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***Via Certified Mail -
Return Receipt Requested***

January 14, 2016

John Donnelly Sweeney
Point Buckler LLC
Point Buckler Club LLC
171 Sandpiper Drive
Pittsburg, CA 94565

Sally Jewell, Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Penny Pritzker, Secretary
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, D.C. 20230

**Re: Notice of Violations and Intent to File Suit Under the Endangered
Species Act**

Dear Mr Sweeney,

NOTICE

The Endangered Species Act (“ESA”) Section 11(g), 16 U.S.C. § 1540(g) requires that sixty (60) days prior to the initiation of a civil action under the ESA, an entity must give notice of its intent to sue to the alleged violator.

This Notice provides notice on behalf of California River Watch (“River Watch”) to Point Buckler LLC, Point Buckler Club LLC and John Donnelly Sweeney (hereafter collectively referred to as “Developers”) as owners and developers of Point Buckler Island

located in Solano County, California¹, of the alleged harm to and unauthorized take of threatened and/or endangered species in the Suisun Bay Conservation Area, in violation of ESA § 9, 16 U.S.C. § 1538. Notice is also provided to the Secretary of the Department of the Interior and Secretary of the Department of Commerce.

The specific threatened and/or endangered species which are the subject of this Notice letter are the Delta Smelt, Central California Steelhead, Green Sturgeon, Sacramento Winter-Run and Central Valley Spring-Run Chinook Salmon, Salt Marsh Harvest Mouse and California Ridgeway Rail.

Following expiration of the 60-day notice period, River Watch will have cause to file suit in federal court to enforce the ESA unless the Secretaries have commenced an action to impose a penalty pursuant to 16 U.S.C. § 1540(a); or, the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress the violations of the ESA alleged in this Notice.

STATUTORY FRAMEWORK

Under ESA § 9, 16 U.S.C. § 1538(a)(1)(B) it is unlawful for any person to “take” an endangered species. ESA § 4(19), 16 U.S.C. § 1532(19), defines the term “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” A “take” includes direct as well as indirect harm and need not be purposeful or intentional. Cumulative acts resulting in a “take” are also actionable.

A “take” is defined in the ESA in the broadest possible manner to include every conceivable way in which a person or entity can “take” or attempt to “take” any fish or wildlife listed as endangered or threatened pursuant to the ESA. ESA § 10 permits the “take” of threatened and endangered species with the granting by the United States Fish & Wildlife Service (“FWS”) of an incidental take permit.

The ESA includes a broad citizen suit provision allowing any person to commence a civil suit on his/her own behalf to enjoin any person or entity alleged to be in violation of any provision of the ESA or a regulation issued under the authority of the ESA. A plaintiff in a civil suit can seek to enjoin both present activities which constitute an ongoing “take” and future activities reasonably likely to result in a “take” (see ESA § 1(g), 16 U.S.C. § 1540(g)).

¹ Latitude: 38-05'50" N; Longitude: 122-01'13" W; Decimal Degrees: Latitude: 38.0971406; Longitude: 122.0202413,

BACKGROUND

Delta Smelt

The delta smelt (*Hypomesus transpacificus*) is a small species of fish endemic to the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. Once abundant in the Bay-Delta ecosystem, it is now in imminent danger of extinction. The species was listed as threatened under the ESA on March 5, 1993 (58 Fed. Reg. 12854). The United States Fish & Wildlife Service (“FWS”) designated the Bay-Delta system as critical habitat for the delta smelt on December 19, 1994 (59 Fed. Reg. 65256).

Over the past decade the delta smelt population has been decimated even relative to these depleted levels, with a measured decline since 2000 of up to three orders of magnitude below historic lows. As a consequence, the U.S. Department of Fish & Wildlife (“FWS”) announced in 2010 that re-classifying the delta smelt from threatened to endangered was warranted, but precluded by higher priority listings (75 Fed. Reg. 17667, April 7, 2010). *See Generally San Luis & Delta-Mendota Water Authority vs. Jewell*, 747 F. 3d. 581 (9th Cir. 2014).

Steelhead Central California Coast DPS

This distinct population segment (“DPS”) includes naturally spawned anadromous steelhead (*Oncorhynchus mykiss*) originating below natural and manmade impassable barriers from the Russian River to and including Aptos Creek and all drainages of San Francisco Bay and San Pablo Bay eastward to Chipps Island at the confluence of the Sacramento and San Joaquin Rivers. This DPS was listed as threatened by the EPA on January 5, 2006 (71 Fed. Reg. 3). Critical habitat was designated on September 2, 2005 (70 Fed. Reg. 170).

