A Yes, there is.

17 Q And is there a generator that looks like it
18 provided electricity for that pump?

19 A Yes, it's still there.

20 Q What kind of pump is it?

21 A It's a water pump that's used on exterior
22 facilities to pump water into an island. It sits on a float
23 and it usually is placed in the outside of a levee.

24 Q Is it your understanding that the pump and
25 generator were put there in order to pump water from an

1 adjacent channel onto the island?

2 A Yes, that's how he described it to me.

3 Q Is it your understanding that the purpose of that
4 is to create duck ponds?

5 A Yes, it was to flood the property.

6 Q Have you ever used that pump?

7 A I have not.

8 Q We've heard that you excavated four, small, semi-
9 circular ponds on the property; why did you do that?

10 A Those were historically where I think the ponds
11 were and I was -- those were the beginnings of several
12 larger ponds. That was just the beginning but we stopped
13 work.

14 Q Why did you stop work?

15 A My lawyers told me to.

16 Q Were those your previous lawyers before I was
17 retained?

18 A Yes, my previous law firm.

19 Q When you purchased Point Buckler were you a
20 kiteboarder?

21 A No, I was not.

22 Q When did you become a kiteboarder?

23 A In 2012.

24 Q Do you need the levee for kiteboarding?

25 A No, it's for duck hunting.

1 Q Why don't you need the levee for kiteboarding?

2 A We had the kiteboard set up on the point outside
3 of the levees for three years. We mowed the property and
4 had two trailers and it's above high tide so we were quite
5 happy with that but that didn't provide for any hunting.

6 Q When you say you mowed the property, do you mean
7 the whole property or just part of it?

8 A Just parts of it.

9 Q About how much of the island were you using for
10 kiteboarding then?

11 A About a quarter of an acre.

12 Q In a roughly 30 acre island we think now?

13 A Yes.

14 Q Before purchasing Point Buckler did you talk with
15 any regulatory agency?

16 A Yes, I did.

17 Q Which ones did you talk with?

18 A BCDC and SRCD.

19 Q What did they tell you?

20 A My conversation with BCDC was due diligence before
21 I bought the property and I asked them to check if it was in
22 their jurisdiction.

23 Q What did they say?

24 A They said it was not.

25 Q What did SRCD tell you?

1 A They said it was no longer an active club in SRCD.

2 Q The staff has said that you willfully disregarded
3 regulatory requirements. Did you willfully disregard
4 regulatory requirements?

5 A No, not at all.

6 Q Now when -- staff has said that when you or other
7 people were using the western tip of the island for
8 kiteboarding, that use was or might have been disrupted by
9 high tides. Was there ever any disruption of the
10 kiteboarding on the tip of the island by high tides?

11 A No, that's why we set it up where it was, it was
12 above high tide.

13 Q And how could you tell that it was above high
14 tide?

15 A It was inboard of the high tide debris line.

16 Q What do you mean by "the high tide debris line?"

17 A The island was surrounded by driftwood, logs and
18 large flotsam that show where the high tide reaches on a
19 highest possible basis.

20 Q And by the way, this kiteboarding area that we are
21 talking about on the western tip, is that outside the
22 repaired levee?

23 A Yes, it is.

24 Q So that area would never have -- well, let me
25 rephrase that.

1 During the time when you used that western area for
2 kiteboarding did you ever see any tides come up and wet down
3 -- yes, come up and wet down that kiteboarding area?

4 A No, I did not.

5 Q Did you hear anyone else ever say that that area
6 was -- became wet from the tides?

7 A No.

8 MR. JACOBS: Pardon me, Mr. Bazel, that question
9 reminds me of something that I should advise the Committee
10 Members. The last question was about what other people told
11 the witness. The Commission's regulations provide that
12 hearsay is not admissible in this proceeding unless it would
13 be admissible, essentially, in a court of law.

14 In a court of law hearsay is generally admissible to
15 demonstrate the witness's state of mind, which I believe is
16 probably the purpose for which it is being introduced here.
17 So you certainly could consider what the witness was told by
18 other people in evaluating things such as whether the
19 violation was intentional or what his intention was in
20 taking certain actions.

21 It would not be admissible to prove the truth of the
22 matter asserted. In other words, if someone told the
23 witness something, that is not evidence of whether that
24 original statement was true or not, we would have to have
25 the original witness here testifying under oath.

1 Additionally, to the extent that the witness is testifying
2 about what someone from BCDC told him, that would be
3 admissible because BCDC is a party to this proceeding.

4 So I know that's a little complicated but I wanted to
5 -- do any of the Commissioners have any questions about
6 those rules?

7 COMMITTEE CHAIR SCHARFF: So just briefly, do we expect
8 counsel for BCDC to make objections when they hear hearsay
9 or do you expect -- are you going to make those or are we
10 just supposed to keep it in mind as people testify?

11 MR. JACOBS: Counsel for BCDC is certainly permitted to
12 make objections and Committee Members should consider those
13 objections. Because there is a regulation that specifically
14 has a rule about hearsay I just wanted to make sure that the
15 members understood that rule and my understanding of how it
16 would apply to this proceeding. I don't know whether
17 counsel for BCDC intends to make objections. Generally the
18 rules of evidence for this procedure are more relaxed than
19 they are in a court of law but there is a specific
20 regulation about hearsay that does control the proceedings
21 here.

22 COMMITTEE CHAIR SCHARFF: Okay. So counsel, if you
23 could try to honor those as best as possible.

24 BY MR. BAZEL:

25 Q Mr. Sweeney, you've provided some photographs of

1 when you were on the island in 2012, I believe May 2012 when
2 you were cutting or pushing aside vegetation. My question
3 is, when you were out there doing that work in 2012 did you
4 see any areas of the island, let's say away from the water,
5 that were wet or marshy?

6 A No. Besides the tidal ditches, no.

7 Q And when you say "the tidal ditches," there are a
8 few ditches and channels that water flowed into and out of;
9 is that what you were meaning?

10 A Correct, they had silted in but there were still
11 some ditches, yes.

12 Q Okay. Now, did you drive bulldozers around the
13 island?

14 A Bulldozers, excavators, dump trucks, yes.

15 Q When you were using the bulldozers to clear the
16 island were you actually moving dirt or doing something
17 else?

18 A No, just pushing the dead tules over.

19 Q How did you know the tules were dead?

20 A They were brittle and brown.

21 Q Okay. When you were driving around the island or
22 walking around the island in May 2012 did you ever have any
23 problem with those vehicles getting stuck in the mud?

24 A No, we did not, it was dry.

25 Q Now, since then at any time have you seen water

1 come out of those channels, overflow those channels and
2 spread out over the island?

3 A No, that didn't occur.

4 Q To your knowledge it didn't occur?

5 A To my knowledge while I worked there, no, it never
6 has.

7 Q And when you were working to repair the levee,
8 that was in 2014, yes?

9 A Yes, correct.

10 Q About how long did it take to make those repairs?

11 A I think it took me six months.

12 Q Working approximately how many days a week?

13 A Five days a week, about eight hours a day.

14 Q And did you start in the, when you were repairing
15 the levee, start in the southeast corner and then go around
16 the island clockwise?

17 A Yes, that's correct.

18 Q Did you ever talk with the Corps of Engineers
19 about a permit for Point Buckler?

20 A Yes, I did.

21 Q What happened?

22 A They came on-site in I believe it was February of
23 2015 and met with me and we filled out an RGP3 permit after
24 the fact and calculated the amount of material that we
25 moved. I signed it and I gave them also a copy of the club

1 plan, which they requested.

2 Q Did the Corps ever follow up with you on that
3 after-the-fact permit application?

4 A No, they did not.

5 Q Have you ever spoken with DWR about Point Buckler?

6 A Yes, many times.

7 Q What has DWR told you about the history of the
8 island?

9 A They told me up until this lawsuit stuff happened
10 that they wanted to come to the island and see if the levee
11 repairs were made to allow them to bring a new pump to the
12 facility.

13 Q Did they tell you anything about the pump that was
14 there?

15 A Yes, they said they had no records to confirm or
16 deny if the pump was delivered by them.

17 Q Why did you bring containers to the island?

18 A The containers are for temporary lounges and for
19 storage for duck hunting and kiteboarding equipment.

20 Q Do you intend them to be permanent structures?

21 A No, the intent would be to get a permit to build a
22 clubhouse that was previously there.

23 Q When you say there was a clubhouse previously
24 there, can you tell me more?

25 A Yeah, there was a large clubhouse there from 1942

1 until 1986 when it burned down.

2 Q Did BCDC have any role in supplying the dock for
3 Point Buckler?

4 A Yes, they did.

5 Q What was that role?

6 A They were doing an enforcement action on Salt
7 River Construction in 2011 and called me and asked me if I
8 would facilitate taking the docks, which would be demolished
9 and put on the upland side, at my islands.

10 Q And what did you say?

11 A I agreed.

12 Q What happened then?

13 A The docks were delivered to one island and they
14 were dropped off and they were never demolished and put on
15 the upland side.

16 Q Who was supposed to do the demolishing and putting
17 on the uplands?

18 A Salt River Construction.

19 Q How did the dock that's at Point Buckler get
20 there?

21 A In January 2014 the docks broke free and they
22 ended up in, I guess it was called Honker Bay. And I got a
23 call from Solano sheriffs and the California State Lands
24 Commission asking me whose the docks were and I explained to
25 them. And they said that if I moved the docks to Point

1 Buckler they would grant me a permit.

2 Q "They" meaning State Lands?

3 A Correct.

4 Q And did State Lands grant you a permit or a lease?

5 A Yes, they did.

6 Q Did you have to cut the dock to get it to fit?

7 A Yeah, it was a massive dock so I cut it in half
8 and wedged it into the existing pilings at Point Buckler.

9 Q Did you intend to plant vegetation that would
10 provide duck food at Point Buckler?

11 A Yes.

12 Q Did you bring any equipment to the island to
13 support that planting?

14 A Yeah, we have a bulldozer and a disc and we would
15 have planted if we were allowed to.

16 Q What do you use the disc for?

17 A It's to turn up the dead tules and allows you to
18 get fresh ground and plant.

19 Q Have you planted duck-friendly food at Point
20 Buckler?

21 A I have not.

22 Q Why not?

23 A I was stopped from doing that.

24 Q What would you like to do with Point Buckler?

25 A I would simply like to complete the club and allow

1 duck hunting and in the summertime use it for kiteboarding.

2 Q Do you have any family connections to Suisun
3 Marsh?

4 A Yes, my lovely wife Jennifer is a fourth
5 generation Grizzly Island native, probably the last family
6 in the Marsh that still lives in the Marsh.

