

San Francisco Bay Regional Water Quality Control Board

December 14, 2016 Board Meeting Draft Minutes for Board Consideration ADOPTED FEBRUARY 8, 2017

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Item 1 - Roll Call and Introductions

Meeting called to order at 9:07 a.m. in the Elihu M. Harris Building, First Floor Auditorium.

Board Members Present

Cecilia Ogbu
Jayne Battey (left at 10:50)
Newsha Ajami
William Kissinger
Vice-Chair James McGrath (left
at 10:50)
Chair Terry Young

Board Members Absent

Steve Lefkovits

Status

QUORUM

Executive Officer Bruce Wolfe recognized Senior Environmental Scientist Karen Taberski's contribution to the Board and wished her well in her retirement.

Chair Young introduced new Board Member Battey.

Division Chief Bill Johnson introduced new Senior Engineer Robert Schlipf. Division Chief Keith Lichten introduced new Senior Environmental Scientist Xavier Fernandez. Senior Engineer Cheryl Prowell introduced new Scientific Aid Darin Chun.

State Water Board Member Steve Moore updated the Board about the statewide mercury water quality objectives and beneficial uses and the toxicity policy project. He noted that the State Board is planning to release revised draft dredge and fill procedures in February. State Board Member Moore also discussed emerging drought, water supply, and agriculture issues.

Item 2 – Public Forum

No parties requested to speak.

Item 3 - Minutes of the Board Meeting for November 9, 2016

Mr. Wolfe recommended adoption of the Minutes from the November 9, 2016 Board Meeting. Vice Chair McGrath moved for adoption of the Minutes; Board Member Ogbu seconded the motion.

Ayes: Ogbu, Ajami, Kissinger, McGrath, Young, Battey

Nos: none

ITEM ADOPTED

Item 4 - Chairman's, Board Members', and Executive Officer's Reports

Vice Chair McGrath recognized Phyllis Faber's contribution to wetlands preservation.

Mr. Wolfe gave an overview of this month's Executive Officer's Report. He gave an update about cleanup efforts at the Prosperity Cleaners site in Marinwood. He also noted that earlier in the month, the Alameda County Superior Court denied Baykeeper's Petition concerning the Board's CEQA finding for the Army Corps of Engineers maintenance dredging permit.

Consideration of Uncontested Item

Item 5A – Chevron Products Company, a division of Chevron USA Inc., Chevron Environmental Management Company, and Chem Trade West US LLC, Chevron Richmond Refinery, Richmond, Contra Costa County – Reissuance of NPDES Permit

Mr. Wolfe recommended adoption of Item 5A.

Board Member Ogbu moved for adoption of Item 5A; Board Member Ajami seconded the motion.

Ayes: Ogbu, Ajami, Kissinger, McGrath, Young, Battey

Nos: none

ITEM ADOPTED

Enforcement

Item 6 – John D. Sweeney and Point Buckler Club, LLC, Point Buckler Island, Suisun Marsh, Solano County – Consideration of Imposition of Administrative Civil Liability

Executive Officer Wolfe turned the item over to the Board's Advisory Team. Vice Chair McGrath recused himself. Board Member Battey stated that she would be abstaining.

Chair Young reviewed the hearing procedures. Advisory Team Legal Counsel Marnie Ajello noted that five documents were received after their relevant deadlines and recommended that the Chair use her discretion and exclude these submittals. Chair Young agreed and rejected the submittals. Ms. Ajello asked each of the Board members to individually confirm that they had not had any ex parte communications on this matter. All sitting Board members confirmed that this was the case.

Assistant Executive Officer Dyan Whyte introduced the item on behalf of the Prosecution Team. Staff Environmental Scientist Ben Martin gave the presentation to the Board. Mr. Martin gave an overview of the site and summarized the key findings in the cleanup and abatement order adopted by the Board in August 2016. He then described how the Prosecution Team used the statewide Enforcement Policy's penalty methodology to compute the administrative liability for the unpermitted discharge of fill. He highlighted how the Prosecution Team evaluated harm, culpability, cleanup and cooperation, ability to pay, and economic benefit in support of the recommended \$4.6 million penalty.

