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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SOLANO

JOHN D. SWEENEY and POINT BUCKLER CLUB, LLC,

Petitioners and Plaintiffs,

v.

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION; LAWRENCE J. GOLDZBAND, Executive Director of the San Francisco Bay Conservation and Development Commission; CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN FRANCISCO BAY REGION; BRUCE H. WOLFE, Executive Officer of the California Regional Water Quality Control Board, San Francisco Bay Region; and DOES 1 through 20;

Respondents and Defendants.

And related cross-claim.

No. FCS048136

~~[PROPOSED]~~ STATEMENT OF DECISION ON BCDC ORDER

Petitioner and plaintiffs John D. Sweeney and Point Buckler Club, LLC ("Plaintiffs") filed this suit challenging Commission Cease And Desist And Civil Penalty Order No. CDO 2016.02 (the "BCDC Order") issued by respondents and defendants San Francisco Bay Conservation and Development Commission and Lawrence J. Goldzband, its Executive Director (jointly "BCDC") and Cleanup and Abatement Order No. R2-2016-0038 (the "CAO") issued by respondents and

defendants California Regional Water Quality Control Board, San Francisco Bay Region and Bruce H. Wolfe, its Executive Officer (jointly the "Regional Board"). Plaintiffs have also filed case no. FCS048861 challenging an administrative civil liability order (the "ACL Order") issued by the Regional Board.

Plaintiffs have moved for a writ of mandate on all three orders. The parties have requested separate statements of decision. This statement covers Plaintiffs' motion for a writ of mandate setting aside the BCDC Order. For the following reasons, the motion is GRANTED.

BACKGROUND

All three orders relate to Point Buckler Island, which is about 39 acres and located in Suisun Marsh. There has been a levee around the island since the 1920s. The island was operated as a duck club, and the levee was used to maintain a relatively constant water level in duck ponds. The Suisun Marsh Preservation Act (the "Preservation Act") requires that an "individual management plan" be prepared for each "managed wetland" (i.e. duck club), and in 1984 BCDC certified an individual management plan for the island. By 2011, however, when John Sweeney purchased the island, the levee had fallen into disrepair and was breached in several places. Three years later, in 2014, Sweeney repaired or reconstructed the levee. Dirt was excavated from an interior "borrow ditch" and placed on the existing levee or inland of it. In late 2014, Sweeney sold the island to Point Buckler Club, LLC, which now owns the island.

In March 2014, shortly after work began on the levee repair, BCDC staff observed the work. BCDC staff knew that the work was being done by Sweeney, and knew Sweeney from conversations related to another island, but made no immediate effort to contact Sweeney or to get him to stop the work. BCDC staff first contacted Sweeney about the work seven months later. In November 2014, BCDC toured the island, gave Sweeney a copy of the individual management plan for the island, and told him that if the repair was consistent with the plan, then no permit was needed for the work. This statement was consistent with the Preservation Act, which provides that no BCDC permit is required for work specified in an individual management plan. (Public Resources Code ("PRC") § 29501.5.)

In January 2015, however, BCDC changed its mind and sent a letter asserting that the individual management plan had expired, and that the levee repair and other activities in the island

violated the Preservation Act because they were implemented without a permit. Although there were discussions and additional correspondence, BCDC took no formal action in 2015.

In September 2015, the Regional Board issued a cleanup and abatement order requiring the restoration of Point Buckler Island. Penalties were not imposed. In December 2015, plaintiff Point Buckler Club, LLC filed case no. FCS046410 in this Court alleging that the Regional Board's order violated due process, and applied for a stay of that order. This Court granted the stay on December 29, 2015. In early January 2016, the Regional Board rescinded the September 2015 order.

Two days later, the Regional Board met with BCDC, spoke with consultants, began the process of re-issuing the September 2015 order, and for the first time began imposing penalties. On May 12, 2016, the Regional Board's consultants issued a Technical Assessment. Within a few days after that, Regional Board issued a proposed cleanup and abatement order and penalty complaint that would have imposed $4.6 million in penalties. BCDC issued a cease and desist order in April 2016 and, in May 2016, a proposed penalty order that would have imposed $952,000 in penalties. Together the proposed penalties amounted to $5.552 million.

In August 2016 the Regional Board held a hearing and issued the CAO, which imposed restoration, mitigation, and monitoring requirements on Plaintiffs.

In October 2016, BCDC's enforcement committee held a hearing on the proposed penalty order and recommended that the penalty should be reduced from $992,000 to $752,000. The Commission held a hearing in November 2016 and issued the BCDC Order, which imposed the penalty of $752,000 and included restoration, mitigation, and monitoring requirements almost identical to the CAO.

In December 2016, the Regional Board held a hearing and issued the ACL Order, which imposed a penalty of $2.828 million on Plaintiffs. The combined penalty imposed by BCDC and the Regional Board is $3.6 million.

In December 2016, Plaintiffs filed case no. FCS048136 challenging the CAO and the BCDC Order. In May 2017, Plaintiffs filed case no. FCS048861 challenging the ACL Order. Plaintiffs argue that each of these orders is invalid and must be set aside in accordance with Code of Civil Procedure ("CCP") § 1094.5.

Plaintiffs' motions for a writ of mandate in case no. FCS048136 were heard on Friday, October 27, 2017. The motion for a writ of mandate in case no. FCS048861 was heard the following Monday, October 30, 2017. The parties filed additional motions, requests, and objections, which were also heard at those times.

SUISUN MARSH PRESERVATION ACT

As its name suggests, the Suisun Marsh Preservation Act was enacted to preserve Suisun Marsh. More than 90% of the marshland—51,700 acres of 55,000 acres— is in duck clubs, which the Preservation Act refers to as "managed wetlands". Duck clubs use levees and tide gates to maintain duck ponds, and they plant vegetation that provides food for ducks and other waterfowl. Ducks prefer artificial duck ponds to natural tidal marsh.

Plaintiffs argue that BCDC violated the Preservation Act, and thereby acted in excess of jurisdiction and did not proceed in the manner required by law as required by CCP § 1094.5. The BCDC Order penalizes Plaintiffs for repairing the levee without obtaining a BCDC permit. Plaintiffs argue that two provisions of the Preservation Act exempted Plaintiffs from having to obtain a permit. This Court agrees.

PRC § 29508 specifies that "Notwithstanding any provision of this division to the contrary, no marsh development permit shall be required" for "(b) Repair, replacement, reconstruction, or maintenance that does not result in an addition to, or enlargement or expansion of, the object of such repair, replacement, reconstruction, or maintenance." This Court finds that Plaintiffs' levee work was repair, replacement, reconstruction, or maintenance, and it did not result in an addition, enlargement, or expansion.

BCDC argues that Plaintiffs failed to exhaust their administrative remedies on this issue. Plaintiffs and BCDC staff both argued this issue in the final November 2016 hearing before BCDC. BCDC insists that the issue should have been raised earlier in the administrative process, but has not presented any authority supporting its position. The issue was clearly presented to BCDC, and BCDC had an opportunity to consider and rule on it. Plaintiffs exhausted their administrative remedies.

BCDC, noting that § 29508 refers to "the object of such repair, replacement, reconstruction,

or maintenance", argues that there was no "object" here to repair, replace, reconstruct or maintain. But BCDC's own consultants concluded that when Sweeney began the repair there was a levee with seven breaches. A levee with breaches is an object that can be repaired, replaced, or reconstructed. Even if the levee had been completely destroyed, like a house that burned to the ground, it could have been replaced or reconstructed.

BCDC imposed penalties and other requirement on Plaintiffs for implementing the levee work without a permit. Because the work comes within PRC § 29508, no permit was required. BCDC therefore exceeded its jurisdiction and did not proceed in the manner required by law. The BCDC Order should be set aside on this ground.

PRC § 29501.5

The parties agree that the Preservation Act also exempts from the permit requirement any development specified in an individual management plan. (PRC § 29501.5.)[1] Plaintiffs argue that the levee work comes within this provision, and is therefore exempt from the permit requirement. This Court agrees.

Although the individual management plan for Point Buckler (known at that time as "Annie Mason") is rather terse, it makes clear that "tight levees" are "necessary for proper water management", it calls for frequent inspection and attention to prevent major breaks, and it refers to an enclosed set of standard recommendations (the "Suisun Marsh Management Program") that includes specifications for the "renovation, restoration, repair and maintenance" of levees. (*See* PRC § 29401(d) (requiring "management program" that includes "enforceable standards").) Without tight levees, water levels cannot be managed and duck ponds cannot be maintained. Because individual management plans must include "necessary development related to such management" (PRC § 29412.5), these plans necessarily must provide for repair and reconstruction of levees when they are breached. The Court therefore finds that the individual management plan for Point Buckler

[1] PRC § 29501 does not use the phrase "individual management plan", but instead refers to "the component of the local protection program prepared by the Suisun Resource Conservation District and certified by the commission pursuant to Section 29415". This component "shall include a water management program for each managed wetland in private ownership...and shall specify all necessary development related to such management". (PRC § 29412.5.) The "water management program for each managed wetland" has, according to the parties, come to be known as an "individual management plan".

specified the work Plaintiffs performed on the levee.

The BCDC Order also imposes penalties on Plaintiffs for the removal of vegetation without a permit. But the plan specifies the removal of old vegetation, and thereby exempts that activity from the permit requirement.