7 MR. BAZEL: No other questions.

8 MR. SWEENEY: Thank you.

9 MR. ZEPPELLO: I have a few questions, either now or
10 later.

11 COMMITTEE CHAIR SCHARFF: Why don't you proceed now.

12 CROSS-EXAMINATION

13 BY MR. ZEPPELLO:

14 Q You testified that you conducted due diligence by
15 contacting BCDC. When was that, do you know the date?

16 A I do, it was March of 2011-ish.

17 Q And who did you speak with?

18 A Ming Yeung.

19 Q And what did you ask her?

20 A I asked her if Point Buckler Island was in BCDC
21 territory.

22 Q And what did she say?

23 A She said she'd have to get back to me and she
24 called me back a week later.

25 Q And what did she say when she called you back?

1 A She said it was not in your jurisdiction.

2 Q Can you explain why you failed to mention a
3 conversation with Ming Yeung in your declaration?

4 A I wasn't asked that question.

5 Q You did say in your declaration that you spoke
6 with Adrienne Klein and she told you that Point Buckler was
7 not in the jurisdiction. The declaration had notes, an
8 exhibit that said you spoke with Ms. Klein and she told
9 you --

10 A Yes, that's correct.

11 Q Okay, so you put that in your declaration but
12 today you are here with a different story that you spoke
13 with Ming Yeung; is that correct?

14 A No, I have the same story, the declaration said
15 that I spoke to Adrienne Klein as well.

16 Q Okay, so when did you speak with Adrienne Klein?

17 A When she contacted me about taking the docks from
18 Salt River Construction, September 1st, 2011.

19 Q And your testimony is that Ms. Klein contacted
20 you?

21 A Yes, she called me.

22 Q And in the conversation about Chipps Island and
23 taking docks to Chipps Island you brought up Point Buckler;
24 is that your testimony?

25 A Yes, exactly.

1 Q Why did you bring up Point Buckler in the
2 conversation about docks being removed from Chipps Island?

3 A No, the docks were being moved to the Delta from
4 Point San Pablo Marina. And I told her that I had two
5 islands I could take them to and move them upland, one was
6 Point Buckler and one was Chipps Island.

7 Q And is it your testimony that in the course of
8 that conversation you asked Ms. Klein about whether Point
9 Buckler was in BCDC jurisdiction?

10 A That's correct.

11 Q And your testimony is she said it's not?

12 A That is correct.

13 Q Tell me about your conversation with SRCD. You
14 said you contacted SRCD and they said it was no longer an
15 active club. Who did you speak with at SRCD?

16 A Orlando Rocha, my water master for Spinner Island.

17 Q And when was that?

18 A That was prior to the purchase so it would be
19 somewhere in March 2011.

20 Q You're aware that Point Buckler is located to the
21 west of Chipps Island, is that right?

22 A I assume so, yes.

23 Q In the middle of Suisun Bay?

24 A Yes.

25 Q And you were aware that you needed to get

1 authorization from the Corps of Engineers to do a levee
2 repair at Chipps Island?

3 A No, it's called Fin and Feathers Duck Club.

4 Q Is it on Chipps Island?

5 A It's one of the clubs on Chipps Island, yes.

6 Q Yet it never occurred to you to contact SRCD to
7 ask whether you needed authorization from the Corps prior to
8 conducting levee work at Point Buckler; is that correct?

9 A That's not correct, I did contact them and asked
10 if I could actually apply for permits to get grant
11 consideration for the work I was doing at Point Buckler
12 because most of the clubs in the Suisun Marsh apply for
13 permits to get grants. And they said I could not because
14 the club was not part of SRCD.

15 Q This is SRCD told you this, Orlando?

16 A That's correct.

17 Q So your understanding was it was no longer an
18 active club; is that right?

19 A No, that's not my understanding, I just understood
20 that it was not in SRCD or BCDC jurisdiction.

21 Q You testified that you constructed the levee at
22 Point Buckler to have a duck club; is that right?

23 A Yes, that's correct.

24 Q When did you start the levee work at Point
25 Buckler?

1 A I believe it was March 2014.

2 Q And is it correct that you did not have a copy of
3 the Individual Management Plan until BCDC provided you a
4 copy in November of that year?

5 A That's correct, I had never seen one or heard
6 about one before in my life.

7 Q You said that the Corps of Engineers, you filled
8 out an RGP3 application after the fact in February of 2015;
9 is that correct?

10 A Yes, it was Alicia Kirschebaum on their site visit
11 to look at the property after you guys had been there.

12 Q And do you have a copy of that document?

13 A I do not.

14 MR. ZEPPETELLO: No further questions.

15 COMMITTEE CHAIR SCHARFF: Okay. Counsel, if you want
16 to proceed.

17 MR. BAZEL: No redirect. I think I will make my
18 presentation now and I'll try and make it fast.

19 COMMITTEE CHAIR SCHARFF: Okay.

20 MR. SWEENEY: Thank you for your time.

21 COMMITTEE CHAIR SCHARFF: Thank you.

22 MR. BAZEL: I'm Larry Bazel and let's see if I can make
23 this work. In the interest of time I will skip over the
24 contents and go straight to what we'd like the Committee to
25 do and that is to postpone the penalty decision.

1 You have heard a little bit about meetings between
2 Mr. Sweeney, BCDC staff, Regional Board staff and EPA staff
3 to resolve this by creating some breaches in the levee,
4 getting permit approvals for some facilities there,
5 including some kiteboarding facilities and a duck pond.

6 Going through the permitting process will give the
7 staff everything they want, because if we don't they won't
8 approve the permits. And it will also resolve the factual
9 issues and we'll get into some of the factual issues.

10 That will also do the most to protect the environment.
11 If there is concern now about the way the island is now, the
12 thing to do is to get the island fixed.

13 Mr. Sweeney does not have a lot of money, he cannot
14 afford to pay the proposed penalty.

15 And every dollar spent on the penalty can't be used for
16 restoration and permitting.

17 Also, issuing a penalty will force litigation. We have
18 to challenge any penalty decision within 30 days. We have
19 to file suit or lose that right forever; and as a practical
20 matter that means that we'll have to file suit. Whether or
21 not we push the suit is another matter but it will force him
22 to spend some money on lawyers. We are willing to negotiate
23 a penalty, we would like to negotiate a penalty. We think
24 that's going to happen in due course as we go through these
25 meetings on permitting and penalty; penalty discussions are

1 very much on the table.

2 BCDC after-the-fact permits. The regulations allow for
3 them and they have their own built-in penalty. The
4 regulations say that the fees are doubled if you apply for a
5 permit when there is an enforcement action going on.

6 Or if you feel like you need to impose a penalty,
7 please impose a small one, not 35 violations. When I wrote
8 this I thought, let's make it payable in two years, but
9 let's make it payable in the distant future and waive most
10 if the permit is issued. But again, the best thing to do is
11 bring it back when this is resolved. And if you think at
12 that time when there is a permit in place, where we have
13 agreed on everything including a path forward, that
14 Mr. Sweeney's actions were egregious, you can certainly
15 impose the same penalty then.

16 Let me say that the proposed penalty is completely out
17 of proportion to the acts and to other penalties. Here is
18 the penalty. We have divided it up into five groups and
19 I'll go through each of those one by one and explain why I
20 think there are too many or inappropriate.

21 But we should also compare them to the top ten BCDC
22 administrative penalties ever - and I have a list here, we
23 submitted one with our papers - and if anyone is interested
24 in another copy I can distribute it.

25 The maximum penalty ever was \$220,000; this is

1 \$952,000.

2 Six of the top ten, we're talking about the top ten
3 ever, were \$50,000 or less.

4 The very highest one was \$220,000 in penalties over
5 five years, so there was a provision for a five year payout.
6 And in some of the cases the penalty was waived completely,
7 in two, and in two half the penalty was waived.

8 This proposed penalty is more than the top ten put
9 together.

10 The total penalties BCDC collected in the ten years
11 between 2001 and 2010 was a little over a million dollars.
12 This proposed penalty is a little bit less. But staff are
13 asserting in effect that what happened, what Mr. Sweeney did
14 is not only worse than the top ten worst things done of all
15 time, but everything that was done that deserved a penalty
16 between 2001 and 2010.

17 Now how does that compare to other penalties for duck
18 clubs in Suisun Marsh? The answer is, zero, there have been
19 no penalties for duck clubs ever imposed.

20 For trailers and containers in the marsh, zero, no
21 penalty ever imposed.

22 We have a comparison on the levee repair. We submitted
23 a letter from staff on another levee that had been breached
24 for 15 years. The letter was giving the owner six months to
25 repair the levee; there was no penalty. Six months to

1 repair after it was breached 15 years.

2 Here, the levee was breached for 20 years. Do we get
3 six months? No, we get stuck with \$390,000 in penalties for
4 repairing a levee. And there's no doubt that there was a
5 levee on that island, at least back to the 1940s.

6 Trailers. Previous counsel submitted 67 photographs
7 showing, some showing more than one duck club with lots of
8 trailers on them. Virtually all are unpermitted. No
9 penalty, no enforcement. Here staff want \$262,000 for those
10 trailers.

11 Docks. The very docks that led to the -- the very
12 incident that led to the dock at Point Buckler. Those docks
13 are still sitting around out there in the water. Salt River
14 Construction, I guess, is responsible for them, we don't
15 know that. But according to the declaration recently
16 submitted, there was a phone call, no follow-up. No penalty
17 for Salt River Construction. Here staff want \$60,000 for
18 one of the docks that was put to good use to replace another
19 dock.

20 In April 2014 staff observed the levee repair when it
21 was beginning but they didn't say anything. Mr. Zeppetello
22 said they had to determine whether this was some sort of
23 project going on. But whoever they talked to, they didn't
24 talk to Mr. Sweeney. They already knew about him from his
25 involvement with Salt River. They could have sent him an

1 email, they could have put in a phone call, they could have
2 stopped by on the island and said, 'What are you doing? We
3 think you need a permit. Do you have a permit? Is this
4 part of a repair?' If that had happened events would have
5 been very different.

6 And then in November when they showed up and they gave
7 him a plan, they said the repair was okay if it was in
8 compliance with the club's plan.

9 It was only in January, that January 30 letter, that
10 says it's no good.

11 Are these really egregious violations? If this was the
12 worst violation ever why would it take ten months to
13 determine it?

14 We've heard again and again that tidal marsh was being
15 destroyed. But the island was dry, you've heard that, I'll
16 talk more about it.

17 And what was his intent? Was this all so that he could
18 go on with his kiteboarding without getting permits? No.
19 He didn't need any of this. He certainly didn't need the
20 levee for kiteboarding and he just used a very small part of
21 the island. The ponds have nothing to do with the
22 kiteboarding.

23 What's going on? I don't really know. But certainly
24 one of the things that is going on is that Mr. Sweeney and
25 Point Buckler Club have filed suit here against the Regional

1 Board related to the cease and desist order and asserted
2 that the Regional Board didn't comply with due process,
3 asked for a stay of the cease and desist order. The court
4 agreed, the order was stayed and then the Regional Board
5 rescinded the order.

6 COMMITTEE MEMBER GIBBS: Mr. Bazel?

7 MR. BAZEL: Yes.

8 COMMITTEE MEMBER GIBBS: May I ask you a question?

9 MR. BAZEL: Mm-hmm.

10 COMMITTEE MEMBER GIBBS: So you're going down a very
11 slippery slope here alleging a personal vendetta by the BCDC
12 staff against Mr. Sweeney.