Green Sturgeon DPS

The green sturgeon (*Acipenser medirostris*) was listed as threatened under the ESA for its Southern District DPS in 2006 (71 Fed. Reg. 67, April 7, 2006). The green sturgeon, a long-lived, slow growing species of fish, is the most marine oriented of the sturgeon species. Males reach maturity at the age of 15 years and range from 4.5 to 6.5 feet in length. Females reach maturity at the age of 17 years and range from 5 to 7 feet in length. They have survived practically unchanged for almost 200 million years, but are now on the brink of extinction due to rapid habitat change and over-harvesting.

The Sacramento River system is one of only three systems in North America in which the green sturgeon spawns. The green sturgeon is currently threatened by reduced water flow rates, impassable barriers and loss of critical habitat in the Sacramento River system. Critical habitat for this DPS was designated on October 9, 2009 to include the main stem Sacramento

River, the Sacramento-San Joaquin Delta, Suisun Bay, San Pablo Bay and San Francisco Bay (74 Fed. Reg. 195).

Sacramento Winter-Run/Central Valley Spring-Run Chinook Salmon

The Sacramento-San Joaquin River watershed is home to these two endangered species of fish. The National Marine Fisheries Service (“NMFS”) oversees the welfare of these anadromous fish species. Both have suffered a dramatic decline over the last several decades as reflected in their listing under the ESA.

Populations of the Sacramento Winter-Run Chinook Salmon (*Oncorhynchus tshawytscha*) have declined precipitously since the early 1980's from an estimated historic high of 117,808 to as few as 191 adult individuals returning to spawn in 1991. The species was declared by the ESA as threatened in 1990 (55 Fed. Reg. 46515) and re-classified as endangered on January 4, 1994 (59 Fed. Reg. 440). The NMFS re-affirmed the listing as endangered on June 28, 2005 (70 Fed. Reg. 37160, 37191).

Critical habitat for this species was extended downstream to Chipps Island (River Mile 0) at the westward margin of the Sacramento-San Joaquin Delta on June 16, 1993. Critical habitat now includes all waters from Chipps Island west to the Carquinez Bridge including Honker Bay, Suisun Bay, Carquinez Strait, all waters of San Pablo Bay west of the Carquinez Bridge, and all waters of the San Francisco Bay (north of the San Francisco-Oakland Bay Bridge) from San Pablo to the Golden Gate Bridge (58 Fed. Reg. 33212).

In 2009 the NMFS declared the species to have reached a high risk of extinction. See National Marine Fisheries Service Biological Opinion and Conference Opinion on the Long-Term Operations of the Central Valley Project and State Water Project 672, 674 - June 4, 2009.

The Central Valley Spring-Run Chinook Salmon (*Oncorhynchus tshawytscha*) was historically the second largest salmon run in the Central Valley watershed, supporting the bulk of the commercial fishery. Only remnant independent natural populations survive, representing the last vestige of the once robust populations in the Sacramento-San Joaquin River system. The species was listed by the EPA as threatened on September 16, 1999 (64 Fed. Reg. 50394). The NMFS re-affirmed this status on June 28, 2005 (70 Fed. Reg. 37160, 37191). The NMFS published the final designation of critical habitat for the species on September 2, 2005, described and published in detail at 70 Fed. Reg. 52488, 52518, and 52590-52603.

Salt Marsh Harvest Mouse

This rodent (*Reithrodontomys raviventris*) is in the family Muridae (sub-family *Sigmodontinae*). Two sub-species of salt marsh harvest mice are described in the Recovery Plan for Tidal Marsh Ecosystems of Northern and Central California, FWS, 2013 (“Draft Recovery Plan”). This Notice refers to the northern salt marsh harvest mouse (*Reithrodontomys raviventris halicoetes*) residing in the marshes of San Pablo Bay and Suisun Bay. The species was listed as endangered by the ESA on October 13, 1970 (35 Fed. Reg. 16047). This species is restricted to saline or brackish marsh habitats surrounding the San Francisco Bay Estuary and can be found in mixed saline/brackish areas near Suisun Bay.