Bryan Elder, Water Resource Control Engineer and financial expert with the State Water Board's Office of Enforcement, described the Prosecution Team's analyses of ability to pay and economic benefit. Mr. Martin described how the Prosecution Team considered other factors as justice may require. Office of Enforcement Legal Counsel Laura Drabrandt summarized the legal questions raised regarding jurisdiction and the Prosecution Team's recommendation.

Larry Bazel, legal counsel for the Dischargers, requested that he give his presentation first before conducting cross examination. Chair Young granted the request.

Board Member Kissinger asked clarifying questions about nearby islands and the potential cost of restoration. Board Member Ogbu asked about the ability to pay and continue in business analyses. Board Member Kissinger asked about staff's communication with the Dischargers regarding the documentation needed to support their inability to pay claim. Board Member Ajami asked about business licenses for the activities on the Island and who conducted work on the Island. Chair Young asked about the sale of Mr. Sweeney's company in 2001 and avoided permit costs.

LUNCH BREAK at 12.30 p.m.; RECONVENED at 1:09 p.m.

Mr. Bazel introduced John and Jennifer Sweeney. He discussed the nature of the proceedings and separation of agency functions issues. Mr. Bazel presented background information on the Island. He described historical uses of the Island, changes in its vegetation, the presence of a debris line, and reasons why the Dischargers assert that most of the interior of the Island is not a tidal marsh. Mr. Bazel described how there is no evidence that a mass die back of vegetation occurred on the Island or that there was harm to endangered fish by blocking the Island's channels. Board members asked clarifying questions. Mr. Bazel described the bases for the Dischargers' assertion that the Island's interior is above the high tide line. Mr. Bazel introduced Dr. David Mayer, a fisheries expert, and asked him a number of questions related to his background and experience. Dr. Mayer elaborated on the statements made in his declaration regarding the potential for predation on endangered fish. Board members asked Dr. Mayer clarifying questions. Mr. Bazel asked Dr. Terry Huffman to describe his educational background and experience. Dr. Huffman responded to questions put forth by Mr. Bazel regarding his observations of vegetation on the Island and methods for estimating tidal elevations. Board Member Kissinger asked Dr. Huffman about methods to delineate wetlands and the vegetation observed. Board Member Ajami asked Dr. Huffman a number of questions related to interpreting aerial imagery and Freeman and Snag Islands. Mr. Bazel asked Dr. Huffman a

number of questions regarding groundwater. Mr. Bazel asked Mr. Sweeney a number of questions about the history of the Island and his activities, observations, and intentions. Mr. Sweeney then responded to a number of questions Mr. Bazel asked regarding his assets. Board members asked clarifying questions. Mr. Sweeney described his understanding of the permitting process, and Board members Ajami and Kissinger asked a number of questions.

Mr. Bazel cross examined the Prosecution Team's expert Dr. Peter Baye regarding his observations of the condition of vegetation on the Island. Ms. Drabrandt asked Dr. Stuart Siegel to give a quick overview of jurisdiction and how the Prosecution Team established the high tide line and determined that the majority of the Island is below the high tide. Ms. Drabrandt cross-examined Mr. Sweeney regarding his assets, the Club's assets, and the work performed on the Island. Ms. Drabrandt invited Steve Chappell, Executive Director of the Suisun Resource Conservation District, to discuss practices at managed wetlands, the local permitting process, and his knowledge of the Island.

Erica Maharg, an attorney representing San Francisco Baykeeper and the Citizen's Committee to Complete the Refuge, urged the Board to approve the \$4.6 million penalty. She noted that this is the most egregious violation the Board has considered in recent history. She stated that any uncertainties as to the harm caused or the condition of the Island before the unlawful acts is because the Dischargers did the work without permits.