13 I think you have now been, you and your client have now
14 been testifying for about 45 minutes, half an hour between
15 everything, to 45 minutes. And what I have yet to hear is,
16 the staff made a presentation and they laid out a very
17 compelling case alleging a series over years of knowing,
18 willful and egregious violations of BCDC regulations.

19 You have made all these presentations about there were
20 other penalties or lack of other penalties for other people,
21 now you're alleging a personal vendetta. What I have yet to
22 hear is anything, including in the questions that you asked
23 your client, that relate to, frankly, the very compelling
24 and very detailed case that our staff laid out.

25 And I must say, just as a tip for you if I will, that

1 to come in and say that both Adrienne Klein and Ming Yeung
2 -- I have been on this Commission for more than ten years
3 and they are some of the most dedicated and diligent staff
4 people that we have. And they may make certain mistakes,
5 but I will tell you that the question of whether or not an
6 island sitting in the middle of Suisun Marsh is in or out of
7 BCDC jurisdiction is probably not one of them.

8 MR. BAZEL: Well let me --

9 COMMITTEE MEMBER GIBBS: The floor is yours but I hope
10 that you can get to some of those points, sooner rather than
11 later.

12 MR. BAZEL: I'd like to, let me respond to that last
13 one. One of the things -- and certainly we are not saying
14 that the island is not within BCDC jurisdiction. What we
15 are saying is there was some confusion over that. And one
16 of the things we submitted was an enforcement report in
17 which -- from the BCDC website that says those Salt River
18 Construction docks were taken to Chipps Island, which is not
19 within BCDC jurisdiction. And so there is no question that
20 at that time statements were made, certainly about Chipps
21 Island, that it was outside of BCDC jurisdiction. And
22 Ms. Klein doesn't disagree with that, as I understand from
23 her declaration.

24 And I also should be -- I should be clear that I don't
25 mean anything personally against any of BCDC's staff. I am

1 not accusing anyone on the staff of doing anything --

2 COMMITTEE MEMBER GIBBS: Well, it appears you are
3 accusing them of trying to destroy Mr. Sweeney, per your own
4 words.

5 MR. BAZEL: Well, that is, that is the case. And I
6 think they have an exaggerated response, partly because I
7 think they think Mr. Sweeney has intentionally destroyed
8 tidal marsh; which we think he hasn't done, it's dry land.
9 And we can provide more about that but if that's not helpful
10 we won't.

11 Let me ask, what kind of testimony or information you
12 would find useful to help persuade you?

13 COMMITTEE MEMBER GIBBS: Well, I would find testimony
14 or information that goes to directly refute the case that
15 was laid out by staff, which is factual, which is detailed,
16 which is compelling, which is supported by visual and other
17 evidence. Right now you are -- you have asked your client a
18 whole set of questions that didn't seem to relate to that
19 case and now you are alleging a personal vendetta and you
20 are also referring to other alleged violations and how they
21 were or were not punished. But the matter before us relates
22 to your client and this particular --

23 MR. BAZEL: We are not disputing that the levee was
24 repaired and the containers were placed there.

25 COMMITTEE CHAIR SCHARFF: Counsel, maybe you could just

1 move on.

2 MR. BAZEL: Move on.

3 Since time is getting short I will skip through a whole
4 lot of this on the island was dry. Just let me say that the
5 "Tidal marshes are defined as vegetation areas ... which are
6 subject to daily tidal action." And I think we -- let me
7 just flip through some of the aerial photographs that may be
8 helpful.

9 February 1948, you can still see ponds on the island,
10 you can see the levee around the island.

11 In 1981 there's a pond, levee in a slightly different
12 place.

13 This is May 2012 when Mr. Sweeney was there mowing and
14 knocking down vegetation. It was mostly brown. The island
15 is sometimes brown and sometimes green.

16 Here is a picture of the cutting of the vegetation.
17 You can see it's dry land.

18 Here are some bulldozers knocking down vegetation.

19 Just wanted to show you another one. Here the island
20 is green. And by the way, let's take a look here, if I can
21 find where -- this is the little area here that they're
22 using for kiteboarding. It's a very little bit of the
23 island. Don't need the whole island for kiteboarding.

24 Here is January 2013 to show how completely brown the
25 island got, all the vegetation seems to have died off before

1 any of the levee repair was done. This is in 2013, the
2 levee repair started in 2014.

3 Here we are in January 2014, also before the levee
4 repair. Again the island is very brown. There is some
5 water coming in there on that channel. And you can see
6 there is water there but there is no water anywhere around
7 it, it was a dry island.

8 MR. JACOBS: Pardon me --

9 MR. BAZEL: This is just --

10 MR. JACOBS: Mr. Bazel, pardon me, I just want to
11 confirm. The regulations provide that you can refer to
12 evidence that has already been made part of the
13 administrative record. So I would just like you to confirm
14 that these photographs are already part of the record.

15 MR. BAZEL: They are.

16 MR. JACOBS: Okay, thank you.

17 MR. BAZEL: We just wanted to show here, here is the
18 white debris line, the high tide line that Mr. Sweeney was
19 talking about.

20 Here is a photograph showing what that looks like on
21 the ground, a lot of debris. And the concept is that high
22 tides float this debris, which is very floatable, and then
23 as it recedes it drops it, as you can see from the previous
24 photograph. Around much of the island there is a very clear
25 debris high tide line.

1 Okay, here is March 2014. This is when the work was
2 starting, when it was observed and staff didn't respond.

3 Here we are in February 2016. This year the island is
4 mostly brown again.

5 But in May it turned green. These are photographs
6 taken in May. You can see that there is robust vegetation,
7 lots of it all over the place.

8 Mr. Sweeney's consultant just says that the island did
9 not dry out -- the levee did not dry out the island.

10 The pump provides more evidence that the island was
11 high and dry because you needed to pump water onto it.

12 Witnesses have said the island was dry. Now this I
13 think is very interesting: The Regional Board's consultant
14 reconsiders from his initial Regional Board report to his
15 follow-up one. The first report says the island was subject
16 to daily tidal inundation; and there is the picture. Now
17 you saw this picture in the staff presentation. The whole
18 island except for a little strip along the east is subject
19 to tidal action. This is a Regional Board figure.

20 The rebuttal report changes. Now the rebuttal report
21 says the marsh plains such as those at Point Buckler do not
22 have daily tidal flooding, but only periodic.

23 And then there is a new version of the figure and this
24 one shows that only those little channels, like the blue
25 channel we saw before, like that one and this one, are

1 subject to daily tidal flows. A great majority of the
2 island is subject only to periodic overbank tidal flows,
3 that's the light green area.

4 What does "periodic overbank flows" mean?

5 Infrequently, as much as a few times per month to none
6 for several months. They are briefly and they are shallow.

7 So on this the parties aren't too far off.

8 Both sides agree, at least the experts agree, there is
9 no daily tidal flooding on the great majority of the island.

10 Mr. Sweeney has seen no evidence that there were ever
11 bank overflows. The consultant says it might happen a few
12 times a month to none for several months.

13 Most of the island is dry, the parties agree.

14 We can skip that.

15 Here is -- This is a high tide photo again, taken by
16 the Regional Board's consultant on February 17th of this
17 year, which was the highest tide or one of the highest tides
18 in this year. Right over there you see the levee. The
19 water is not up, not quite up to the base of the levee.
20 What that tells you is that even at the highest tide of the
21 year the island wouldn't have been flooded, even without the
22 repaired levee.

23 Everyone agrees the island was dry. Mr. Sweeney did
24 not destroy tidal marsh.

25 The levee was not needed for kiteboarding. I think

1 you've heard some of that. We can skip through that
2 quickly.

3 Let's go through the penalty factors. There are five
4 factors, or I have grouped them into five things, gravity,
5 resolution, ability to pay, cost to the state and
6 culpability.

7 We think the fact that the island was dry affects the
8 gravity. The levee did not dry out the island.

9 We also think there was minimal harm from the trailers,
10 the crescent ponds, the dock and the interior use.

11 Resolution: This is very capable of resolution.

12 Staff ordered Mr. Sweeney to apply for a permit and he
13 will, we were talking about that. We were willing to apply
14 for a permit, the problem is BCDC regs say that in order to
15 apply for a permit you have to submit the permit you've
16 gotten from the Corps and the Regional Board cert, which of
17 course we don't have yet. We're working with all three
18 agencies. We want to come up with a plan that is acceptable
19 to all of them.

20 This is the last submission we made. The concept is
21 these red things are breaches in the levee that would allow
22 water to flow into the borrow ditch, it would circulate
23 around the whole island, it would go back in the channels.
24 And if it turns out that there is some overflow of those
25 channels on the adjoining land it would happen, if it didn't

1 happen, it didn't happen. But in any case, there would be
2 water made available to the interior of the island. This
3 would be a new duck pond and this would be new kiteboarding
4 facilities and a clubhouse. Again, the great majority of
5 the island isn't needed for kiteboarding and it really isn't
6 -- a smaller duck pond can be created also. The little duck
7 ponds are probably too small.

8 Factor 3: Ability to Pay.

9 Mr. Sweeney cannot pay a six figure penalty. His other
10 assets aren't liquid. Regional Board is demanding a \$4.6
11 million penalty on top of that. Regional Board's
12 calculation of Mr. Sweeney's assets was only \$4.2 million
13 but they made some mistakes.

14 A penalty like this, certainly with Regional Board's
15 added, would destroy him and it would certainly remove any
16 ability to fix the island.

17 Factor 4: Cost to the state.

18 No additional costs.

19 The culpability.

20 Some. This is not the most culpable act ever.

21 This is not the kind of nefarious intent that you have
22 when someone is dumping toxic waste. The goal here was to
23 restore a duck club and restoring duck clubs is not a bad
24 thing.

25 The Suisun Marsh Preservation Act and the Suisun Marsh

1 Protection Plan strongly endorse duck ponds and duck clubs.
2 Why? Because waterfowl prefer duck ponds over natural tidal
3 marsh. Duck ponds provide food. They are managed to grow
4 plants that provide food for ducks and the ducks, not
5 surprisingly, like them.

6 The recent scientific -- the protection plan is from
7 the 1970s, the Preservation Act is from the 1970s, but this
8 is still the case. Recent scientific work by USGS confirmed
9 that ducks still prefer duck ponds to natural tidal marsh.
10 And USGS is being concerned that without enough duck ponds
11 there is going to be a problem for waterfowl.

12 The Suisun Marsh Protection Plan says duck ponds are
13 vital.

14 They are critical habitats, they are important to
15 waterfowl. Duck ponds are needed to maintain waterfowl.

16 Mr. Sweeney is accused of intransigence. This was my
17 letter back in February of 2016. Since I came on last fall
18 I've been trying to get this onto a track where the agencies
19 and Mr. Sweeney work together to get some permits for
20 something and resolve it without orders and penalties. I
21 wrote BCDC staff in February 2016: I don't see any reason
22 why there can't be both. Mr. Sweeney remains interested in
23 a resolution. There ought to be a way to work our
24 differences out. That was my position then, it is still my
25 position. I think we can work things out on all this, it

1 doesn't have to be as hostile as it has become. But this
2 certainly isn't a refusal to do what is necessary.