Habitat loss, due to filling, diking, subsidence, changes in water salinity, non-native species invasions, rising of sea levels associated with global climate change, and pollution is the species’ greatest threat. Habitat suitability of many marshes is further limited by small size, fragmentation, and lack of other vital features such as sufficient escape habitat. Larger tracts of high quality habitat are needed to maintain stable populations over time. *See Salt Marsh Harvest Mouse 5-Year Review: Summary and Evaluation*, FWS, 2010. Maintenance of dike systems continues to isolate marshes into areas too small to develop complex tidal drainage networks. Dikes ordinarily hinder normal circulation of tidal flows and drainage, resulting in diked areas having less tidal amplitude and flushing which are either more dry or more wet (or both, seasonally) than undisturbed marsh. *Ibid.*

California Ridgeway’s Rail

Formerly known as the California clapper rail, the Ridgeway’s Rail (*Rallus longirostris obsoletus*) was listed as endangered by the EPA on October 13, 1970 (35 Fed. Reg. 1604). This bird species inhabits a range of salt and brackish water marshes in San Francisco Bay and Suisun Bay. Typically, the species utilizes salt marshes dominated by pickleweed (*Salicornia virginica*) and Pacific cordgrass (*Spartina foliosa*), and brackish marshes dominated by a wider range of plant species including bulrushes (*Bolboschoenus americanus*) and tules (*Schoenoplectus spp.*).

Originally these marshes consisted of vegetation zones including high, middle and low marshland. High marsh zones functioned as refugium for many salt marsh animals escaping high tides, particularly winter flood tides. However, these have largely been eliminated by the diking and filling of the marsh for land conversion. The fragmentation of habitat and construction of dikes and levees has increased predation of the species as terrestrial predators utilize the dike and levees as corridors to access those habitats where the species resides.

CONVERSATION OF TIDAL HABITAT TO DIKED UPLAND

The Developers own approximately 51 acres of land on Point Buckler Island located off the western tip of Simmons Island in the Suisun Marsh (the "Site"). Originally consisting of tidal marsh, the Site was diked decades ago as were most of the tidal marshes of Suisun Marsh. As of the time of the State Suisun Marsh Preservation Act in 1977, the Site was presumed to be managed for ducks. The 1984 Management Plan for the Site indicates the presence of two water control structures - one to flood the land with tidal waters and the second to drain it to tidal waters. There is no known updated Management Plan. With minimal or no management in place, tidal circulation was naturally restored to the Site over the past two to three decades, thereby re-establishing tidal marshes.

Beginning sometime between September, 2011 and May, 2012, and ending between August, 2014 and April, 2015, the Developers constructed a levee around Point Buckler Island. This construction took place without proper authorizations, certifications and/or permits having been obtained by the Developers from the FWS, NMFS, EPA, the Regional Water Quality Control Board, San Francisco Region, the San Francisco Bay Conservation and Development Commission ("BCDC"), California Department of Fish and Wildlife ("DFW") or the Delta Stewardship Council.

Construction of the levee around the perimeter of the Site by Developers resulted in the diking off of tidal channels located on the northeast, northwest and southwest portions of the Site. The Developers used an excavator to deepen and widen existing ditches and construct new ditches, and placed excavation materials onto the remnants of degraded levees and tidal marshes in order to construct the remnant levee or to construct the new levees. This materials placement was used to repair three levee breach locations and by-passed two levee breach locations - all where materials had eroded away. The resulting levees on the Site are at least 2 to 3 feet above the surrounding land.

Additional activities taking place on Point Buckler Island included securing a dock to newly installed pilings in tidal waterways, the planting of 14 trees, and the digging of 4 semi-circular ponds used to enhance duck habitat. Some grasses were mowed. Seven portable structures were brought to the property and placed on or adjacent to the new levees and within the Site interior. An elevated pathway was constructed on tidal marshes from the new levee to the Bay's edge in the northwest. A water control structure is currently located in the southwest corner of the property, not in a location identified in the 1984 Management Plan.

In performing these activities, the Developers cut off crucial tidal flow to the interior of the Site thereby drying out the former tidal marsh areas. Based upon photographic evidence and a review of reports filed by BCDC and DFW staff, the Developers have adversely impacted tidal marsh vegetation and critical habitat for several species listed as

endangered by the EPA. The Developers advertise the Site for recreational use - mainly kite surfing. Locked storage units on the now diked tidal marshes are maintained by Developers for the storage of kite surfing equipment. The ponds referred to above are designated by the Developers for use by duck hunters.