BCDC concedes that it certified the individual management plan for Point Buckler in 1984, but asserts that the plan is no longer in effect. BCDC argues that because these plans are prepared only for managed wetlands, they cease to be effective when a managed wetland is no longer managed. This Court disagrees.

The purpose of the Preservation Act is to preserve and protect Suisun Marsh in perpetuity. Consistent with that goal, the Preservation Act does not set any expiration date on individual management plans, or require duck clubs to take any actions to renew their management plans. Instead, the Legislature required duck club owners to comply with their plans, and imposed penalties on those who do not. (PRC § 9962(a) (directing the Suisun Resource Conservation District to issue regulations "requiring compliance" with individual management plans), § 9962(d) (imposing penalties for noncompliance).)

The Court finds that the individual management plan exempts five of the eight violations alleged in the BCDC Order: repairing the levee, excavating ditches (i.e. the borrow ditch, which was part of the levee repair), installing a tide gate (same), constructing roads (i.e. crossings over the borrow ditch), and destroying vegetation. By imposing penalties for these acts, BCDC exceeded its jurisdiction and did not proceed in the manner required by law. The BCDC Order should be set aside on this ground.

McATEER-PETRIS ACT

BCDC issued its penalty under authority provided by the McAteer-Petris Act, which imposes a limit of $30,000 for a single violation. (Gov. Code § 66641.5(e), § 66641.9.) Plaintiffs argue that BCDC exceeded the limit. This Court agrees.

The BCDC Order imposes a penalty of $772,000. To stay within the $30,000 limit, BCDC would have had to find at least 26 violations. But the BCDC Order identifies only 8 violations, as listed in subparagraphs (a) through (h) of paragraph II.XX. (AR 4047.)

BCDC argues that each of these of these subparagraphs covers multiple violations, as can be ascertained by consulting the administrative record. But CCP § 1094.5 specifies that "[a]buse of discretion is established if...the order or decision is not supported by the findings...." Here, abuse of discretion is established because the decision to impose $772,000 in penalties is not supported by the findings, which identify only 8 violations.

BCDC therefore abused its discretion, exceeded its jurisdiction, and did not proceed in the manner required by law. The BCDC Order should be set aside on this ground.

VINDICTIVE PROSECUTION

When a "defendant shows that the prosecution has increased the charges in apparent response to the defendant's exercise of a procedural right, the defendant has made an initial showing of an appearance of vindictiveness." (*People v. Puentes* (2010) 190 Cal.App.4th 1480, 1486, quoting *Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 371.) "Once this prima facie case is made, the prosecution bears a 'heavy burden' of dispelling the appearance of vindictiveness as well as actual vindictiveness." (*Id.*)

The facts here support an initial showing of an appearance of vindictiveness. The Regional Board issued a cleanup and abatement order in September 2015, but took no action to impose penalties. In December 2015, Point Buckler Club filed suit and applied for a stay of that order on the ground that the Regional Board had not complied with due process. This Court stayed that order, and in January 2016 the Regional Board rescinded that order. Two days later, the Regional Board met with BCDC and began the process of re-imposing the order and in addition imposing the highest penalties the Regional Board and BCDC had ever imposed. Notably, BCDC does not deny that it acted vindictively.

Instead, BCDC argues that Plaintiffs have not made their prima facie showing. BCDC argues that in January 2015 it sent a letter threatening penalties. But BCDC took no enforcement action of any sort until April 2016, more than two years after it became aware of the levee work. The seven-month delay in contacting Sweeney implies that BCDC did not initially think that the work was a significant violation or that it was causing significant harm to the environment. This implication is supported by BCDC's initial visit to the island in November 2014, when it told

Sweeney that the levee work was compliant if it was consistent with the individual management plan for the island. BCDC did not declare the work a violation until it sent the letter in January 2015, ten months after it became aware of the work. BCDC did not begin to take enforcement action until January 2016, when it met with the Regional Board. BCDC did not hire its own consultants to provide the expert opinions underlying its enforcement proceeding, but rather relied on the Technical Assessment prepared by the Regional Board's consultants. These facts support the conclusion that BCDC and the Regional Board imposed penalties in retribution for the lawsuit challenging the Regional Board's September 2015 order, and that BCDC collaborated with the Regional Board to impose penalties. BCDC makes no effort to explain why the levee work deserved a greater penalty than other violations it has penalized. If BCDC truly believed that the levee work was the most severe violation it had ever seen, or had caused the greatest harm to the environment, it surely would have acted sooner. The Court finds that BCDC imposed penalties on Plaintiffs with vindictive intent in retribution for the lawsuit challenging the Regional Board's order as a violation of due process. The penalties were an apparent response to the club's exercise of its procedural right, and BCDC has not met its burden of dispelling the appearance of vindictiveness as well as actual vindictiveness.

BCDC argues that the prohibition on vindictive prosecution does not apply to civil cases. The parties have not identified any civil case in which the prohibition was applied. It may be the rare civil case in which a party can make the prima facie showing needed, but in this case the showing has been made. The prohibition implements a basic due process protection: "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." (*United States v. Goodwin* (1982) 457 U.S. 368, 372, quotation marks omitted.) Because due process applies to civil cases, there is no reason why the prohibition on vindictive prosecution should not apply here.

The BCDC Order should be set aside on this ground.

EXESSIVE FINE

Plaintiffs argue that the BCDC fine violated the Eight Amendment's prohibition on excessive fines. As BCDC points out, the question of whether a fine is excessive depends on four factors: "(1) the defendants' culpability; (2) the relationship between the harm and the penalty; (3) the

penalties imposed in similar statutes; and (4) the defendants' ability to pay. (*People ex rel. Bill Lockyer v. R.J Reynolds Tobacco Co.* (2006) 37 Cal.4th 707, 728.)

For the first factor, Plaintiffs argue that their culpability was low. Sweeney's motivation in repairing the levee was to restore a duck club, an activity that is promoted and encouraged by the Suisun Marsh Preservation Act. BCDC argues that Sweeney should have known, from previous experience at another island, that he needed a permit from the U.S. Army Corps of Engineers. But he did not need a BCDC permit for the work at that other island, and there was no evidence he should have known he needed a permit from BCDC. The Court finds that Plaintiffs' culpability was low.

For the second factor, Plaintiffs argue that the penalty was grossly disproportional to the harm. The parties agree on two basic facts related to the evaluation of harm: before the levee work, there was tidal flow into a few small channels on the island, and the levee work prevented this tidal flow. BCDC asserts that some small threatened or endangered fish "likely" used these channels. The parties agree that there is no direct evidence that the fish actually used these channels or that there was harm to any specific endangered or threatened fish. BCDC does not assert that there was a violation of the federal or California Endangered Species Act. Plaintiffs argue that the evidence of harm is therefore speculative at best. BCDC also argues that the work resulted in the destruction of tidal marsh, but does explain why this harm is significant. If the project had proceeded to completion, the island would have been planted with vegetation that provides food for waterfowl. BCDC does not explain why one type of vegetation should be preferred over the other. BCDC is also penalizing Plaintiffs for the bringing of shipping containers to the island, for enlargement of the dock at the island, and for kiteboarding at the island. BCDC does not assert that these activities have resulted in any significant harm. Plaintiffs also argue that the levee work will benefit the environment because it will provide valuable habitat for ducks and other waterfowl. The Court finds that the penalty was grossly disproportional to the harm. BCDC has not established that fish actually used the channels, and even assuming they did BCDC has not established the magnitude of that harm. The benefits to the environment of duck ponds, in comparison, are clear and definite. The Court therefore finds that the work would, if allowed to proceed to completion, have created a net

benefit for the environment rather than a harm. The other activities being penalized resulted in no significant harm.

The third factor, as identified by the California Supreme Court, considers penalties in other statutes. Plaintiffs cite to a decision of the United States Supreme Court, which identifies the factor as "the sanctions imposed in other cases for comparable misconduct." (*Cooper Industries v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 435.) Plaintiffs then argue that the sanctions here are much greater than those imposed in other cases for comparable misconduct. BCDC does not dispute that the penalty imposed on Plaintiffs is the highest penalty BCDC has ever imposed. Plaintiffs present evidence that at another island, where a breached levee had not been repaired for 15 years (compared with 20 years here), BCDC gave the island another six months to repair the levee. BCDC is also penalizing Plaintiffs for bringing shipping containers to the island without a BCDC permit. Plaintiffs provided aerial photographs showing that containers were present at 67 other duck clubs, apparently without permits from BCDC. The Court finds that there is a great disparity between the absence of penalties BCDC has imposed for similar behavior, and the severe penalty imposed here.

For the fourth factor, Plaintiffs argue that they do not have the ability to pay. The evidence in the administrative record consists of financial information submitted by Plaintiffs, and a financial evaluation prepared by the Regional Board. The Regional Board calculated Sweeney's assets at $4.2 million, substantially less than the total of $5.552 million in penalties that the Regional Board and BCDC were proposing. Sweeney argued that the $4.2 million estimate was much too high. It included $2.1 million for a house Sweeney no longer owned, and it did not consider the liabilities associated with Point Buckler Island: the BCDC Order and the CAO require restoration, mitigation, and monitoring, thereby imposing substantial costs. Plaintiffs argued that the penalties exceeded their ability to pay, and would put them out of business. In response, BCDC argues that Sweeney's evidence was insufficient to contradict the Regional Board's evaluation. The Court finds that the evidence submitted was sufficient to establish that Plaintiffs cannot pay the penalty imposed by the BCDC Order.