3 Should have known? Duck clubs don't get BCDC permits.
4 When you look at the BCDC permits issued to duck clubs in
5 Suisun Marsh there are almost none for anything.

6 So we think the factors favor Mr. Sweeney. There is
7 insufficient harm for a large penalty, it is capable of
8 resolution and will be resolved, he is unable to pay, there
9 is no cost to BCDC or the state and there is certainly
10 insufficient culpability for the largest penalty ever.

11 Levee repair. I think there was an over-counting issue
12 on a lot of these things.

13 At one point in the complaint, the administrative
14 penalty complaint, it refers to levee repairs, one
15 violation; but when it comes to money there are 13
16 violations. If any it ought to be one violation, 13 really
17 is too many, it's over-counting.

18 It is one activity.

19 Consistent with the IMP. It doesn't matter whether
20 Mr. Sweeney knew an IMP existed. The law provides, and
21 staff agree, that work done, specified in an Individual
22 Management Plan, doesn't need a BCDC permit.

23 The plan here calls for tight levees. The levees are
24 now tight. If the levee track is somewhat different because
25 part of the island eroded away, I don't think that makes it

1 inconsistent with the IMP.

2 We think it is still in effect. That is a legal
3 argument that you probably won't want to get into. But let
4 me say there is no expiration date on it. And at one point
5 in November 2014 staff acted as though it was still in
6 effect. And if staff were uncertain at that time they
7 certainly shouldn't impose the biggest penalty ever.

8 IMPs don't just give landowners the right to maintain
9 their duck clubs, it gives them an obligation to. They are
10 required to comply with their IMPs, and if they don't it's
11 \$5,000 a violation. The Legislature intended that duck
12 clubs would be preserved and that owners of duck clubs could
13 be made to repair their levees, to keep their duck ponds
14 managed.

15 Again I mention that there was another club where the
16 levees had been breached for 15 years, no penalty.

17 The cost for permitting, according to the Regional
18 Board, is going to be \$1.1 million. So it is certainly
19 better to penalize Mr. Sweeney after permitting is complete
20 and at that point there will be a far better record on
21 cooperation and factual disputes.

22 As far as factual disputes go, there are data issues.
23 Let me just make the point that according to the data
24 submitted by the Regional Board and by staff here, the water
25 level and the top of the levee are supposed to be at the

1 same elevation, they are obviously not. The levee there is
2 something like 2.5 feet tall.

3 The levee again, you can see the levee here. That's
4 the side of the levee. So there is a several foot problem
5 in trying to resolve these two elevations that are supposed
6 to be the same but obviously aren't. This is something that
7 will undoubtedly be resolved as time goes on. It's useful
8 not only in getting the data straight but in determining
9 BCDC jurisdiction.

10 So we think there is too much over-counting going on
11 here.

12 There is the fact that the IMP provides for duck club
13 maintenance and there is no need to penalize now.

14 Trailers and containers.

15 We submitted the 67 aerial photographs. Permitting
16 generally isn't required.

17 Here is one of those photographs. It shows 20 40-foot
18 shipping containers, 12 40-foot RV trailers. And I
19 understand this is very close to SRCD headquarters so this
20 shouldn't be news.

21 There are obviously places with lots of other
22 containers. Here is one with 7 --

23 COMMITTEE CHAIR SCHARFF: You have a couple more
24 minutes so you might want to bring it to a conclusion.

25 Crescent ponds.

1 The only reason there was -- we were alleged to fill
2 the roads but there was no road fill so that part is simply
3 incorrect.

4 Penalty will do more harm than good.

5 Every dollar spent on penalties can't be spent on
6 restoration or on new tidal marsh. We can certainly dig out
7 some of that island and create an area that's clearly marsh.
8 Have to litigate.

9 The legal limit is \$30,000 per violation.

10 This over-counting is an obvious attempt to avoid the
11 law and that shouldn't happen, especially in a penalty
12 proceeding for someone who is accused of violating the law.

13 There is an existing cease and desist order that we
14 have stipulated to and that can continue in effect.

15 The new Cease and Desist Order is designed in some ways
16 for failure. It requires a permit application by February,
17 and we can certainly do that, but we can't submit a complete
18 application because that requires a Corps permit and we
19 can't get a Corps permit by February.

20 And again, the Regional Board has calculated that
21 Mr. Sweeney had \$4.2 million in assets; and that's the
22 evidence in the record of his worth.

23 They did a search but they were incorrect about some
24 things. Mr. Sweeney doesn't have a \$3.3 million house in
25 Marin. He sold that and the money was put into Point

1 Buckler. And Point Buckler was valued at \$1.2 million.
2 That doesn't consider the liabilities and oh boy are there
3 liabilities associated with it.

4 There is a landing craft. Mr. Sweeney is trying to
5 sell that landing craft for \$850,000, I believe, and put
6 that money into restoring Point Buckler.

7 We have got a situation here, however it came about,
8 that there was no discussion of a penalty against
9 Mr. Sweeney by BCDC staff or the Regional Board until he
10 sued the Regional Board and prevailed because the Regional
11 Board wasn't following the due process requirements.

12 So the message that is coming out of here, intentional
13 or not, is if you insist on your constitutional rights,
14 staff will destroy you; and that shouldn't be the message
15 that any agency is trying to send.

16 Any questions?

17 COMMITTEE CHAIR SCHARFF: Well thank you very much.

18 MR. BAZEL: If I could just --

19 COMMITTEE CHAIR SCHARFF: I think what we are going to
20 do now is hear from the public.

21 MR. BAZEL: I would like to submit a copy of the full
22 presentation for the record.

23 COMMITTEE CHAIR SCHARFF: You have one question?

24 COMMITTEE MEMBER GILMORE: Yes. It's actually two
25 parts. I just want to make sure I have my timing straight.

1 So you received a Cease and Desist Order from BCDC in
2 January of 2015; is that correct?

3 MR. BAZEL: April, I believe.

4 MR. ZEPPETELLO: It was a letter in January of 2015.

5 COMMITTEE MEMBER GILMORE: Okay. So you were put on
6 notice that there was an issue.

7 MR. BAZEL: January 30th, 2015.

8 COMMITTEE MEMBER GILMORE: Okay, there was a letter.

9 MR. BAZEL: And after --

10 COMMITTEE MEMBER GILMORE: Okay. And so my second
11 question is, after your client received that letter did work
12 continue?

13 MR. BAZEL: There was some work done, I don't know
14 about the fourth of the crescent ponds. But a couple of or
15 some additional flat racks or containers have been put on
16 the island.

17 COMMITTEE MEMBER GILMORE: Okay. Because my
18 recollection and my notes say, based on the staff
19 presentation, that there was a significant amount of work
20 that continued after that letter was received. And so my
21 question to you, and maybe this is a better question for
22 your client, is why?

23 MR. BAZEL: Well, I should ask him. But let me be
24 clear on that. The bulk of the work was all before that
25 letter. The levee repair was all completed by that time.

1 Of the semicircular ponds at least three of them had been
2 dug. The containers, some of the containers were there if
3 not all of them. The dock was in there, almost everything
4 was done. Why don't I just ask Mr. Sweeney to answer why
5 did work continue?

6 MR. SWEENEY: Well first of all, Larry wasn't my lawyer
7 at the time. And so my attorneys advised me to stop work on
8 all levees so that's what I did. So that's what they
9 advised me to do. Larry became my lawyer much after that so
10 that was their advice to me. There was no cease and desist
11 letter, though.

12 MR. BAZEL: And my understanding, I wasn't there for
13 any of this stuff, is that the focus seemed to be on the
14 levee on drying out the marsh and that sort of thing rather
15 than on the work that was done afterwards. My understanding
16 was that after the submission on the trailers it had seemed
17 to stop being an issue but obviously BCDC staff didn't think
18 that, it certainly doesn't think that now.

19 COMMITTEE MEMBER GILMORE: Thank you.

20 COMMITTEE CHAIR SCHARFF: Any other questions from
21 members?

22 All right. I think what we would like to do now is
23 hear from the public. We have four speakers. You will each
24 have three minutes. The first speaker is Nicole Sasaki from
25 Baykeeper.

1 MR. JACOBS: Mr. Chair, I would like to remind the
2 Committee Members that the evidentiary rules are the same
3 for speakers from the public as they were for the
4 Respondent, that if the speakers are commenting on evidence
5 that is in the record, there is no problem, if they wish to
6 provide testimony about new facts then they should take an
7 oath; and it at the discretion of the Committee.

8 COMMITTEE CHAIR SCHARFF: Do you expect a need to take
9 an oath?

10 MS. SASAKI: I will not be discussing new facts. No.

11 COMMITTEE CHAIR SCHARFF: Okay.

12 MS. SASAKI: Good morning, Enforcement Committee
13 Members and staff. I am Nicole Sasaki, Associate Attorney
14 at San Francisco Baykeeper.

15 I'd like to thank staff for issuing the Cease and
16 Desist and Civil Penalty Order against Respondents and I
17 encourage the Enforcement Committee to vote today in favor
18 of adopting the Order.

19 Baykeeper has monitored the illegal fill activities at
20 Point Buckler Island and the enforcement actions by both the
21 Regional Board and BCDC. We appreciate the agencies'
22 efforts to restore the island's tidal marshlands.

23 Staff has thoughtfully investigated and reviewed the
24 evidence supporting the alleged violations of the McAteer-
25 Petris Act and the Suisun Marsh Preservation Act and has

1 proposed reasonable remedies to address these violations.

2 Baykeeper encourages the Committee to reject
3 Respondents' multitude of defenses to limit their liability.
4 Staff has established evidence that the IMP was not
5 implemented and that Respondents' activities cannot be
6 justified under the IMP. Respondents' defenses constitute
7 post hoc rationalizations, which cannot stand. Likewise,
8 Respondents' mitigating factors must also be rejected by the
9 Committee.

10 Staff presented evidence that the illegal fill
11 activities continued after staff instructed Respondents to
12 stop work and that Respondents knew that permits were
13 required for the activities conducted at the island.

14 In calculating the civil penalty, staff appropriately
15 considered the factors in Government Code Section 66641.9
16 and required the proper penalty for each violation of the
17 McAteer-Petris Act. Respondents' activities continue to be
18 the most egregious illegal fill of tidal marshland in the
19 Bay's recent history. The penalties should not be reduced.

20 Wetlands and tidal marshes are vital to a healthy Bay
21 ecosystem. They will play an essential role in the Bay
22 Area's resiliency to sea level rise. We cannot sit idly by
23 and let existing tidal marshlands be illegally filled. We
24 need more wetlands, not less.

25 In closing, Baykeeper appreciates BCDC's action to

1 protect and restore Point Buckler Island and we ask the
2 Enforcement Committee adopt the Order as proposed. Thank
3 you.