The tidal marshlands on the Site impacted by the Developers' activities as described in this Notice constitute waters of the State and of the United States. These activities pose significant risks to the threatened and endangered species identified in this Notice through both physical harm and reduction of critical habitat. The adverse impacts from levee construction activities on the Site may include those resulting from work conducted outside appropriate work windows for these protected species. These activities have compromised habitat function and value that provide food, cover or dispersal opportunities for the species identified in this Notice, and have modified habitat so as to eliminate or reduce breeding and feeding functions, thereby negatively affecting survival of these species. Further, these actions by Developers reduce habitat functions which these species use for foraging and protection from predators.

River Watch contends the Developers failed to seek consultation with or apply for requisite "take" permits from the FWS, NMFS or DFW, as required under the ESA, even though such application and appropriate mitigation would be required prior to the conversion of land on the Site. Such application with FWS or NMFS is a component of that impact and mitigation determination under the ESA.

HARM AND/OR HARASSMENT OF PROTECTED/ENDANGERED SPECIES

River Watch alleges that the threatened and endangered species identified in this Notice were present during the diking of Point Buckler Island; and, that the construction and continued maintenance of the levees on the Site and activities carried out by and/or conducted under the direction of the Developers, have modified and degraded the vegetation and habitat for those species and thus directly harmed and/or harassed the species. The high likelihood that these species were present on the Site and/or historically utilized the Site during the above-described activities, is based on the proximity of the Developers' property to the known feeding, breeding and migratory sites of these species.

VIOLATIONS OF THE ESA

The ESA prohibits any person, agency, or entity from committing a "take" or harming or harassing a species listed as endangered or threatened under ESA § 4, 16 U.S.C. § 1533; ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B). As clarified by the FWS in 1999, habitat modification or degradation that harms a listed species constitutes a "take" under the ESA (64 Fed. Reg. 60727).

River Watch alleges that the Developers, as owners and operators of the property and Site which is the subject of this Notice, converted habitat, including critical habitat of the species identified in this Notice, into a diked island for recreational purposes upon such property, and in doing so destroyed the critical habitat of these species, resulting in the harm and/or harassment of these species due to interference with feeding, breeding and sheltering. As a result the Developers are liable for a “take” under both the definitions of “harm” and “harassment”, ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B). This harm and harassment is continuing as the diking and other development on the Site permanently destroyed critical habitat essential to the survival of these species.

ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B), *et seq.*, authorizes any “take” otherwise prohibited by ESA § 9, 16 U.S.C. § 1538(a)(1)(B) under an incidental take permit, upon submission by the applicant of a habitat conservation plan approved by the Secretary of either the Department of the Interior or the Department of Commerce. River Watch alleges that no such habitat conservation plan was submitted by or approved on behalf of the Developers; and, that the Developers failed to apply for an incidental take permit for the diking and development of the Site, in violation of ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B).

IDENTIFICATION OF ENTITY BRINGING NOTICE

California River Watch is an Internal Revenue Code 501(c)(3) non-profit, public benefit corporation organized under the laws of the State of California, with headquarters located in Sebastopol, California and offices in Los Angeles, California. The mailing address of River Watch’s northern California office is 290 S. Main Street, #817, Sebastopol, CA 95472. The mailing address of River Watch’s southern California office is 7401 Crenshaw Boulevard, #422, Los Angeles, CA 90043. River Watch is dedicated to protecting, enhancing, and helping to restore surface waters and groundwaters of California including rivers, creeks, streams, wetlands, vernal pools, aquifers and associated environs, biota, flora and fauna, and educating the public concerning environmental issues associated with these environs.

River Watch has retained legal counsel identified below with respect to the issues addressed in this Notice. All communications should be addressed to counsel:

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CONCLUSION

The activities of the Developers as alleged in this Notice violate the ESA. The destruction of critical habitat of threatened, protected and endangered species significantly hinders the prospects for their recovery.

At the close of the 60-day notice period, River Watch has cause to pursue a citizens' suit against the Developers for the violations of the ESA described herein. If the Developers correct these violations prior to expiration of the notice period, River Watch will not proceed to suit.

River Watch is willing to discuss effective remedies for the violations described in this Notice. If the Developers wish to pursue such discussions in the absence of litigation, it is suggested those discussions be initiated within the next 20 days so that they may be completed before the end of the notice period.

Sincerely,



Edward E. Yates

EEA:lmh

cc: Jack Silver, Esq.
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