The Court therefore finds that the penalty was grossly disproportional to the gravity of

Plaintiffs' offense, and that it violated the Eight Amendment. The BCDC Order should be set aside on this ground.

FAIR TRIAL

A party can establish that an agency has violated that party's "constitutional due process right to an impartial tribunal" by establishing that "rules mandating an agency's internal separation of functions and prohibiting ex parte communications" have not been observed, or by showing that a particular combination of circumstances (sometimes referred to as the "totality of the circumstances") creates an unacceptable risk of bias. (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 741.) Plaintiffs argue that BCDC did not separate functions, and that the totality of the circumstances created an unacceptable risk of bias.

BCDC regulations provide for two assessments of the arguments of the parties. First, the Executive Director must summarize "the essential allegations made by staff" and "all defenses and mitigating factors raised by the respondent(s)" as well as "a summary and analysis of all unresolved issues" and "a recommendation on what action the Commission should take". (14 CCR § 11324, § 11326(b).) The BCDC Enforcement Committee then conducts a hearing and provides its own summaries and an "analysis of all unresolved issues", and makes its own recommendation to the Commission. The Commission then holds its own hearing and makes its decision.

Plaintiffs argue that BCDC violated the separation-of-functions requirement, and that the trial was unfair under the totality of the circumstances, because this "analysis of all unresolved issues"—a decision-making function—was delegated to the prosecution team rather than the decision- makers or their advisors. Plaintiffs argue that an actual analysis was never performed, and that the prosecution team provided only their own position instead of evaluating the arguments of both sides. Plaintiffs also argue that the trial was unfair because BCDC gave them insufficient time to make their case: 15 minutes before the Commission, and 60 minutes before the Enforcement Committee, which they contend was not enough time to present witnesses, make argument, and cross-examine the other side's witnesses.

The Court agrees that BCDC did not adequately separate functions, and finds that the trial was unfair under the totality of the circumstances. The summaries and analyses called for by the

BCDC regulations are like those of a law clerk preparing a bench memo and proposed decision for a judge. They summarize the arguments of both parties, analyze them, and recommend a decision. These are judicial functions, and should be performed by those acting in a judicial capacity, i.e. the Commission and its advisors. Here the prosecution team acted as the law clerk, and thereby impermissibly commingled the prosecution function with the judicial decision-making function. The prosecution team was biased in favor of its own position, and did not provide an impartial assessment of the issues. Because the prosecution team (rather than the Commission's advisory team) prepared the summary memos on which the Commission relied, the trial appeared to be biased and unfair. The trial also appeared to be unfair because of the short times allowed for Plaintiffs to make their case. Although the BCDC Order identifies eight violations, BCDC argues that the Commission found 27 violations. If so, then Plaintiffs had only about 2 minutes before the Enforcement Committee to make their case on each violation, and about 30 seconds before the Commission itself. The Court finds that these times were not sufficient for a fair trial in this case. The trial also appeared to be unfair because there was no ruling on the legal issues. Plaintiffs identified two sections of the Suisun Marsh Preservation Act, PRC § 29508 and § 29501.5, that on their face authorized Plaintiffs to perform the levee work that BCDC found to be a violation. Why didn't these sections apply? By refusing to rule on these issues or any other substantive legal issue raised by Plaintiffs, the Commission gave the impression that it did not have to comply with the law. The trial also appeared to be unfair because BCDC did not appear to give serious consideration to Plaintiffs' ability to pay the penalty. The BCDC Order finds that Plaintiffs submitted "no evidence" on ability to pay, but this finding was not supported by the evidence. Sweeney submitted a declaration in which he provided some evidence about his assets. And even if he had not submitted any evidence, there was evidence before the Commission because the prosecution team submitted the Regional Board's assessment of ability to pay. The BCDC Order makes no finding about whether Plaintiffs have the ability to pay.

The BCDC Order should be set aside on this ground.

FINDINGS NOT SUPPORTED BY THE EVIDENCE

Plaintiffs argue that seven findings in the BCDC Order are not supported by the evidence.

The parties disagree about what standard applies to the review of these findings. None of these findings appears to be relevant to the resolution of any of the principal issues in dispute. The Court therefore does not need to rule on them.

OTHER ISSUES

The parties make several requests for judicial notice, to augment the record, and to correct the record. None of these requests appears necessary for resolving the principal issues in this case, and there is no need to rule on them.

This statement of decision resolves the first cause of action in Plaintiffs' amended complaint. The second cause of action, asserting a CEQA cause of action, was resolved by demurrer. Plaintiffs' third cause of action alleges a violation of the Bagley-Keene Act, and has been withdrawn. Plaintiffs' fourth cause of action is for inverse condemnation. The count is based on the concept that the BCDC Order took a valuable property right from Plaintiffs for public use. Because the Court is granting Plaintiffs' motion for a writ to set aside the BCDC Order, the inverse condemnation count is now moot. Plaintiffs' fifth cause of action alleges that BCDC violated the Public Records Act. However, Plaintiffs are willing to waive this argument if the Court rules in their favor on the writ. This issue is therefore waived. All causes of action in Plaintiffs' amended complaint are now fully resolved.

CCP § 1094.5(f) specifies that "[t]he court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ." Judgment shall be entered in favor of Plaintiffs. A writ of mandate shall issue commanding BCDC to set aside the BCDC Order.

IT IS SO ORDERED.

Date: DEC 26 2017

HARRY S. KINNICUTT
Judge of the Superior Court

PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. I am employed in the City and County of San Francisco, and my business address is 155 Sansome Street, Suite 700, San Francisco, California 94104.

On November 14, 2017, at San Francisco, California, I served the attached document(s):

[PROPOSED] STATEMENT OF DECISION ON BCDC ORDER

On the following parties:

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☒ **BY OVERNIGHT DELIVERY:** On the date written above, I delivered the Federal Express package to a location authorized by Federal Express to receive documents for pickup. The package was placed in a sealed envelope or package designated by Federal Express with delivery fees paid or provided for, addressed to the persons on whom it is to be served at the addresses shown above.

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** On the date written above, I e-mailed the documents to the persons on the service list at the e-mail addresses listed above. I did not receive, within a reasonable time after transmission, any electronic message or other indication that transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on November 14, 2017, at San Francisco, California.

Arlene Won

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COUNTY OF SOLANO

JOHN D. SWEENEY and POINT BUCKLER CLUB, LLC,

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Respondents and Defendants.

And related cross-claim.

No. FCS048136

~~[PROPOSED]~~ STATEMENT OF DECISION ON CLEANUP AND ABATEMENT ORDER

Petitioner and plaintiffs John D. Sweeney and Point Buckler Club, LLC ("Plaintiffs") filed this suit challenging Commission Cease And Desist And Civil Penalty Order No. CDO 2016.02 (the "BCDC Order") issued by respondents and defendants San Francisco Bay Conservation and Development Commission and Lawrence J. Goldzband, its Executive Director (jointly "BCDC") and Cleanup and Abatement Order No. R2-2016-0038 (the "CAO") issued by respondents and

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Plaintiffs have moved for a writ of mandate on all three orders. The parties have requested separate statements of decision. This statement covers Plaintiffs' motion for a writ of mandate setting aside the CAO. For the following reasons, the motion is GRANTED.

BACKGROUND

All three orders relate to Point Buckler Island, which is about 39 acres and located in Suisun Marsh. There has been a levee around the island since the 1920s. The island was operated as a duck club, and the levee was used to maintain a relatively constant water level in duck ponds. The Suisun Marsh Preservation Act (the "Preservation Act") requires that an "individual management plan" be prepared for each "managed wetland" (i.e. duck club), and in 1984 BCDC certified an individual management plan for the island. By 2011, however, when John Sweeney purchased the island, the levee had fallen into disrepair and was breached in several places. Three years later, in 2014, Sweeney repaired or reconstructed the levee. Dirt was excavated from an interior "borrow ditch" and placed on the existing levee or inland of it. In late 2014, Sweeney sold the island to Point Buckler Club, LLC, which now owns the island.

In March 2014, shortly after work began on the levee repair, BCDC staff observed the work. BCDC staff knew that the work was being done by Sweeney, and knew Sweeney from conversations related to another island, but made no immediate effort to contact Sweeney or to get him to stop the work. BCDC staff first contacted Sweeney about the work seven months later. In November 2014, BCDC toured the island, gave Sweeney a copy of the individual management plan for the island, and told him that if the repair was consistent with the plan, then no permit was needed for the work. This statement was consistent with the Preservation Act, which provides that no BCDC permit is required for work specified in an individual management plan. (Public Resources Code ("PRC") § 29501.5.)

In January 2015, however, BCDC changed its mind and sent a letter asserting that the individual management plan had expired, and that the levee repair and other activities in the island

violated the Preservation Act because they were implemented without a permit. Although there were discussions and additional correspondence, BCDC took no formal action in 2015.

In September 2015, the Regional Board issued a cleanup and abatement order requiring the restoration of Point Buckler Island. Penalties were not imposed. In December 2015, plaintiff Point Buckler Club, LLC filed case no. FCS046410 in this Court alleging that the Regional Board's order violated due process, and applied for a stay of that order. This Court granted the stay on December 29, 2015. In early January 2016, the Regional Board rescinded the September 2015 order.