4 COMMITTEE CHAIR SCHARFF: Thank you.

5 And our next speaker is Dyan Whyte from the Regional
6 Board. You will also have three minutes.

7 MS. WHYTE: Great, thank you. My name is Dyan Whyte; I
8 am the Assistant Executive Officer at the San Francisco Bay
9 Regional Water Quality Control Board and I also serve as our
10 prosecution lead on enforcement-related matters. I will not
11 be presenting any new evidence with my statements.

12 In August the Water Board adopted a Cleanup and
13 Abatement Order which found that John Sweeney and Point
14 Buckler Club, who we refer to collectively as "Dischargers,"
15 violated our Basin Plan Discharge Prohibitions as well as
16 the Federal Clean Water Act by discharging fill into
17 approximately 3 acres of tidal wetlands in state waters and
18 contributing to the degradation of approximately 27 acres of
19 tidal marsh in Suisun Bay.

20 Suisun Bay, as you know, is part of the Delta and in
21 2009 the Legislature declared the Delta as being of
22 hemispheric significance for the western North and South
23 Americas. They also further recognized that it is in a
24 state of delicate balance and it is that delicate balance
25 that the water boards are mandated to protect and restore.

1 The Water Board found that the Dischargers' disregard
2 of permitting requirements resulted in harm to water quality
3 beneficial uses.

4 The California Water Code clearly states that discharge
5 into waters of the state is a privilege, not a right, and we
6 use our permitting program to grant that privilege. As part
7 of a permitting program we evaluate applications in order to
8 determine if the actions that are proposed will comply with
9 state standards, and part of that is working with applicants
10 in order to assure that all projects are done in a manner
11 where they avoid, to the maximum extent possible, minimize,
12 and then mitigate for any impacts to waters and associated
13 water quality beneficial uses.

14 This did not take place. In fact, the cutting off of
15 tidal channels to this island severely impacted the tidal
16 marsh, such that there has been a mass die-off of vegetation
17 and a spreading of invasive species.

18 But I will say furthermore, the direct cutting off of
19 these tidal channels is very significant. I typically refer
20 to these tidal marshes as the lungs of our ecosystem. They
21 pump nutrients and food into the surrounding ecosystem.
22 Cutting off those tidal channels, almost 10,000 feet of
23 tidal channels, these are the channels in which the salmon
24 on their way out to the Golden Gate go into to seek refuge,
25 to feed. These are the same channels that the longfin smelt

1 use for spawning. These are the same channels that export
2 nutrients and food into the surround watershed --
3 surrounding waters, which is critical habitat for the Delta
4 smelt, a species that is close to extinction.

5 COMMITTEE CHAIR SCHARFF: So we are over three minutes
6 so if you could just wrap up.

7 MS. WHYTE: So with that I will just say that your
8 staff has clearly laid out the requirements of the Water
9 Board's Cleanup and Abatement Order. And I will not go into
10 details but we will be proposing a \$4.6 million penalty at
11 our December hearing. We have been working closely with
12 your staff in terms of simply sharing the technical
13 information to support our actions. We are a science-based
14 organization and I believe our Board will make their
15 decision on the science that is presented to them at that
16 time. Thank you.

17 COMMITTEE CHAIR SCHARFF: Thank you.

18 Next we have Steve Chappell from SRCD. You will also
19 have three minutes. Do we need to swear you?

20 MR. CHAPPELL: (Shook head.)

21 COMMITTEE CHAIR SCHARFF: Okay.

22 MR. CHAPPELL: I am Steve Chappell, the Executive
23 Director of the Suisun Resource Conservation District. My
24 primary purpose here was to come today before the Commission
25 to offer any advice or questions associated with the

1 testimony provided today.

2 I have spent my career assisting private landowners of
3 the marsh to manage wetlands and duck clubs and operating
4 and maintaining those habitats. The key component of that
5 is we hold the Army Corps of Engineers' Regional General
6 Permit for the ongoing maintenance and operation of dike-
7 managed wetlands, the 401 certification with the Regional
8 Board, endangered species consultations with Fish & Wildlife
9 Service, NOAA Fisheries. All those permits are available to
10 the landowners, including the Department of Fish & Wildlife,
11 the Department of Water Resources and the Bureau of
12 Reclamation, which are joint applicants. The District
13 administers that permit.

14 Violation of the permits are serious. They compromise
15 the permits for 150 landowners, private landowners and duck
16 clubs, as well as all of the other landowners in the marsh
17 that use it, primarily the resource agencies through
18 Department of Fish & Wildlife.

19 I have had conversations with Mr. Sweeney previously on
20 the other properties that he owned. My door is always open,
21 my phone is always available to me, my cell phone is
22 available to me. He never contacted me. Yet he claims that
23 my staff member, who is no longer with me but I respect
24 highly as being familiar with the permit, he contacted him
25 and asked the questions he wanted to hear so he could get

1 the answers he could get. Thank you.

2 COMMITTEE CHAIR SCHARFF: Thank you.

3 The next speaker is Stuart Siegel. You will also have
4 three minutes. Mr. Siegel, do we need to swear you in?

5 DR. SIEGEL: I don't think so.

6 COMMITTEE CHAIR SCHARFF: Okay.

7 DR. SIEGEL: My name is Stuart Siegel, I am the owner
8 of Siegel Environmental. I am adjunct professor at San
9 Francisco State in Earth and Climate Sciences and I am the
10 Coastal Resilient Specialist for the San Francisco Bay
11 National Estuary and Research Reserve. I am the author of
12 -- the lead author of -- the May 2016 technical report and
13 the July 2016 addendum to that.

14 I really want to make just a few points to be clear.
15 Mr. Bazel was trying to sow a little bit of confusion and
16 doubt as to whether the island, in fact, was tidal marsh. I
17 just want to make it very clear that there is an
18 overwhelming body of evidence that the island is tidal
19 marsh; there is no ambiguity around that. He used the term
20 "high and dry."

21 MR. BAZEL: Objection, I believe Dr. Siegel is now
22 testifying.

23 DR. SIEGEL: I am citing information in our technical
24 reports and nothing more.

25 COMMITTEE CHAIR SCHARFF: Dr. Siegel, I don't have the

1 record in front of me so why don't we just swear you just as
2 a precaution. Do you promise to tell the truth, the whole
3 truth, under penalty of perjury?

4 DR. SIEGEL: I do.

5 COMMITTEE CHAIR SCHARFF: Thank you.

6 DR. SIEGEL: Okay. All this information is contained
7 in the May technical report and the July experts' rebuttal.

8 So one of the issues about being high and dry is that
9 Mr. Sweeney commented upon that when he was out there in May
10 of 2012 he didn't see any water on the island. I will
11 actually say that though I cannot refute what he had to say,
12 that the way the tides work in the San Francisco Estuary is
13 that in the spring, summer and fall, high tides happen at
14 nighttime, the bigger high tides. So when you're out there
15 in the daytime you can very easily walk out there and not
16 see that because it's not happening, they happened at
17 midnight when it's dark and nobody is out there. So let's
18 be very clear that his personal observations, which are
19 perfectly fine to make, they in no way refute the evidence
20 of the island being tidal marsh.

21 Also he put up, Mr. Bazel put up photos, air photos
22 from January of I think 2013 and 2014 that showed the island
23 very brown before the work began. And I think it is very
24 important to point out that tidal marshes around the globe,
25 every winter the above-ground vegetation dies off, it looks

1 brown, it grows back in the spring and it's green in the
2 summertime. That's how tidal marshes around the planet
3 work. So the evidence he presented in those photographs was
4 not of dead vegetation, the term is "senescence," each year
5 that above-ground part dies off.

6 One of the things that also he cites, this idea of the
7 rack line and photographs of the logs and debris at the edge
8 of the marsh. That is a very movable line and even the air
9 photo that BCDC presented today showed between 2011 and 2016
10 that entire debris rack line moved inward because there's a
11 series of higher tides that happened and moved it in.

12 Also the observation that Mr. Sweeney purchased the
13 island at the time when California experienced the most
14 significant drought it has had. The water levels in Suisun
15 Bay are driven in large part by Delta outflow. During the
16 drought the Delta outflow has been lower. In the report we
17 have the tides for over 20 years from Port Chicago that show
18 that the high tide levels during the period he's owned the
19 island have been much lower than they were in the preceding
20 16 years in that tide record. And that covers the period of
21 tide cycles on the planet, which is about a 18.6 year cycle.
22 So he owned the island during this period of drought. And
23 so his observations, while I wouldn't refute them, don't
24 establish the island was not tidal marsh. Thank you very
25 much.

1 MR. BAZEL: I have a few questions, if I may?

2 COMMITTEE CHAIR SCHARFF: You know, I think not.

3 MR. JACOBS: Mr. Chair, to the extent that the
4 questions are about facts that are not in the record the
5 Respondent is permitted to cross-examine the witness on any
6 new facts that are presented.

7 COMMITTEE CHAIR SCHARFF: All right, if you could limit
8 it to what you consider to be new facts that were not in the
9 record.

10 CROSS-EXAMINATION

11 BY MR. BAZEL:

12 Q Dr. Siegel, you said in the - I want to quote you
13 correctly here - that the senescent vegetation is found in
14 the wintertime but in spring and summer it grows back; was
15 that correct?

16 A That is how tidal marshes work, yes.

17 Q Have you been on Point Buckler Island since
18 February of this year?

19 A No, I have not.

20 Q We presented some photographs in May 2016 showing
21 the island was green. Did you make any effort to determine
22 whether the senescent vegetation had grown back this year?

23 A I have not made that effort, no. I will add that
24 the wetland vegetation, whether it's diked marshes or tidal
25 marshes, grows in that same period of time. So just the

1 fact that there has been some new growth this year does not
2 establish that it was not tidal marsh prior to the new levee
3 being constructed.

4 Q I presented a figure showing that in the Regional
5 Board's rebuttal report that it was the opinion of that
6 group that water overflowed those channels as often as a few
7 times a month and as infrequently as none for several
8 months. My question is, was that figure prepared under your
9 direction?

10 A That was. That figure, tidal inundation, water
11 flooding the surface of the marsh, happens around the globe
12 on an infrequent basis; water in and out of the tidal
13 channels happens every single day. And that water that goes
14 in and out of the channels is what saturates the groundwater
15 and allows tidal marshes to grow. So there is a definition
16 of tidal marsh - in the Suisun Marsh Management Plan I
17 believe it is - it talks about daily tidal action. And so
18 the daily tides that go in and out of those channels, they
19 directly control vegetation through the groundwater
20 connection. In tidal marshes around the planet the surface
21 of that marsh only sees water on the higher tides, not every
22 single day, and that's how tidal marshes work on the planet.

23 Q One more question, I think. Have you done any
24 work to determine whether there has been any change in the
25 groundwater at Point Buckler over time?

1 A We have not done work on that. We have
2 measurements from our site visit on March 2nd.

3 MR. BAZEL: No other questions, thank you.

4 COMMITTEE CHAIR SCHARFF: All right, thank you very
5 much.

6 DR. SIEGEL: Thank you.

7 COMMITTEE CHAIR SCHARFF: All right. Now we will
8 return to the Commission for deliberations, questions,
9 comments. I am not going to close the public hearing yet
10 because we can only do that -- then we can't ask any
11 questions and I figure you may have questions for staff or
12 you may have questions for the Respondent. Would anyone
13 like to start?