Mr. Bazel presented his closing arguments. He highlighted that there was no mass die off, no direct evidence of harm to endangered fish, and the Island is high in elevation and therefore not jurisdictional. Mr. Bazel provided an overview of his legal arguments, discussed the Suisun Marsh Preservation Act, noted that, under the federal Clean Water Act, a discharge did not occur every day as calculated, and that the Club should not be named a discharger. He also reiterated that Mr. Sweeney cannot afford to pay the penalty, there was no economic benefit, and a penalty will force Mr. Sweeney to litigate.

Ms. Whyte presented closing remarks on behalf of the Prosecution Team. She stated that the Dischargers presented no new information and that the Prosecution Team has rebutted their arguments with scientific data. She noted that the Prosecution Team does not have to prove harm but, rather, support their recommendation that the potential for harm is major. She asserted that they have proven that a violation occurred and summarized how the final penalty was calculated. She noted that the Bay Conservation and Development Commission (BCDC) had rejected the Dischargers arguments about being permitted under the Suisun Marsh Conservation Act and the Army Corps Regional General Permit No. 3. She stated that none of the testimony refuted the Prosecution Team's demonstration that Mr. Sweeney should have been aware of the permitting process.

Board Member Kissinger asked about the possibility of opening the tide gate, what will be evaluated as part of the plan due in February, and the activities conducted by the Club. Board Member Ajami asked for more information about fish screens, and Dr. Bruce Herbold, fisheries expert for the Prosecution Team, responded. Board Member Ajami asked a number of clarifying questions about the permitting process and regulatory history. Board Member Ogbu asked

about the penalty calculation. Board Member Ajami asked BCDC Staff Counsel John Bowers to explain its regulatory process. Mr. Chappell described the local permitting process for Suisun Marsh. Board Member Ajami asked Mr. Sweeney about the timing of his activities. Board members Kissinger and Ajami asked Mr. Chappell a number of questions about permits for duck clubs.

Chair Young closed the session and noted that the Board would be going into closed session. Mr. Bazel objected.

CLOSED SESSION at 6:01 p.m.; RECONVENED at 7:56

Chair Young asked Ms. Ajello to read the changes the Board made to the Tentative Order into the record. These changes included reducing the penalty amount to \$2,828,000 from \$4,600,000 based on other factors as justice may require, as provided in the Enforcement Policy. Board Member Kissinger noted that he was persuaded by the Prosecution Team's case that there were tidal wetlands that were waters of the State and United States, and that there were discharges into those waters. He emphasized the seriousness of the violations and explained the rationale for reducing the penalty. Board Member Ogbu noted the need to get the restoration done and that the liability was appropriate given the serious violations. Board Member Ajami noted that the Dischargers had ample opportunity to change course and they did not. Chair Young discussed how the Board considered all the evidence and concluded with no doubt that the Board has jurisdiction in this matter. She noted that the Board disagreed with the proposition that the staff was vindictive. She noted that she agreed with the base liability calculation of \$11.2 million. She reiterated that Mr. Sweeney's actions caused serious damage to valuable and increasingly rare habitat and the importance of carrying out the restoration envisioned by the Board's cleanup and abatement order.

Board Member Kissinger moved for adoption of Item 6 as amended; Board Member Ogbu seconded the motion.

Ayes: Ogbu, Ajami, Kissinger, Young

Nos: none

ITEM ADOPTED

Item 9 – Closed Session – Litigation

Chair Young announced that the Board will be meeting in closed session to determine whether to initiate litigation. She noted that none of today's action items will be discussed during this session. [Authority: Government Code sections 11126(e)(1) and 11126(2)(B)-(C)]

CLOSED SESSION at 9:41 a.m.; RECONVENED at 10:42 a.m.

Item 11 - Adjournment

Meeting adjourned at 8:19 p.m. until the next Board Meeting – January 11, 2017