Two days later, the Regional Board met with BCDC, spoke with consultants, began the process of re-issuing the September 2015 order, and for the first time began imposing penalties. On May 12, 2016, the Regional Board's consultants issued a Technical Assessment. Within a few days after that, Regional Board issued a proposed cleanup and abatement order and penalty complaint that would have imposed $4.6 million in penalties. BCDC issued a cease and desist order in April 2016 and, in May 2016, a proposed penalty order that would have imposed $952,000 in penalties. Together the proposed penalties amounted to $5.552 million.

In August 2016 the Regional Board held a hearing and issued the CAO, which imposed restoration, mitigation, and monitoring requirements on Plaintiffs.

In October 2016, BCDC's enforcement committee held a hearing on the proposed penalty order and recommended that the penalty should be reduced from $992,000 to $752,000. The Commission held a hearing in November 2016 and issued the BCDC Order, which imposed the penalty of $752,000 and included restoration, mitigation, and monitoring requirements almost identical to the CAO.

In December 2016, the Regional Board held a hearing and issued the ACL Order, which imposed a penalty of $2.828 million on Plaintiffs. The combined penalty imposed by BCDC and the Regional Board is $3.6 million.

In December 2016, Plaintiffs filed case no. FCS048136 challenging the CAO and the BCDC Order. In May 2017, Plaintiffs filed case no. FCS048861 challenging the ACL Order. Plaintiffs argue that each of these orders is invalid and must be set aside in accordance with Code of Civil Procedure ("CCP") § 1094.5.

Plaintiffs' motions for a writ of mandate in case no. FCS048136 were heard on Friday, October 27, 2017. The motion for a writ of mandate in case no. FCS048861 was heard the following Monday, October 30, 2017. The parties filed additional motions, requests, and objections, which were also heard at those times.

SUISUN MARSH PRESERVATION ACT

As its name suggests, the Suisun Marsh Preservation Act was enacted to preserve Suisun Marsh. More than 90% of the marshland—51,700 acres of 55,000 acres— is in duck clubs, which the Preservation Act refers to as "managed wetlands". Duck clubs use levees and tide gates to maintain duck ponds, and they plant vegetation that provides food for ducks and other waterfowl. Ducks prefer artificial duck ponds to natural tidal marsh.

Plaintiffs argue that the Regional Board violated the Preservation Act, and thereby acted in excess of jurisdiction and did not proceed in the manner required by law as required by CCP § 1094.5. This Court agrees.

PRC § 29302(a) imposes "a judicially enforceable duty on state agencies to comply with, and to carry out their duties and responsibilities in conformity with, this division and the policies of the protection plan." The "protection plan" is the Suisun Marsh Protection Plan (the "Protection Plan"), which was prepared in 1976 and continues to provide a blueprint for the preservation of the marsh.

Plaintiffs argue that the CAO violates the policy of the Preservation Act, which is to "preserve and protect" resources such as duck clubs, which exercise "control over the widespread presence of water and the abundant source of waterfowl foods" (PRC § 29002). Plaintiffs also argue that the CAO violates several policies of the Protection Plan, which specify that "recreational use of privately-owned managed wetlands should be encouraged", and that "land and water areas should be managed to achieve...habitat attractive to waterfowl" and "[i]mprovement of...levee systems". (Protection Plan at 29, 30 (amended 2007).) Plaintiffs argue that the CAO would destroy the duck club at Point Buckler, and the Regional Board is hostile to duck clubs and the protection of waterfowl. The Regional Board does not dispute these assertions.

Instead, the Regional Board argues that the Preservation Act does not apply to the CAO. It cites PRC § 29006 for the proposition that the Preservation Act does not limit the power of a state

agency to "enjoin waste or pollution of the marsh or any nuisance". The Regional Board misreads that section, which applies to "the power of the Attorney General to bring an action", but says nothing about administrative orders issued by state agencies. (PRC § 29006(c).) The Regional Board argues that Plaintiffs must comply with both the Preservation Act and the Porter-Cologne Act, which regulates waste discharges. But so must the Regional Board. Because the Regional Board is a state agency, it must comply with the "judicially enforceable duty" imposed on state agencies by PRC § 29302. The Court finds that the levee and excavation work was done to restore the duck ponds at Point Buckler and provide waterfowl with food and habitat, and that the CAO harms waterfowl and their food supply and habitat by prohibiting Plaintiffs from repairing the levee, establishing duck ponds, and planting duck food. The Court finds that the Regional Board can comply with the requirements of the Preservation Act without violating the Porter-Cologne Act, and that the two statues are not in conflict here. The Regional Board has therefore not acted in conformity with the Preservation Act and the policies of the Protection Plan. The CAO should be set aside on this ground.

CONDITION OF POLLUTION

The Porter-Cologne Act authorizes a regional board to issue a cleanup and abatement order if specified conditions are met. (Water Code § 13304.) Here, the CAO asserts that those conditions are met because there was a "discharge of waste" into "waters of the state" that "created a condition of pollution". Plaintiffs argue that none of these elements was met, and therefore that the Regional Board acted in excess of jurisdiction and did not proceed in the manner required by law in violation of CCP § 1094.5.

Plaintiffs begin with the last of the elements, the "condition of pollution". A "condition of pollution" is different from a nuisance, and the Regional Board concedes that the levee work was not a nuisance. The Porter-Cologne Act defines "condition of pollution" as an "alteration of the quality of the waters of the state by waste" that "unreasonably affects" either the "waters for beneficial uses" or the facilities that serve those uses. (Water Code § 13050(l)(1).) Plaintiffs argue that, for several reasons, the levee work did not "unreasonably" affect the beneficial uses. This Court agrees.

The Legislature determined that duck clubs do not unreasonably affect beneficial uses when

it enacted the Suisun Marsh Preservation Act, which requires the protection and preservation of duck clubs. Plaintiffs analogize to those cases holding that an activity cannot be considered a nuisance when it is specifically authorized by statute. Although activities authorized by statute can be a nuisance if they are conducted in an improper manner, the manner in which the work was conducted is not at issue here. The Regional Board asserts harm from closing the breaches in the levee. It does not assert that the harm could have been avoided if the breaches were closed in some other manner.

In addition, the Court finds that the levee work did not unreasonably affect beneficial uses. The Porter-Cologne Act specifies that the independent judgment standard shall apply to judicial review of cleanup and abatement orders (Water Code § 13330(e).) Although the CAO finds that the levee work unreasonably affected beneficial uses, that finding was not supported by the weight of the evidence. The Porter-Cologne Act defines "beneficial uses" to include "recreation" and "preservation and enhancement of...wildlife". (Water Code § 13050(f).) The levee work promoted those beneficial uses by taking a necessary step in the restoration of functioning duck ponds. Promoting a beneficial use is not unreasonably affecting it. The Regional Board asserts that the levee work caused harm to other beneficial uses mostly related to fish, but the evidence was highly speculative. There was no direct evidence that fish used the small channels that were closed by the levee repair, and there was no evidence that the levee repair significantly reduced the amount of organic material that was available to fish in the waters around the island. There was conflicting expert testimony on whether the small channels on the island tended to shelter fish from predators, or on the contrary harmed fish by attracting predators. Because the benefits of the levee are clear and certain, and the asserted harm to fish was unquantified and uncertain, the Court finds that any harm the levee work may have caused to beneficial uses did not unreasonably affect those uses.[1]

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[1] Water Code § 13304 authorizes the issuance of a cleanup and abatement order when a person "discharges waste into the waters of this state in violation of any...prohibition issued by a regional board". Although the CAO did not assert that it was being issued on this ground, the Regional Board now argues that the levee work violated a prohibition, contained in the "basin plan", on the discharge of "earthen material... in quantities sufficient to cause deleterious bottom deposits, turbidity, or discoloration in surface waters or to unreasonably affect... beneficial uses." Although the CAO included a finding to this effect, the finding was not supported by the weight of the evidence. As discussed in the text, the levee work did not unreasonably affect beneficial uses. The Court finds that the actions of Plaintiffs at issue did not cause deleterious bottom deposits, turbidity, or discoloration in surface waters.

The Regional Board therefore lacked authority to issue the CAO. The CAO should be set aside on this ground.

WASTE

Plaintiffs argue that the dirt used to repair the levee was not "waste". This Court agrees. The Porter-Cologne Act defines "waste" to include "sewage and any and all other waste substances" from a broad range of human sources, but does not define what a waste is. In this situation, a court applies the commonly understood meaning of "waste", which is something discarded as worthless or useless. (*Waste Management of the Desert v. Palm Springs Recycling Center, Inc.* (1994) 7 Cal.4th 478, 485.) Here, the dirt used for the levee work was a valuable building material, not something discarded as worthless or useless.

The Regional Board argues that dirt is always a waste, regardless of whether it is discarded. For this proposition, it cites *Lake Madrone Water Dist. v. State Water Resources Control Bd.* (1989) 209 Cal.App.3d 163. *Lake Madrone* held that concentrated sediment flushed from a dam was "waste" regulated by the Porter-Cologne Act. (*Id.* at 171.) Because the flushed sediment was being discarded as something worthless or useless, *Lake Madrone* does not support the Regional Board's argument that dirt is "waste" even when it is not discarded as useless.