14 COMMITTEE MEMBER TECHEL: I guess I have a question
15 about the levee. We have heard and we saw the diagram that
16 appeared this was a new levee, we also heard from the
17 Respondent "levee repair." Can I have a little more
18 information on exactly -- between those two, levee repair
19 versus a new levee.

20 MR. ZEPPETELLO: Yes. I think it's a matter of
21 characterization and also this issue of they are trying to
22 fit within this old IMP and so they characterize it as a
23 repair. But it was -- from staff's point of view and I
24 think Adrienne talked about it, over 80 percent or
25 approximately 80 percent of the levee was placed not on the

1 footprint of the former levee. So from staff's point of
2 view it was levee construction, Respondents'
3 characterization is levee repair.

4 MR. BAZEL: Our response to that would be, I think,
5 there were the remnants of an old levee in place. The
6 Regional Board and BCDC staff identified seven breaches in
7 that old levee. We don't disagree with that.

8 When the levee was repaired, in some places rather than
9 go out into the water, Mr. Sweeney built the levee on dry
10 land and so it's a little bit inside the old location of the
11 levee and that's where they get their 80 percent is not in
12 exactly the same place. But the levee was around the edge
13 of the island before and it's pretty much around the edge of
14 the island now. The concept wasn't to change it in any
15 dramatic way.

16 COMMITTEE CHAIR SCHARFF: Just as a quick follow-up to
17 that, does it make a big difference if it's repair or if
18 it's not repair? I'm asking staff that question in terms of
19 your view of the matter.

20 MR. ZEPPETELLO: Well, if it was a repair to a well-
21 maintained levee.

22 COMMITTEE CHAIR SCHARFF: I don't think anyone is
23 arguing it was a well-maintained levee. I mean, given the
24 facts which seem pretty clear. I mean, I don't think they
25 seem to even be in dispute.

1 MR. ZEPPETELLO: Our position would be that a permit
2 would still be required. And I would mention, as I did
3 earlier, that in 1989 an owner came to us to repair the
4 levee and applied for a permit to do so.

5 COMMITTEE CHAIR SCHARFF: Okay. Any other questions?

6 No?

7 So I have some questions. I have a little bit of
8 concerns about the amount of the penalty, frankly, and the
9 number of violations. I guess I would just like staff to
10 basically address the issue of that. You know, the law does
11 basically say \$30,000 per violation, so what we have here is
12 a number of different violations. And what I would like to
13 basically understand is how we get to those number of
14 violations and why we should go with that number of
15 violations as opposed to a different number. And then I
16 wanted to give Respondents' counsel a chance to focus on
17 that as well.

18 MR. ZEPPETELLO: Well I'll go first, although if
19 Adrienne has any comments to add. The approach we took and
20 the concept was that putting fill in discrete locations
21 should count as separate violations because it is impacting
22 separate, discrete geographic areas and in different points
23 in time. So putting fill to close off seven breaches we
24 counted and considered to be seven violations.

25 COMMITTEE CHAIR SCHARFF: Do we have any precedent

1 about how we have looked at that in the past and what we
2 have done?

3 MR. ZEPPETELLO: Not that I am aware of, this case is
4 kind of unique. Prior violations, you know, are one deposit
5 of fill or -- I mean, there's been public access violations.
6 But the nature and extent of these violations are unique.
7 Do you have any further insight on that?

8 MS. KLEIN: Perhaps I could cite precedent with permit
9 violations as opposed to unauthorized development. We do
10 consider as separate violations, violations of each permit's
11 special condition and of each subsection of each special
12 condition.

13 COMMITTEE CHAIR SCHARFF: Okay.

14 MS. KLEIN: Also, we have looked a little bit at the
15 different periods of time for some of these violations and
16 considered a similar activity at a different period of time
17 to constitute a different violation.

18 COMMITTEE CHAIR SCHARFF: Okay.

19 MR. ZEPPETELLO: So just to continue but not go on too
20 long about it. I mean, they excavated four different ponds
21 and so it seems appropriate that those are four violations.
22 In fact, they excavated the ponds and then they took the
23 fill and placed it next to the ponds. We think that it
24 would have been appropriate and reasonable to count those as
25 two violations. But since it was one action, excavating the

1 pond and placing the fill, we didn't count that as two but
2 we think theoretically it could have been.

3 The same with the containers. Each container, under
4 the law, is a separate placement of fill that is impacting
5 habitat. You know, if someone brought one container that
6 would be one violation; here there were - I don't know the
7 exact number but we counted them separately. The Committee
8 or the Commission in your discretion could count it
9 differently or decide that it is, you know, under the
10 circumstances it shouldn't be counted that way, but from
11 staff's perspective there's different actions at different
12 times.

13 The same, for example, with the dock. He replaced a
14 dock. That impacted -- that was fill that covered -- it
15 covered the Bay. And then later they put in a bigger dock
16 so it covered more of the Bay. It's appropriate that that's
17 a separate violation with separate impacts.

18 COMMITTEE CHAIR SCHARFF: Okay.

19 COMMITTEE MEMBER GIBBS: I do have one.

20 COMMITTEE CHAIR SCHARFF: Sure. He still gets a chance
21 to respond to me. Go ahead.

22 MR. BAZEL: We think that the levee repair and the
23 borrow ditch was one violation at most. The way the levee
24 was repaired is that Mr. Sweeney went around with an
25 excavator -- and this is what was done before, there was an

1 old borrow ditch there. And dirt is dug out of the borrow
2 ditch and put on the levee and you just go around the levee
3 digging out. And the idea is to build up a levee to make
4 it, to make it better.

5 The staff have counted that one going around as one
6 violation every time the levee crossed a breach plus one
7 violation for the borrow ditch. Plus two violations --
8 along the way there were two tide gates in place and one of
9 them was repaired. I believe the flaps at the end weren't
10 working, those were replaced, and the other one was
11 irreparable, if that's the right word, and it was just
12 pulled out. But if there is any fill there it's the same
13 sort of fill that was put there in the first place. So
14 there shouldn't be extra penalties for that. We think this
15 is all over-counting.

16 And since Mr. Zeppetello mentioned the dock, one dock
17 -- there was an old dock there that was removed; one dock
18 was brought there, cut in half, attached to the pilings.
19 That's two violations? It doesn't seem that way to us.

20 COMMITTEE CHAIR SCHARFF: Okay, thank you.

21 Commissioner Gibbs.

22 COMMITTEE MEMBER GIBBS: So my question is the
23 following. Mr. Bazel's presentation spent a lot of time
24 focusing on whether or not the vegetation on the island was
25 dry and in fact whether or not it was a tidal marsh.

1 Your presentation seems to spend a lot of time focusing
2 on whether or not there was a series of actions taken by the
3 Respondent, after which he either knew or should have known
4 the island was subject to BCDC jurisdiction.

5 Which question are we actually being asked to decide
6 here and where should the relative priorities be?

7 MR. ZEPPETELLO: Let me see if I understand the
8 question. The threshold question is whether you determine
9 that there were unpermitted, unauthorized work that should
10 have been permitted and therefore violations of the law.
11 And if the answer to that is "yes" then both a Cease and
12 Desist Order to order them to come into compliance with the
13 law and to engage in -- and get a permit for what they can
14 seek authorization for, and then an appropriate penalty for
15 those violations.

16 I believe the issue of what they did, you know, it may
17 go to their knowledge or whatever, that goes to mitigating
18 circumstances but it doesn't go to whether there was a
19 violation of the law and whether or not an order should be
20 issued in the first place.

21 I am not sure if I answered your question.

22 COMMITTEE MEMBER GIBBS: I think you did, thank you.

23 Maybe Mr. Bazel wants to comment as well.

24 MR. BAZEL: Thank you. I think -- I spent a lot of
25 time focusing on gravity. If we didn't destroy the island

1 the proposed penalty should be less. And I don't think we
2 destroyed the island, most of the island is still senescent
3 when it's brown and green when it's green.

4 As far as what Mr. Sweeney knew, that goes to
5 culpability, that's another factor. And on that I'd
6 emphasize that the great majority of the work, certainly all
7 the levee repair that is supposed to be the destroying of
8 the island, was done before the notice and he definitely
9 stopped work on that.

10 And that the staff knew about it when he was just
11 beginning and I think that goes to culpability also. If
12 someone had said, 'Hey, stop' at the beginning of this, it
13 would have been a whole different story.

14 COMMITTEE MEMBER GIBBS: Thank you.

15 COMMITTEE CHAIR SCHARFF: Any other questions? Shall
16 we then sort of talk more deliberations?

17 COMMITTEE MEMBER TECHEL: Yes. This one is interesting
18 because normally when there is an action that looks like
19 it's going to come to us, it gets worked out. They work out
20 a situation, a solution. And this one it didn't look like
21 the Respondents were as willing to work out a solution and
22 so we got a lot of, I thought, mixed information today.
23 It's like, 'We want to work it out but we want to say it's
24 an IMP' and 'Somebody said something to us and other people
25 do things differently' and there's data arguments and so I

1 am not seeing at this point that, 'Gee, we really want to
2 work it out.' There seems to be a lot of other issues
3 underlying, still arguing about.

4 So I do think this is probably the first in a long time
5 that we have had to come to one of these hearings and really
6 look at the record and decide from what the record says
7 whether or not. I think at this point staff has evaluated
8 the operation accurately and has brought forward that data.

9 MR. BAZEL: May I respond? If it's still open.

10 COMMITTEE CHAIR SCHARFF: No. It will still be open
11 but let us deliberate for a little bit.

12 Commissioner Gilmore, do you want to?

13 COMMITTEE MEMBER GILMORE: Yes. I'm having a hard time
14 with this because it seems like on the part of Mr. Sweeney,
15 at least in their mind, there is a real discussion as to
16 whether or not this is a tideland marsh. Yet staff, the
17 Regional Board and the expert who was here say the
18 overwhelming body of evidence is that it is. It makes me
19 kind of think of the discussion about global warming. You
20 know, 98 percent of the scientific community believes that
21 global warming is real and then you have the 2 percent
22 holdouts.

23 And so I think if you start from their proposition that
24 this is not a tidal marsh and therefore we didn't destroy it
25 then I can kind of, sort of see where they got to where they

1 are in their argument. Unfortunately, I don't believe that
2 the science backs up that particular belief so I have to
3 start from the period, from the point where I go, 'Okay,
4 this is a tidal marsh and BCDC has jurisdiction over it and
5 they didn't come to BCDC to get the requisite permits.' So
6 that's kind of my train of thought.

7 And this is for something maybe later on in the
8 discussion. I do have some sympathy about the --
9 potentially the amount of the penalty. But more so than
10 that, I have sympathy for the timing of the payment of
11 whatever penalty, if we decide to levy a penalty. Because
12 to me, job one is putting the situation on a path to
13 remediate the marsh. And I want to see that happen and I
14 want to make sure that Mr. Sweeney has the resources to do
15 that. And we may not have enough information in front of us
16 to make that determination; I am just saying that I am
17 somewhat sympathetic towards the timing of the payment if
18 the Commission decides to levy a penalty or how much of that
19 penalty.