In circumstances closer to those here, a federal court has distinguished *Lake Madrone* and held that "building a house" is not a discharge of waste, even though the house might generate stormwater runoff into Lake Tahoe. (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (D.Nev. 1999) 34 F.Supp.2d 1226, 1254, overruled on other grounds (9th Cir. 2000) 216 F.3d 764, 771, affirmed (2002) 535 U.S. 302, 312.) Here, the Regional Board does not assert that the levee work will cause runoff or anything else that might be considered a discharge of waste. The only question is whether the dirt placed to construct a valuable improvement is a waste.

The U.S. Army Corps of Engineers, which administers the permitting program for dredge and fill material under the federal Clean Water Act, has taken the same position that Plaintiffs assert here. The Corps, in a letter to the State Water Resources Control Board, has asserted that the definition of "waste" under the Porter-Cologne Act does not include discharge of dredge or fill materials, and that the Porter-Cologne Act does not authorize state agencies to reregulated dredge

and fill operations.

The Court finds that Plaintiffs' placement of dirt to repair or reconstruct the levee was not the discarding of a material as valueless or useless. The dirt was not a waste, and the Regional Board lacked authority to issue the CAO. The CAO should be set aside on this ground.

DISCHARGE

Among the unauthorized activities the CAO identifies are the excavation of ditches and the removal of vegetation. The Regional Board also objected to the keeping of pet goats on the island, on the grounds that the goats might eat the vegetation. Plaintiffs argue that a "discharge" under the Porter-Cologne Act does not include the removal of material, and is therefore not subject to a cleanup and abatement order. This Court agrees.

The Porter-Cologne Act does not define "discharge". Google defines "discharge" as to "allow (a liquid, gas, or other substance) to flow out from where it has been confined". Merriam-Webster's online dictionary defines the word as "to give outlet or vent to" and "emit". The ordinary meaning of "discharge", therefore, does not include a removal. Federal cases have reached the same conclusion for the word "discharge" in the Clean Water Act. (*E.g. National Mining Association v. United States Army Corps of Engineers* (1998) 145 F.3d 1399, 1404.) Under both the ordinary definition and federal law, therefore, the removal of material is not a "discharge". The Regional Board lacked authority to issue a CAO regulating activities that are not discharges. The CAO should be set aside on this ground.

WATERS OF THE STATE

The Porter-Cologne Act defines "waters of the state" as "any surface water or groundwater, including saline waters, within the boundaries of the state." (Water Code § 13050(e).) But it does not define where a surface water ends and dry land begins. Plaintiffs argue that no matter how the phrase is defined, it does not apply to dry land, and that most of the work was done on dry land. This Court agrees.

The Regional Board's consultants initially opined that the interior of the island was inundated by the tides every day. This conclusion was based on their calculations about how high the tides were at the island. Sweeney then testified that in the many months he had been on the

island he had never seen the interior inundated (although he had seen water in the small channels and ditches). In response, the Regional Board's consultants changed position and opined that the interior was rarely inundated by the tides. But they did not admit that they changed their opinion, they did not explain why their initial calculations had been wrong, and they did not make any corrections to their calculations. The Court finds that the Regional Board's consultants lack credibility, that their opinions on this issue should be given no weight, and that the interior of the island (except for the channels and ditches) was dry land rather than waters of the state. Water Code § 13304 does not give the Regional Board authority to issue a cleanup and abatement order for the placement of dirt in areas that are not waters of the state. Except for those areas in which dirt was placed in channels or ditches, the dirt was placed on dry land, not waters of the state. The CAO should be set aside on this ground.

WATER CODE § 13267

The CAO requires Plaintiffs to submit technical reports in accordance with Water Code § 13267. That section provides that "[t]he burden, including costs, of these reports shall be a reasonable relationship to the need for the report and the benefits to be obtain", and specifies that the "regional board shall provide the person with a written explanation". (Water Code § 13267(b)(1).) The CAO includes a conclusory statement asserting that it complies with § 13267, but does not include the written explanation or otherwise explain why the burden bears a reasonable relationship to the need. Plaintiffs argue that the CAO's conclusory statement does not comply with the requirements of § 13267. This Court agrees.

In the case most closely on point, the California Supreme Court concluded that a conclusory finding was not sufficient. (*Voices of the Wetlands v. State Water Resources Control Board* (2011) 52 Cal.4th 499, 511-513 (interpreting cost-benefit analysis required by § 316(b) of the federal Clean Water Act).) By requiring technical reports without meeting the requirements of Water Code § 13267, the Regional Board exceeded its jurisdiction and did not proceed in the manner required by law. The CAO should be set aside on this ground.

FAIR TRIAL

A party can establish that an agency has violated that party's "constitutional due process right

to an impartial tribunal" by establishing that "rules mandating an agency's internal separation of functions and prohibiting ex parte communications" have not been observed, or by showing that a particular combination of circumstances (sometimes referred to as the "totality of the circumstances") creates an unacceptable risk of bias. (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 741.) Plaintiffs argue that the Regional Board did not separate functions, and that the totality of the circumstances created an unacceptable risk of bias. This Court agrees.

The Regional Board admits that, when the first cleanup and abatement order was issued in September 2015, functions had not yet been separated. By mid-2016, however, when proceedings on the CAO were underway, the Regional Board had identified a prosecution team and an advisory team. For the preliminary procedural issues, such as when the hearing would take place, Plaintiffs and the prosecution team submitted their arguments to the advisory team, and the advisory team ruled on them. But neither the advisory team nor the Regional Board ruled on the principal factual and legal issues in the case. The California Administrative Procedure Act ("APA") specifies that "[t]he decision shall be in writing and shall include a statement of the factual and legal basis for the decision." (Gov. Code § 11425.50(a).) Here the only writing is the CAO, and the CAO was drafted by the prosecution team rather than the advisory team. Although some minor modifications were made to the CAO at the hearing, they were made only with the approval of the prosecution team. The Court finds that the Regional Board appeared to be biased in favor of the prosecution team, and against Plaintiffs. The factual and legal issues raised by Plaintiffs deserved to be taken seriously, but they were not evaluated and ruled on. The advisory team, which included two lawyers, could have prepared an analysis and recommended decision on the legal issues that could have been adopted by the Regional Board. Technical staff on the advisory team could have prepared an analysis of the factual issues. By not ruling on the issues raised by Plaintiffs, the Regional Board gave the impression that it did not have to comply with the law, and that the result was a foregone conclusion.

Plaintiffs also argue that the Regional Board did not allow sufficient time for the trial. This Court agrees. Although Plaintiffs requested a full hearing similar to one held by the State Water Resources Control Board, the advisory team initially concluded that a half hour was sufficient for

Plaintiffs to try their case. When Plaintiffs repeated their request and asked for 7 hours, the advisory team increased Plaintiffs' allotted time to 1 hour, which the advisory team deemed enough to examine witnesses, introduce exhibits, cross-examine opposing witnesses, and rebut the evidence against Plaintiffs. The Court finds that 1 hour is not enough to try a case as complex as this one, and that the allotted time was not enough to give Plaintiffs a fair opportunity to present their opening statement, examine their percipient and expert witnesses, cross-examine the prosecution team's witnesses, and make their closing argument. The Court also finds that the short time gave the appearance that the Regional Board was not interested in determining the truth, but rather than it intended and expected to rely on staff, as it usually did, to provide the facts and law. The Regional Board has the responsibility of deciding all issues needed to resolve the dispute, and it should take the time required to understand the issues and make the decisions, rather than delegating those tasks to staff. Because the advisory team did not take an active role in the judicial decision-making function on the substantive legal and factual issues in dispute, the Regional Board relied on the prosecution team, which was biased in favor of its own position.

When an agency is called on to conduct an adjudicatory hearing, it should fairly adjudicate the legal and factual issues. Here Plaintiffs made strong legal and factual arguments that were not seriously considered by the decision-makers, who refused to rule on them. Instead, the findings and decision were principally determined by the prosecution team, which expressed only its own position in the CAO. Under the totality of the circumstances, Plaintiffs did not receive a fair trial. The CAO should be set aside on this ground.

FINDINGS NOT SUPPORTED BY THE EVIDENCE

Plaintiffs argue that at least five key findings were not supported by the weight of the evidence. Four of the five have been discussed in the sections in which they were relevant. The Court agrees that those four findings were not supported by the weight of the evidence. The CAO should be set aside on this ground.

OTHER ISSUES

The Regional Board submitted an administrative record of about 17,000 pages. Plaintiffs object to about 14,400 of those pages on the ground that they were not submitted as part of the CAO

proceeding. Plaintiffs analogize to the record on appeal, and argue that the administrative record should consist of the documents included in a clerk's transcript (the written documents submitted by the parties and the decision-maker) and the reporter's transcript. The 14,400 pages at issue consist mostly of technical reports that were cited in the Technical Assessment, but not submitted to the Regional Board. The Court agrees that these documents are not properly part of the administrative record. Plaintiffs' objections are SUSTAINED.

The Regional Board moves to strike Plaintiffs' opening brief on the ground that it incorporated material from another brief and exceeded the page limits. The Regional Board's motion is DENIED.