20 COMMITTEE CHAIR SCHARFF: I actually concur a lot with
21 what you said there. I also would like to see this on a
22 path to resolution.

23 Commissioner Gibbs, do you have some thoughts?

24 COMMITTEE MEMBER GIBBS: My first thought is that in
25 all the time we have been on BCDC the one thing that has

1 never, ever, ever occurred is anyone accusing BCDC of not
2 taking the maximum, expansive view of their jurisdiction.
3 So I kind of get lost from the very start when I am told
4 that two of my most -- our most experienced staffers in fact
5 said that this island was not within BCDC jurisdiction.

6 So we'll put that aside for now because one of the
7 other things, you do seem like a very skilled attorney,
8 Mr. Bazel, and your client does seem like a sophisticated
9 business person. We do want to seek resolution. That is
10 what we try and do. And so I would frankly be in favor of a
11 mechanism that levies the penalty but provides an open
12 period, a short brief period, to get this resolved. And to
13 get this resolved in the spirit of, let's kind of throw away
14 all this, let's see what we can throw up on the wall and see
15 if it sticks, kind of arguments, and get down to the real
16 facts and try and mitigate the situation at this marsh.

17 And if there is some financial information that is
18 being withheld, it can't be withheld anymore; and I will
19 leave that up to the staff. But we need to really sit down
20 at the table and get this resolved. And if the Respondent
21 is willing to do that I would certainly be in favor of it.
22 And so maybe, and staff can advise us, we can levy a penalty
23 and hold it in abeyance for a short time. But we do need
24 some cooperation from the Respondent at this point.

25 I just want to say that questioning the knowledge or

1 the motives of our staff is probably not the path to
2 continue down.

3 MR. ZEPPETELLO: If I could comment?

4 COMMITTEE CHAIR SCHARFF: Sure.

5 MR. ZEPPETELLO: Just briefly and then perhaps
6 Mr. Bazel could respond. I would mention that in our staff
7 recommendation we did suggest that if Respondents provided
8 evidence regarding their ability to pay, that staff would be
9 open to the possibility of some amount of the penalty being
10 suspended and put into an escrow account to fund restoration
11 at this island. There was no response from Respondents to
12 that proposal.

13 Staff would be open to discussing that. My concern is,
14 I expect, from statements that have been made by
15 Respondents' counsel, that if the Commission adopts an
16 order, they will challenge it in court and they won't pay a
17 penalty and so the proposal that we suggested about an
18 escrow account won't go anywhere to actually funding
19 anything. Mr. Bazel may respond to that. But we did
20 suggest that as a possibility, at least with respect to a
21 portion of the penalty.

22 COMMITTEE CHAIR SCHARFF: Okay. I had another
23 question. Respondents' counsel raised the issue of needing
24 a permit from the Corps before they could submit their
25 permit to BCDC. And so the way this is written does staff

1 have any concerns about the ability to implement this, given
2 that issue?

3 MR. ZEPPETELLO: I'll comment and then maybe Adrienne
4 would add. The permit application from BCDC requires
5 evidence of discretionary approvals before the application
6 will be deemed complete but that doesn't stop them from
7 submitting an application and giving us the status of their
8 efforts to obtain other permits. And again, I would defer
9 to Adrienne. Generally it's local discretionary approvals
10 that are application requirements. I am not sure whether
11 the Corps falls into that category because many times the
12 Corps says 'We go last.'

13 COMMITTEE CHAIR SCHARFF: Okay, that's helpful.

14 I have one other question for Respondent's counsel.
15 You have seen the proposed Cease and Desist Order,
16 obviously.

17 MR. BAZEL: Yes.

18 COMMITTEE CHAIR SCHARFF: When you read through this
19 are there any particular things that you feel are factually
20 - and short, I don't want a long - that are factually
21 incorrect that you would like us to consider right now? Or
22 are there issues in here that you think that you would like
23 to change or comment on a little bit in terms of the factual
24 stuff?

25 MR. BAZEL: I don't think I can give you a short answer

1 to that. Let me say on the Cease and Desist Order -- the
2 proposal is combined penalty and cease and desist.

3 COMMITTEE CHAIR SCHARFF: Correct.

4 MR. BAZEL: Although we have many disputes about the
5 facts I think an important one to us is that we didn't
6 destroy the island. Let me make that clear that -- because
7 I am not a global warming denier.

8 COMMITTEE CHAIR SCHARFF: So where does it say,
9 'destroy the island' in here?

10 MR. BAZEL: You're asking a good question. I didn't
11 look at it paragraph by paragraph to determine.

12 But as far as any kind of destroying tidal marsh, even
13 if the -- here is what I tried to do with tidal marsh: Not
14 to disagree with what all the experts think but to use their
15 statements against them. Even the Regional Board's experts
16 say that the surface of the island is usually dry. If it's
17 usually dry then putting a levee around it didn't make it
18 drier. So it's not like we had a wet surface that we dried
19 up. We did cut off the flows into the channels but we
20 didn't dry up the surface of the island. So to us that's
21 very important because the island is still pretty much the
22 way it was.

23 So when it comes to, did we do bad things? Well we
24 certainly repaired the levee. But did that have a terrible
25 effect? We think not. So to the extent that -- the places

1 in the Cease and Desist Order that say things like that, we
2 would disagree with. The island hasn't been destroyed. If
3 you want to call it tidal marsh because of the vegetation,
4 the vegetation is still there. So I would think factual
5 things along those lines are things that we would disagree
6 with. We'd say -- if there's something in there, and maybe
7 with a few minutes I could find some that says we have
8 destroyed tidal marsh and tidal vegetation, we would
9 disagree with that.

10 COMMITTEE CHAIR SCHARFF: Commissioner Gibbs just
11 mentioned to me that he would like to make a short proposal.

12 COMMITTEE MEMBER GIBBS: We'd like to see if you would
13 like to take ten minutes to confer with your client,
14 Mr. Sweeney, and see if you have a counter proposal to make
15 to us before we take our final vote?

16 MR. BAZEL: Ten minutes would be useful.

17 MR. JACOBS: There is another room that is available if
18 they would like to use it.

19 MR. ZEPPETELLO: Excuse me, are you asking for a
20 counter-proposal on the penalty or just more broadly?

21 COMMITTEE CHAIR SCHARFF: I think I would like to see a
22 counter-proposal on the penalty but also a counter-proposal
23 in general of how you would like to get this resolved,
24 right? We're open to hearing a concrete counter-proposal.

25 COMMITTEE MEMBER GIBBS: To resolution.

1 COMMITTEE CHAIR SCHARFF: To resolution. So we are
2 adjourned for ten minutes.

3 (Off the record at 12:10 p.m.)

4 (On the record at 12:25 p.m.)

5 COMMITTEE CHAIR SCHARFF: Welcome back. Do you have a
6 proposal?

7 MR. BAZEL: We have a proposal. In my presentation I
8 grouped the asserted violations into five groups. Let's say
9 staff are right and there were five violations and let's say
10 that each one was severe enough to warrant the maximum
11 \$30,000. That would be a total of \$150,000. Mr. Sweeney
12 would be willing to pay \$150,000 over five years, one-fifth
13 due at the end of each year. We would ask that half that
14 penalty would be waived if a permit were issued.

15 And as far as the details, the actual language of the
16 Order, we would ask that that be sent back so that we could
17 negotiate language with staff. We just can't, we don't have
18 the time to do it now. And if we are stuck with all the
19 things in that Order then we might have to file suit just
20 because being stuck with those findings could create
21 problems in the future, which we don't want to do. But I
22 think we ought to be able to work out with staff the many
23 factual assertions that aren't in debate and a way of
24 phrasing the ones that are so that it doesn't matter because
25 in the end we -- if we work this out on those terms then we

1 won't have to file suit and that will be that.

2 COMMITTEE CHAIR SCHARFF: So what were the five
3 categories?

4 MR. BAZEL: Levee Repair was one, Containers was one,
5 the Dock was one, Crescent Ponds was one and what I called
6 Alleged Roads and Cutting Vegetation, I think.

7 COMMITTEE MEMBER GILMORE: So roads and vegetation was
8 one category?

9 MR. BAZEL: Yes. You can think of that as the interior
10 use.

11 COMMITTEE CHAIR SCHARFF: Does staff have a comment on
12 that or opinion of that?

13 MR. ZEPPETELLO: Yes. Staff would be willing to
14 consider a compromise of the proposed penalty but we think
15 that \$150,000 is insufficient. We would remind the
16 Committee that just a month or so ago you considered and the
17 Commission adopted a Stipulated Order for Park SFO for
18 public access violations over a sustained period of time.
19 This case is totally different in that it concerns
20 violations that impacted the Bay itself and resources in the
21 Bay, wildlife, tidal marsh habitat.

22 And so it is not clear if we are going to be
23 negotiating a penalty or whatever but we would consider
24 something on the order of cutting the penalty in half to
25 \$450,000 if there was an agreement that that money could be

1 put into an account that would be used to fund restoration
2 work at the site and if there was also an agreement that
3 they wouldn't file a lawsuit to challenge the order so that
4 the penalty would not get paid.

5 In terms of the cease and desist components of the
6 order, we would ask the Committee to adopt those terms as
7 they exist, we are not interested in negotiating. One of
8 our concerns is that because they continue to have the
9 position that the island was high and dry and wasn't a tidal
10 marsh, they don't really have an intention of going forward
11 with the restoration plan so we think that needs to be
12 ordered. But we would be willing to, you know, set aside
13 the money to actually implement that. Thank you.

14 MR. BAZEL: My response, first of all, is we very much
15 intend to go ahead with the restoration plan. The way we
16 see it, once we create breaches in the levee the water will
17 come on and go wherever it goes. And if you're right and it
18 goes and floods the whole island then that's what it will
19 do. But that's easy to find -- easy in the sense that once
20 the breaches are created the water will go where it goes and
21 that will restore the island to what it was. So no question
22 we intend to do the restoration plan.

23 And we are not opposing the provision that would
24 require us to submit a restoration plan, although we do have
25 some issues with the exact language and we want to work that

1 out.

2 As far as whether or not -- I'm sure we can reach an
3 agreement where if -- on language. We can always say, 'BCDC
4 staff say that blah-blah-blah' and then that probably won't
5 be offensive to us. There are ways to resolve the language.

6 As far as the other provisions about putting the money
7 into an escrow account and use it for restoring the island,
8 that would be great. The problem is Mr. Sweeney doesn't
9 have the cash now even to pay a \$150,000 penalty. He needs
10 to raise the cash to work on getting this done.

11 As far as the provision that the penalty payments be
12 put into an escrow account and used to restore the island,
13 that part we are in favor of it, we just can't put it up
14 front and he certainly doesn't have \$450,000 to put into an
15 account now.

16 COMMITTEE MEMBER GIBBS: Apparently we are going to
17 negotiate this right now because according to staff we can't
18 go into closed session to confer -- according to counsel, we
19 can't go into closed session to confer with staff.

20 So you didn't propose even making the \$150,000 as an
21 immediate payment, you proposed it over five years. They
22 have now come back with \$450,000; is that acceptable to you
23 over five years?

24 MR. BAZEL: I don't think so. I think --

25 COMMITTEE MEMBER GIBBS: What would be acceptable?

1 MR. BAZEL: I think \$150,000 is acceptable.

2 COMMITTEE MEMBER GIBBS: Okay, I think we should
3 probably -- apparently there is no deal. Is that really
4 your last and best?

5 MR. BAZEL: That is all I have authority for at the
6 moment. If the money could be used to restore the island, I
7 think that has potential and maybe a higher number could be
8 reached.

9 COMMITTEE MEMBER GIBBS: That's already been agreed to.
10 A higher number could be reached? The moment is now.

11 MR. BAZEL: Give us some time.

12 COMMITTEE MEMBER GILMORE: Can I just say? You know, I
13 am in total agreement with you. Like I said before, my
14 number one priority is seeing this island get restored,
15 okay. However you want to come across, however you want to
16 do that, whether it's escrow or whatever. You came back in
17 with that \$150,000 proposal and my first reaction is, that's
18 just not enough. And that's just from me, I'm not speaking
19 for my colleagues up here. I will tell you that is not
20 going to fly, okay.

21 And we are kind of running out of time. I don't like
22 negotiating in public because what I used to tell people is,
23 if I have to make a decision nobody is going to be happy
24 with it. So I encourage you -- Could we take maybe another
25 five minute recess? I encourage you to talk to your client.

1 Because the way I am feeling right now, once again, I am not
2 speaking for my colleagues, you have one more chance before
3 I'm ready to make some sort of a decision. I would much
4 prefer to have you guys come to the table and resolve
5 something, but from where I sit you are nowhere near there
6 now.

7 COMMITTEE CHAIR SCHARFF: I think I will add on to that
8 a little bit. And obviously we haven't taken any formal
9 votes yet but I'll give you my thinking on it right now.

10 My thinking is that if you are not at \$450,000, and I
11 don't mind if you pay it over time, I think that we should
12 just impose a penalty.

13 The way I think about the penalty, frankly, is that
14 maybe some of these categories get, you know, get reduced,
15 but maybe they don't depending on what my colleagues think.
16 But I doubt that any penalty will be less than \$450,000 and
17 I believe I will support a penalty that is more than
18 \$450,000 when we -- if we just have to make a decision.

19 COMMITTEE MEMBER GILMORE: Yes. Look at the nodding
20 heads up here.

21 COMMITTEE CHAIR SCHARFF: So I think the best you could
22 do -- unless, you know. Your other option, obviously, is
23 to, you know, we'll impose the penalty, we'll go with most
24 likely the staff recommendation on the Cease and Desist
25 Order and then you can take whatever litigation strategy you

1 wish to take. And that's really the choice before you and
2 we wanted to give you a little bit of chance to talk this
3 out. Because obviously if we can work it out it is in
4 everyone's interest to do that and it is in the interest of
5 the island.

6 MR. BAZEL: Give us a few minutes, please.

7 COMMITTEE CHAIR SCHARFF: All right.

8 (Off the record at 12:34 p.m.)

9 (On the record at 12:47 p.m.)

10 COMMITTEE CHAIR SCHARFF: Ready to go back on the
11 record? All right, you have come back in.

12 MR. BAZEL: Yes, thank you for the opportunity to
13 discuss the issue among ourselves and get back. Here is
14 what we are willing to do. We are willing to agree to
15 \$450,000, payable over five years, one-fifth at the end of
16 each year. Half waived when a permit is issued. The money
17 to go into escrow that Mr. Sweeney can draw on to restore
18 the island. And last, we'd request that the parties be
19 given an opportunity to negotiate the exact terms of the
20 order.

21 COMMITTEE CHAIR SCHARFF: Comments from staff?

22 MR. ZEPPETELLO: The number that I had suggested was
23 \$450,000. It is not acceptable to staff that half that
24 penalty would be waived when a permit is issued.

25 In terms of -- I guess a point that we need to make

1 clear is that under the McAteer-Petris Act the penalty
2 payment is required to go into the Bay Fill Cleanup and
3 Abatement Fund. And so we would have to work out a
4 procedure, which I think we could do, in terms of perhaps
5 waiving a portion of the penalty. Although at least from
6 staff's point of view, we are not prepared to allow the
7 entire penalty to be used for restoration.

8 The other concern I have, just with respect to timing,
9 is that Mr. Bazel has said Mr. Sweeney doesn't have the
10 assets at the present time. There is a requirement in the
11 Regional Board order that would be adopted as part of this
12 order that the restoration plan/work plan needs to be
13 submitted within about five months from now, four or five
14 months, and presumably the work would take place in 2017.
15 So it is not clear to me how this would actually work, that
16 a portion of this penalty would go to do restoration and be
17 sufficient to accomplish those goals if it's paid over time.
18 So those are my comments.

19 COMMITTEE CHAIR SCHARFF: So there seems to be a number
20 of open issues here and they seem very difficult to resolve
21 from up here. So my question to staff is, do you believe
22 there is enough movement and enough possibility of coming to
23 an agreement that would resolve this that we should defer
24 this and give you whatever you would suggest, 2 weeks, 10
25 days, 30 days, what you feel would be useful. Or should we

1 as a Commission just make a ruling today?

2 MR. ZEPPETELLO: I guess my proposal would be that the
3 Committee make a decision today. That would not foreclose
4 Respondents and staff from having a discussion and perhaps
5 coming up with a proposal before this matter goes to the
6 Commission on the 17th of November. And perhaps if we can
7 work out some alternative we could propose that to the
8 Commission, but my proposal or preference would be not to --
9 for the Committee to make a decision at this point.

10 COMMITTEE CHAIR SCHARFF: Would be for the Committee to
11 make a decision.

12 MR. ZEPPETELLO: Yes.

13 COMMITTEE CHAIR SCHARFF: Comments?

14 COMMITTEE MEMBER GILMORE: I'm okay with making a
15 decision.

16 COMMITTEE MEMBER TECHEL: Yes.

17 COMMITTEE CHAIR SCHARFF: Okay, all right. So back to
18 the group.

19 COMMITTEE MEMBER GIBBS: I would like to move the staff
20 proposal with the understanding of this body that we hope
21 they will work out a negotiated settlement along the lines
22 of the discussion we have just been having.

23 COMMITTEE CHAIR SCHARFF: I would support that but I
24 think the penalty is too high, frankly. I would feel
25 comfortable if we said that the violation of the building

1 the levee was one violation and instead of \$210,000 it would
2 be \$30,000 then and that would reduce it by, you know,
3 \$170,000. I don't know how you feel about it, it just
4 struck me.

5 COMMITTEE MEMBER GILMORE: That's fine. So just to be
6 clear, the motion would include the reduction of the penalty
7 to, what, that's roughly \$800,000?

8 COMMITTEE CHAIR SCHARFF: Roughly.

9 COMMITTEE MEMBER GILMORE: And then everything else
10 that is proposed in the staff report would stand, with the
11 expectation that there would be some negotiation, in the
12 hopes that something would come back to the full Commission
13 on November 17th. Whatever that date was.

14 COMMITTEE CHAIR SCHARFF: Correct, but we could leave
15 it to the discretion of staff if they wanted to reconvene
16 the Enforcement Committee or go back to staff or whatever
17 they thought was the appropriate way to effectuate it.

18 COMMITTEE MEMBER GILMORE: I just wanted to make sure I
19 understood what we were voting on. Okay, I'll second that.

20 COMMITTEE CHAIR SCHARFF: All in favor?

21 THE REPORTER: Commissioner Scharff, please, for the
22 record, could I have, as concise as you can, a statement of
23 the actual motion?

24 COMMITTEE CHAIR SCHARFF: Sure.

25 THE REPORTER: Please, for the record.

1 COMMITTEE CHAIR SCHARFF: Would you like to do it or do
2 you want me to do it?

3 COMMITTEE MEMBER GIBBS: Go ahead, you're the Chair.

4 COMMITTEE CHAIR SCHARFF: All right. My understanding
5 of the motion is this, is that we go ahead and adopt the
6 Commission Cease and Desist Order CDO 2016.002. And that
7 the amount of the penalty be reduced - I have to get the
8 math right - so that the part about the -- it says 'placed
9 fill in Bay to close each of the seven tidal breaches.'
10 That's \$210,000; that would be reduced to \$30,000. So then
11 it would be whatever that number is in terms of the math, I
12 don't want to just do it off the top.

13 MR. ZEPPETELLO: I think 782.

14 COMMITTEE CHAIR SCHARFF: Seven-eighty-two, that's
15 correct. That would be the -- that's what we would do. And
16 then we would encourage staff and the Respondent to resolve
17 this matter if they can and to come back to either the
18 Commission or this Committee with a resolution if they can.
19 If there is no resolution then this recommendation would
20 just go forward to the full Commission. And I believe that
21 is set for November?

22 MR. ZEPPETELLO: November 17th.

23 COMMITTEE CHAIR SCHARFF: And staff does have the
24 latitude as part of this to put that off if for some reason
25 things are fruitful and moving forward but you need more

1 time.

2 MR. ZEPPETELLO: The other thing is there would be a
3 possibility of bringing it back to this Committee.

4 COMMITTEE CHAIR SCHARFF: Yes.

5 MR. ZEPPETELLO: -- on either the 20th of October or
6 the 3rd of November.

7 COMMITTEE CHAIR SCHARFF: Correct.

8 THE REPORTER: I have for the record, Commissioner
9 Scharff, that that was moved, what you just said was moved
10 by Commissioner Gibbs and seconded by Commissioner Gilmore.

11 COMMITTEE CHAIR SCHARFF: That is correct.

12 All right, shall we vote on the motion? All in favor?

13 (Ayes.)

14 COMMITTEE CHAIR SCHARFF: That's unanimous and
15 therefore this meeting is then adjourned. Thank you very
16 much.

17 (Thereupon, the Enforcement Committee
18 meeting was adjourned at 12:55 p.m.)

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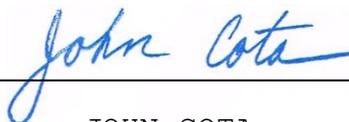
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1 CERTIFICATE OF REPORTER
2

3 I, John Cota, an Electronic Reporter, do hereby certify
4 that I am a disinterested person herein; that I recorded the
5 foregoing San Francisco Bay Conservation and Development
6 Commission Enforcement Committee meeting and the recording
7 was thereafter transcribed.

8 I further certify that I am not of counsel or attorney
9 for any of the parties to said meeting, nor in any way
10 interested in the outcome of said matter.

11 IN WITNESS WHEREOF, I have hereunto set my hand this
12 14th day of October, 2016

13
14 

15 JOHN COTA
16

17 CERTIFICATE OF TRANSCRIBER
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19 I, RAMONA COTA, a Certified Electronic Reporter and
20 Transcriber, certify that the foregoing is a correct
21 transcript, to the best of my ability, from the electronic
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24 October 14, 2016

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