On July 20, 2017, the Regional Board filed an ex parte application for a mandatory temporary restraining order and order to show cause to enforce the CAO and require Plaintiffs to implement an "interim corrective action plan". On July 26, this Court issued an Order After Hearing that denied the application and set a hearing on the order to show cause. That hearing was continued to October 27, 2017. Because the Court has determined that the CAO should be set aside, the Regional Board's motion to enforce the CAO is now DENIED.

The parties make several requests for judicial notice, to augment the record, and to correct the record. None of these requests appears necessary for resolving the principal issues in this case, and there is no need to rule on them.

This statement of decision resolves the first cause of action in Plaintiffs' amended complaint. The second cause of action, asserting a CEQA cause of action, was resolved by demurrer. Plaintiffs' third cause of action alleges a violation of the Bagley-Keene Act, and has been withdrawn. Plaintiffs' fourth cause of action is for inverse condemnation. The count is based on the concept that the CAO took a valuable property right from Plaintiffs for public use. Because the Court is granting Plaintiffs' motion for a writ to set aside the CAO, the inverse condemnation count is now moot. Plaintiffs' fifth cause of action alleges a violation of the Public Records Act. However, Plaintiffs are willing to waive this argument if the Court rules in their favor on the writ. This issue is therefore waived. All causes of action in Plaintiffs' amended complaint are now fully resolved.

The Regional Board has filed a cross-claim alleging that Plaintiffs have violated the CAO.

Because the CAO should be set aside, the cross-claim is now moot.

CCP § 1094.5(f) specifies that "[t]he court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ." Judgment should be entered in favor of Plaintiffs. A writ of mandate should issue commanding the Regional Board to set aside the CAO.

IT IS SO ORDERED.

Date: DEC 26 2017

HARRY S. KINNICUTT
Judge of the Superior Court

PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. I am employed in the City and County of San Francisco, and my business address is 155 Sansome Street, Suite 700, San Francisco, California 94104.

On November 14, 2017, at San Francisco, California, I served the attached document(s):

[PROPOSED] STATEMENT OF DECISION ON CLEANUP AND ABATEMENT ORDER

On the following parties:

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Deputy Attorney General
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☒ **BY OVERNIGHT DELIVERY:** On the date written above, I delivered the Federal Express package to a location authorized by Federal Express to receive documents for pickup. The package was placed in a sealed envelope or package designated by Federal Express with delivery fees paid or provided for, addressed to the persons on whom it is to be served at the addresses shown above.

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** On the date written above, I e-mailed the documents to the persons on the service list at the e-mail addresses listed above. I did not receive, within a reasonable time after transmission, any electronic message or other indication that transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on November 14, 2017, at San Francisco, California.

Arlene Won

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JOHN D. SWEENEY and POINT BUCKLER CLUB, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SOLANO

JOHN D. SWEENEY and POINT BUCKLER CLUB, LLC,

Petitioners and Plaintiffs,

v.

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN FRANCISCO BAY REGION; BRUCE H. WOLFE, Executive Officer of the California Regional Water Quality Control Board, San Francisco Bay Region; and DOES 1 through 20;

Respondents and Defendants.

No. FCS048861

~~[PROPOSED]~~ STATEMENT OF DECISION ON ADMINISTRATIVE CIVIL LIABILITY ORDER

Petitioner and plaintiffs John D. Sweeney and Point Buckler Club, LLC ("Plaintiffs") filed this suit challenging an administrative civil liability order, Order No. R2-2016-0048 (the "ACL Order"), issued by respondents and defendants California Regional Water Quality Control Board, San Francisco Bay Region and Bruce H. Wolfe, its Executive Officer (jointly the "Regional Board"). Plaintiffs filed case no. FCS048146 challenging Commission Cease And Desist And Civil Penalty Order No. CDO 2016.02 (the "BCDC Order") issued by San Francisco Bay Conservation and Development Commission and Lawrence J. Goldzband, its Executive Director (jointly "BCDC") and Cleanup and Abatement Order No. R2-2016-0038 (the "CAO") issued by the Regional Board.

Plaintiffs have moved for a writ of mandate on the ACL Order. The parties have requested separate statements of decision for each of the three orders. This statement covers Plaintiffs' motion for a writ of mandate setting aside the ACL Order. For the following reasons, the motion is GRANTED.

BACKGROUND

All three orders relate to Point Buckler Island, which is about 39 acres and located in Suisun Marsh. There has been a levee around the island since the 1920s. The island was operated as a duck club, and the levee was used to maintain a relatively constant water level in duck ponds. The Suisun Marsh Preservation Act (the "Preservation Act") requires that an "individual management plan" be prepared for each "managed wetland" (i.e. duck club), and in 1984 BCDC certified an individual management plan for the island. By 2011, however, when John Sweeney purchased the island, the levee had fallen into disrepair and was breached in several places. Three years later, in 2014, Sweeney repaired or reconstructed the levee. Dirt was excavated from an interior "borrow ditch" and placed on the existing levee or inland of it. In late 2014, Sweeney sold the island to Point Buckler Club, LLC, which now owns the island.

In March 2014, shortly after work began on the levee repair, BCDC staff observed the work. BCDC staff knew that the work was being done by Sweeney, and knew Sweeney from conversations related to another island, but made no immediate effort to contact Sweeney or to get him to stop the work. BCDC staff first contacted Sweeney about the work seven months later. In November 2014, BCDC toured the island, gave Sweeney a copy of the individual management plan for the island, and told him that if the repair was consistent with the plan, then no permit was needed for the work. This statement was consistent with the Preservation Act, which provides that no BCDC permit is required for work specified in an individual management plan. (Public Resources Code ("PRC") § 29501.5.)

In January 2015, however, BCDC changed its mind and sent a letter asserting that the individual management plan had expired, and that the levee repair and other activities in the island violated the Preservation Act because they were implemented without a permit. Although there were discussions and additional correspondence, BCDC took no formal action in 2015.

In September 2015, the Regional Board issued a cleanup and abatement order requiring the restoration of Point Buckler Island. Penalties were not imposed. In December 2015, plaintiff Point Buckler Club, LLC filed case no. FCS046410 in this Court alleging that the Regional Board's order violated due process, and applied for a stay of that order. This Court granted the stay on December 29, 2015. In early January 2016, the Regional Board rescinded the September 2015 order.

Two days later, the Regional Board met with BCDC, spoke with consultants, began the process of re-issuing the September 2015 order, and for the first time began imposing penalties. On May 12, 2016, the Regional Board's consultants issued a Technical Assessment. Within a few days after that, Regional Board issued a proposed cleanup and abatement order and penalty complaint that would have imposed $4.6 million in penalties. BCDC issued a cease and desist order in April 2016 and, in May 2016, a proposed penalty order that would have imposed $952,000 in penalties. Together the proposed penalties amounted to $5.552 million.

In August 2016 the Regional Board held a hearing and issued the CAO, which imposed restoration, mitigation, and monitoring requirements on Plaintiffs.

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Plaintiffs' motions for a writ of mandate in case no. FCS048136 were heard on Friday, October 27, 2017. The motion for a writ of mandate in case no. FCS048861 was heard the following

Monday, October 30, 2017. The parties filed additional motions, requests, and objections, which were also heard at those times.

SUISUN MARSH PRESERVATION ACT

As its name suggests, the Suisun Marsh Preservation Act was enacted to preserve Suisun Marsh. More than 90% of the marshland—51,700 acres of 55,000 acres— is in duck clubs, which the Preservation Act refers to as "managed wetlands". Duck clubs use levees and tide gates to maintain duck ponds, and they plant vegetation that provides food for ducks and other waterfowl. Ducks prefer artificial duck ponds to natural tidal marsh.

Plaintiffs argue that the Regional Board violated the Preservation Act, and thereby acted in excess of jurisdiction and did not proceed in the manner required by law as required by CCP § 1094.5. This Court agrees.

PRC § 29302(a) imposes "a judicially enforceable duty on state agencies to comply with, and to carry out their duties and responsibilities in conformity with, this division and the policies of the protection plan." The "protection plan" is the Suisun Marsh Protection Plan (the "Protection Plan"), which was prepared in 1976 and continues to provide a blueprint for the preservation of the marsh.

Plaintiffs argue that the ACL Order violates the policy of the Preservation Act, which is to "preserve and protect" resources such as duck clubs, which exercise "control over the widespread presence of water and the abundant source of waterfowl foods" (PRC § 29002). Plaintiffs also argue that the ACL Order violates several policies of the Protection Plan, which specify that "recreational use of privately-owned managed wetlands should be encouraged", and that "land and water areas should be managed to achieve…habitat attractive to waterfowl" and "[i]mprovement of…levee systems". (Protection Plan at 29, 30 (amended 2007).) Plaintiffs argue that the ACL Order imposes bankrupting penalties on Plaintiffs for doing what the Legislature required them to do: comply with the individual management plan and maintain the duck club at Point Buckler. The Regional Board does not dispute these assertions.

Instead, the Regional Board refers back to its argument, in the CAO case, that the Preservation Act does not apply to the CAO. The Court rejected that argument. Because the Regional Board is a state agency, it must comply with the "judicially enforceable duty" imposed on

state agencies by PRC § 29302. The Court finds that the levee and excavation work was done to restore the duck ponds at Point Buckler and provide waterfowl with food and habitat, and that the ACL Order harms waterfowl and their food supply and habitat by penalizing Plaintiffs for repairing the levee, establishing duck ponds, and planting duck food. The Court finds that the Regional Board can comply with the requirements of the Preservation Act without violating the Porter-Cologne Act, and that the two statues are not in conflict here. The Regional Board has therefore not acted in conformity with the Preservation Act and the policies of the Protection Plan. The ACL Order should be set aside on this ground.

VINDICTIVE PROSECUTION

When a "defendant shows that the prosecution has increased the charges in apparent response to the defendant's exercise of a procedural right, the defendant has made an initial showing of an appearance of vindictiveness." (*People v. Puentes* (2010) 190 Cal.App.4th 1480, 1486, quoting *Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 371.) "Once this prima facie case is made, the prosecution bears a 'heavy burden' of dispelling the appearance of vindictiveness as well as actual vindictiveness." (*Id.*)

The facts here support an initial showing of an appearance of vindictiveness. The Regional Board issued a cleanup and abatement order in September 2015, but took no action to impose penalties. In December 2015, Point Buckler Club filed suit and applied for a stay of that order on the ground that the Regional Board had not complied with due process. This Court stayed that order, and in January 2016 the Regional Board rescinded that order. Two days later, the Regional Board met with BCDC and consulted with its experts, and began the process of re-imposing the order and in addition imposing the highest penalties the Regional Board and BCDC had ever imposed.

In previous proceedings in this case, the Regional Board submitted evidence on this issue, including an e-mail requesting enforcement assistance because Plaintiffs seemed "more interested in challenging than cooperating". Plaintiffs argue that this e-mail is a "smoking gun" showing that the motivation for imposing penalties was Plaintiffs' insistence on due process rather than any harm to the environment. For this motion, however, the Regional Board neither submits evidence nor

explains why it imposed penalties after Plaintiffs filed suit in this Court, when it had not imposed penalties before.

If the levee work was the most egregious violation in the Regional Board's history, why didn't the Regional Board take action when it learned about the work in 2014? Why did it wait a year or longer to issue the 2015 cleanup and abatement order (without a hearing)? Why did it impose penalties only after the club filed suit in this Court and obtained a stay of the 2015 order? The Regional Board does not answer these questions or make any attempt to show that the penalties were not imposed for vindictive reasons. It does not explain why the levee work was so egregious that it deserved the highest penalties ever imposed. It does not even deny that the penalties were imposed with vindictive intent. The Court finds that the penalties imposed in the ACL Order were imposed in retribution for the lawsuit challenging the Regional Board's September 2015 order, and that the Regional Board has not met its burden of dispelling the appearance of vindictiveness as well as actual vindictiveness.

The Regional Board suggests that the prohibition on vindictive prosecution does not apply to civil cases. The parties have not identified any civil case in which the prohibition was applied. It may be the rare civil case in which a party can make the prima facie showing needed, but in this case the showing has been made. The prohibition implements a basic due process protection: "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." (*United States v. Goodwin* (1982) 457 U.S. 368, 372, quotation marks omitted.) Because due process applies to civil cases, there is no reason why the prohibition on vindictive prosecution should not apply.

The ACL Order should be set aside on this ground.

EXCESSIVE FINE

Plaintiffs argue that the ACL Order violated the Eight Amendment's prohibition on excessive fines. As the Regional Board points out, the question of whether a fine is excessive depends on four factors: "(1) the defendants' culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendants' ability to pay. (*People ex rel. Bill Lockyer v. R.J Reynolds Tobacco Co.*, (2006) 37 Cal.4th 707, 728.)

For the first factor, Plaintiffs argue that their culpability was low. Sweeney's motivation in repairing the levee was to restore a duck club, an activity that is promoted and encouraged by the Suisun Marsh Preservation Act. He says that before beginning work he contacted BCDC and the Suisun Marsh Conservation District ("SRCD"), with whom he had worked previously to obtain a permit from the U.S. Army Corps of Engineers (the "Corps") for another island, and came away with the understanding that no permits were needed. Neither of the people he talked to testified to the contrary, although a third person Sweeney said he talked to testified that she had no recollection of the conversation. Sweeney also testified that he thought permits were needed only for islands that were submerged by the tides, whereas Point Buckler was high and dry. The Regional Board argues that Sweeney is a sophisticated party who had previous experience obtaining a Corps permit, but there was no evidence that marsh landowners commonly understand that levee work needs a permit.

In its penalty complaint, the Regional Board asserted two violations, of which the second was a failure to obtain a "401 certification" from the Regional Board. Sweeney testified that he had never heard that phrase when he began work, and there was no evidence to the contrary. Nor was there any evidence that any requirements related to a "401 certification" are common knowledge among marsh landowners. The Court finds that Plaintiffs' culpability was low.

For the second factor, Plaintiffs argue that the penalty was grossly disproportional to the harm. The parties agree on two basic facts related to the evaluation of harm: before the levee work, there was tidal flow into a few small channels on the island, and the levee work prevented this tidal flow. The Regional Board argues that there was major harm, but the evidence of harm is weak. The Regional Board asserts that some small threatened or endangered fish "likely" used these channels. The parties agree that there is no direct evidence that the fish actually used these channels or that there was harm to any specific endangered fish. The Regional Board does not assert that there was a violation of the federal or California Endangered Species Act. Plaintiffs argue that the evidence of harm is therefore speculative at best. The Regional Board also argues that the work resulted in the destruction of tidal marsh, but does why this harm is significant. If the project had proceeded to completion, the island would have been planted with vegetation that provides food for waterfowl. The Regional Board does not explain why one type of vegetation should be preferred over the other.

Plaintiffs also argue that the levee work will benefit the environment because it will provide valuable habitat for ducks and other waterfowl. The Court finds that the penalty was grossly disproportional to the harm. The Regional Board has not established that fish actually used the channels, and even assuming they did the Regional Board has not established the magnitude of that harm. The benefits to the environment of duck ponds, in comparison, are clear and definite. The Court therefore finds that the work would, if allowed to proceed to completion, have created a net benefit for the environment rather than a harm.

The third factor, as identified by the California Supreme Court, considers penalties in other statutes. Plaintiffs cite to a decision of the United States Supreme Court, which identifies the factor as "the sanctions imposed in other cases for comparable misconduct." (*Cooper Industries v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 435.) Plaintiffs then argue that the sanctions here are much greater than those imposed in other cases for comparable misconduct. The Regional Board does not dispute that the penalty imposed on Plaintiffs is the highest penalty it has ever imposed. Evidence in the record shows that the top-ten Regional Board penalties have generally been reserved for discharges of millions of gallons of untreated sewage and discharges resulting in hundreds of observably dead fish. Here there is no threat to public health or observably dead fish. Although the Regional Board's second-highest penalty (more than $1.9 million) was imposed for placing "cave spoils" in wetlands, all but $85,000 of that penalty was suspended on completion of specified work. Here the Regional Board did not suspend any portion of the penalty on completion of the work specified in the CAO. There is no evidence that the Regional Board has ever imposed any penalties on duck clubs in Suisun Marsh for levee work. The Court finds that there is a great disparity between the non-existent or modest penalties the Regional Board has imposed for similar behavior, and the severe penalty imposed here.

For the fourth factor, Plaintiffs argue that they do not have the ability to pay. The Regional Board submitted evidence on ability to pay from its non-expert estimator, and Plaintiffs submitted evidence from Sweeney and a financial expert. The evidence was sufficient to establish that the Regional Board's non-expert estimator overestimated Plaintiffs' net worth by not accounting for obvious liabilities, in particular the cost of implementing the restoration, monitoring, and mitigation

requirements imposed by the CAO, and that Plaintiffs could not afford to pay the proposed penalty of $4.6 million, the final combined penalty of $3.6 million, or even the Regional Board penalty of $2.828 million.

The Court therefore finds that the penalty was grossly disproportional to the gravity of Plaintiffs' offense, and that it violated the Eight Amendment. The ACL Order should be set aside on this ground.

FAIR TRIAL

A party can establish that an agency has violated that party's "constitutional due process right to an impartial tribunal" by establishing that "rules mandating an agency's internal separation of functions and prohibiting ex parte communications" have not been observed, or by showing that a particular combination of circumstances (sometimes referred to as the "totality of the circumstances") creates an unacceptable risk of bias. (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 741.) Plaintiffs argue that the Regional Board did not separate functions, and that the totality of the circumstances created an unacceptable risk of bias.

The Regional Board admits that, when the first cleanup and abatement order was issued in September 2015, functions had not yet been separated. By mid-2016, however, when proceedings on the CAO were underway, the Regional Board had identified a prosecution team and an advisory team. For the preliminary procedural issues, such as when the hearing would take place, Plaintiffs and the prosecution team submitted their arguments to the advisory team, and the advisory team ruled on them. But neither the advisory team nor the Regional Board ruled on the principal factual and legal issues in the case. The California Administrative Procedure Act ("APA") specifies that "[t]he decision shall be in writing and shall include a statement of the factual and legal basis for the decision." (Gov. Code § 11425.50(a).) Here the only writing is the ACL Order and the attached penalty complaint, which were drafted by the prosecution team rather than the advisory team. The Court finds that the Regional Board appeared to be biased in favor of the prosecution team, and against Plaintiffs. The factual and legal issues raised by Plaintiffs deserved to be taken seriously, but they were not evaluated and ruled on. The advisory team, which included two lawyers, could have

prepared an analysis and recommended decision on the legal and factual issues that could have been adopted by the Regional Board. By not ruling on the issues raised by Plaintiffs, the Regional Board gave the impression that it did not have to comply with the law, and that the result was a foregone conclusion.

Plaintiffs also argue that the Regional Board did not allow sufficient time for the trial. This Court agrees. Although Plaintiffs requested a full hearing similar to one held by the State Water Resources Control Board, the advisory team allowed Plaintiffs only two hours. A case of this complexity, in which the prosecution team has requested a penalty of $4.6 million, calls for sufficient time so that the Regional Board can do more than decide how much of a penalty to impose. The Regional Board has the responsibility of deciding all issues needed to resolve the dispute, and it should take the time required to understand the issues and make the decisions, rather than delegating those tasks to staff. Because the advisory team did not take an active role in the judicial decision-making function on the substantive legal and factual issues in dispute, the Regional Board relied on the prosecution team, which was biased in favor of its own position.

Plaintiffs also point to other evidence of unfairness, including (a) ex parte communications by a Regional Board member who was eventually disqualified, (b) testimonials by Regional Board members during trial endorsing the prosecution team, (c) the Regional Board's unwillingness to keep Sweeney's private financial information confidential, combined with its criticism of him for not providing more financial information, (d) reliance by Regional Board members on incorrect personal knowledge, (e) unawareness by Regional Board members of Plaintiffs' arguments, (f) blindness of Regional Board members to weaknesses in the prosecution team's arguments, and (g) evidence that the Regional Board does not fairly interpret and apply the applicable law, but rather interprets it to support the decisions of the Regional Board. The Court finds that, under the totality of the circumstances, Plaintiffs did not receive a fair trial. The ACL Order should be set aside on this ground.

FINDINGS NOT SUPPORTED BY EVIDENCE

CCC § 1094.5 specifies that "[a]buse of discretion is established if...the findings are not supported by the evidence." Plaintiffs argue that the findings, to the extent they exist, are not supported by the evidence. This Court agrees.

Of particular significance is the finding that Plaintiffs discharged fill material into waters of the United States. To establish a violation of the federal Clean Water Act and of Water Code § 13385, the Regional Board must show that the island, which Sweeney has described as "high and dry", was waters of the United States. The Regional Board's consultants attempted to make the necessary showing in the Technical Assessment issued in May 2016. That report was not submitted for the proceedings leading to the ACL Order, and is absent from the administrative record in this case. The Regional Board has not requested that the Technical Assessment be added to the record for this proceeding.

Even if the Technical Assessment were in the record, the evidence would not be enough to establish that the island (other than the interior channels and ditches) is waters of the United States. The Regional Board's consultants initially opined that the interior of the island was inundated by the tides every day. This conclusion was based on their calculations about how high the tides were at the island. Sweeney then testified that in the many months he had been on the island he had never seen the interior inundated (although he had seen water in the small channels and ditches). In response, the Regional Board's consultants changed position and opined that the interior was rarely inundated by the tides. But they did not admit that they changed their opinion, they did not explain why their initial calculations had been wrong, and they did not make any corrections to their calculations. According to the Regional Board's consultants, "waters of the United States" extends only to the "high tide line", which may be determined from a line of debris along the shore. Plaintiffs point out that there was a line of bleached debris along the shore, a line so definite that it can be seen in the aerial photographs, and that the great majority of the levee work was done inland of the debris line. Plaintiffs argue that if the island had truly been flooded with any regularity before the levee work, the debris around the island would have been floated up and over the old levee and

into the interior, where it would readily be observed. The absence of any debris in the interior, Plaintiffs argue, is strong evidence of the absence of interior flooding.

The parties disagree about which standard the Court must use to evaluate the evidence, but the Court finds that under any standard the evidence is insufficient to support the finding that all the levee work was done in waters of the United States. By radically revising their opinion, the Regional Board's consultants implicitly admitted that their original opinion was invalid, as were the calculations on which it was based. Because those calculations were invalid, and because they remained the foundation of the consultants' revised opinion, the revised opinion must also be invalid. Whether considered by themselves or as part of the record as a whole, which includes strong evidence of a debris line around the island and the absence of debris in the interior, the consultants' conflicting opinions do not provide sufficient evidence to support the finding that all the levee work was done in waters of the United States. The finding is also not supported by substantial evidence because the Technical Assessment is not in the administrative record.

Plaintiffs also argue that the evidence cannot support a finding that the levee work violated requirements in the basin plan that prohibit discharges into surface waters that affect beneficial uses. There is no finding about which requirements are at issue, and no reference to the administrative record that would make the reference clear. As a result, the decision is not supported by this finding. More generally, however, the evidence did not establish that there were discharges into surface waters of the state that would adversely affect beneficial uses. The Regional Board's evidence on waters of the United States is also its evidence on waters of the state, and for the reasons given above that evidence would not support a finding that all the levee work was done in waters of the state. Although the Regional Board argues that the channels and ditches are waters of the state, the penalty is based on the conclusion that all the levee work was in waters of the state and waters of the United States.

In addition, the evidence is not sufficient to support the conclusion that the levee work adversely affected beneficial uses. The Porter-Cologne Act defines "beneficial uses" to include "recreation" and "preservation and enhancement of...wildlife". (Water Code § 13050(f).) The levee work promoted those beneficial uses by taking a necessary step in the restoration of functioning

duck ponds. Promoting a beneficial use is not adversely affecting it. The Regional Board asserts that the levee work caused harm to other beneficial uses mostly related to fish, but the evidence was highly speculative. There was no direct evidence that fish used the small channels that were closed by the levee repair, and there was no evidence that the levee repair significantly reduced the amount of organic material that was available to fish in the waters around the island. There was conflicting expert testimony on whether the small channels on the island tended to shelter fish from predators, or on the contrary harmed fish by attracting predators. Because the benefits of the levee are clear and certain, and the asserted harm to fish was unquantified and uncertain, the Court finds that the evidence is insufficient to establish that the levee repair adversely affected beneficial uses.

Plaintiffs also argue that the penalty was improperly calculated from 1,000 days of violations. This calculation was based on the assumption that dirt left in place is a violation of the Clean Water Act. The United States Supreme Court has twice held that a "discharge" under the federal Clean Water Act occurs only when a pollutant is added to a water of the United States. (*Los Angeles County Flood Control District v. NRDC, Inc.* (2013) 133 S.Ct. 710, 712-713; *South Florida Management District v. Miccosukee Tribe of Indians* (2004) 541 U.S. 95, 109.) Because the violation requires a discharge, and the discharge requires an addition, the violation ended when the addition stopped. The evidence, therefore, does not support the Regional Board's implicit conclusion that the violation continued for 1,000 days.

OTHER ISSUES

The Regional Board moves to strike Plaintiffs' opening brief on the ground that it incorporated material from another brief and exceeded the page limits. The Regional Board's motion is DENIED.

The Regional Board submitted an administrative record of about 5,000 pages. Plaintiffs object to about 2,000 of those pages on the ground that they were not submitted as part of the ACL Order proceeding. Plaintiffs analogize to the record on appeal, and argue that the administrative record should consist of the documents included in a clerk's transcript (the written documents submitted by the parties and the decision-maker) and the reporter's transcript. The Court agrees that

these documents are not properly part of the administrative record. Plaintiffs' objections are SUSTAINED.

The parties make several requests for judicial notice, to augment the record, and to correct the record. None of these requests appears necessary for resolving the principal issues in this case, and there is no need to rule on them.

This statement of decision resolves the first cause of action in Plaintiffs' complaint. Plaintiffs' second cause of action alleges violation of the Bagley-Keene Act. Plaintiffs have declined to argue that issue as part of this motion. The issue is therefore waived. Plaintiffs' third cause of action alleges inverse condemnation. The claim is based on the concept that the ACL Order took a valuable property right from Plaintiffs for public use. Because the Court is granting Plaintiffs' motion for a writ to set aside the ACL Order, the inverse condemnation count is now moot. All causes of action in Plaintiffs' complaint are now fully resolved.

CCP § 1094.5(f) specifies that "[t]he court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ." Judgment should be entered in favor of Plaintiffs. A writ of mandate should issue commanding the Regional Board to set aside the ACL Order.

IT IS SO ORDERED.

Date: DEC 26 2017

HARRY S. KINNICUTT
Judge of the Superior Court

PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. I am employed in the City and County of San Francisco, and my business address is 155 Sansome Street, Suite 700, San Francisco, California 94104.

On November 14, 2017, at San Francisco, California, I served the attached document(s):

[PROPOSED] STATEMENT OF DECISION ON ADMINISTRATIVE CIVIL LIABILITY ORDER

On the following parties:

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☒ **BY OVERNIGHT DELIVERY:** On the date written above, I delivered the Federal Express package to a location authorized by Federal Express to receive documents for pickup. The package was placed in a sealed envelope or package designated by Federal Express with delivery fees paid or provided for, addressed to the persons on whom it is to be served at the addresses shown above.

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** On the date written above, I e-mailed the documents to the persons on the service list at the e-mail addresses listed above. I did not receive, within a reasonable time after transmission, any electronic message or other indication that transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on November 14, 2017, at San Francisco, California.

Arlene Won