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Filed JUL 09 2020
BRANDON E. RILEY, CLERK
By Allison Little
DEPUTY

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN JOAQUIN
STOCKTON DIVISION**

WETLANDS PRESERVATION)
FOUNDATION,)
Plaintiff,)
v.)
DEPARTMENT OF WATER RESOURCES,)
et al.,)
Defendants.)

Case No.
STK-CV- 2018-8957

STATEMENT OF DECISION

Plaintiff, Wetlands Preservation Foundation (WPF), proceeded to a court trial on its First Amended Petition for Writ of Mandate and Complaint (FAC) against Defendants, Department of Water Resources (DWR), and The Nature Conservancy (TNC). WPF was represented by the law firms of Kecker, Van Nest & Peters LLP and Downey Brand LLP; DWR was represented by the Attorney General of California; TNC was represented by Paul Hastings LLP.

The FAC asserts the following causes of action:

- 1st cause of action – petition for writ of mandate against DWR;
- 2nd cause of action – complaint for destruction of public trust natural resources against DWR;
- 3rd cause of action – complaint for public nuisance against DWR and TNC;
- 4th cause of action – complaint for private nuisance against DWR and TNC; and,
- 5th cause of action – complaint for breach of contract against TNC.

After due consideration of the evidence and arguments presented at trial, the pre-trial

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3 briefs and post-trial briefs, and the post-closing argument briefs submitted and argued, **IT**
4 **IS HEREBY ORDERED** as follows:

5 **1st Cause of Action – Petition for Writ of Mandate v. DWR**

6 The 1st cause of action seeks the issuance of a writ of mandate pursuant to CCP
7 §1085; that is, traditional mandamus. Traditional mandamus is available when an agency
8 abuses its discretion. “A decision is an abuse of discretion only if it is ‘arbitrary,
9 capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair.’
10 [Citations.]” *Alejo v. Torlakson* (2013) 212 Cal.App.4th 768, 780.

11 The threshold issue is what duty DWR has with regard to the operations/maintenance
12 of Staten Island.

13 TNC has owned Staten Island since 2001. In 2001, TNC purchased Staten Island
14 using approximately \$35 million in public taxpayer money authorized by California
15 Proposition 13 and California Proposition 204. Half of the purchase money was provided
16 by CalFED (pursuant to Proposition 204) and half was provided by DWR (pursuant to
17 Proposition 13). See, Trial Transcript (Eaton) 103:22-104:1.

18 In exchange for the Proposition 13 funds that DWR granted to TNC so that TNC
19 could acquire Staten Island, DWR obtained the Staten Island Perpetual Conservation
20 Easement Deed (SPCE), which is an exclusive and perpetual easement requiring
21 conservation of Staten Island’s agricultural land and wildlife habitat. See, Trial Exhibit
22 43 (SPEC); Trial Exhibit 485 (Tabor Deposition Designations) 65:15-20; 87:15-88:4;
23 91:6-10; 105:22-25; Trial Transcript (Eaton) 107:2-13. The SPCE was the mechanism by
24 which DWR sought to fulfill its obligation to ensure that Proposition 13 money was used
25 in furtherance of Proposition 13’s requirements to protect and preserve agricultural lands
26 and wildlife habitat. See, Trial Exhibit 485 (Tabor Deposition Designations) 87:15-88:4;
27 91:6-10; 105:22-25; 143:22-144:3; 152:16-153:10; see also, Trial Transcript (Eaton)
28 107:2-13. The stated purposes of the SPCE are to preserve and protect each of the
Multiple and Complementary Benefits of Staten Island to encourage and promote
wildlife-friendly agricultural practices on Staten Island. Trial Exhibit 43 (SPEC) §1;
Trial Exhibit 485 (Tabor Deposition Designations) 147:11-15. The Multiple and
Complementary Benefits in the SPCE are: “(1) agricultural land preservation, including

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2 the economic viability of agricultural operations; (2) wildlife habitat protection; (3)
3 protection of a flood plain area from potential inappropriate and incompatible
4 development; and, (4) potential role in future flood management and water management
5 improvements.” Trial Exhibit 43 (SPCE) 43.00002. Thus, the SPCE permits TNC to
6 conduct agricultural practices on Staten Island so long as it does so in a manner
7 consistent with the preservation or enhancement of the Multiple and Complementary
8 Benefits. Trial Exhibit 43 (SPCE) §3.A; Trial Exhibit 484 (Smith Deposition
9 Designations) 49:18-21.

10 It was the intent of DWR and TNC that TNC refrain from engaging in actions that
11 would result in the conversion of any material portion of Staten Island away from
12 agricultural use. Trial Exhibit 43 (SPEC) 3.A; Trial Transcript (Smith) 1769:14-24. **The**
13 **SPEC requires TNC to maintain Staten Island, together with the improvements**
14 **thereon, in the same or better condition as on the date it was acquired by TNC,**
15 **subject to normal wear and tear.** Trial Exhibit 43 (SPCE) 3.C. This includes Staten
16 Island’s levees. Trial Exhibit 485 (Tabor Deposition Designations) 143:22-144:3;
17 152:16-153:10; Trial Transcript (Smith) 1476:22-26.

18 The SPCE further provides DWR authority to enjoin any activity or use of Staten
19 Island that is inconsistent with the stated purposes of the SPEC and to enforce the
20 restoration of such areas or features that may be damaged by any activity or use of Staten
21 Island, which is inconsistent with the terms of the SPCE. Trial Exhibit 43 (SPCE) 2.C.

22 The SPCE explicitly states that enforcement is essential to achieve its purposes. Trial
23 Exhibit 43 (SPCE) 5.B.

24 DWR and TNC agreed that the provisions of the SPCE shall be liberally construed to
25 effectuate its conservation purposes. Trial Exhibit 43 (SPCE) 5.H.

26 The SPCE was granted to the “State [of California], acting by and through the
27 Department [of Water Resources].” See, Trial Exhibit 43 (SPEC) 43.00003. The SPEC
28 benefits the State of California “[b]y providing for wildlife-friendly agriculture in
perpetuity.” Trial Exhibit 485 (Tabor Deposition Designations) 128:2-8.

DWR understood that it was its “sole responsibility” in its “relationship with TNC []
to enforce the conservation easement.” Trial Exhibit 484 (Smith Deposition
Designations) 50:25-51:5.

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2 The language of the SPEC indicates that the duty is discretionary and so, how DWR
3 goes about its conservation, preservation, and protection of Staten Island is up to DWR
4 and cannot be second-guessed by third-parties or the courts. *Hollman v. Warren* (1948)
5 32 C.2d 351, 354-356.

6 By its FAC, WPF basically asserts that TNC's planting of corn on a great majority of
7 Staten Island "has been severely detrimental to Staten Island's soil elevations and levee
8 stability, and threatens the flooding and destruction of Staten Island and its environmental
9 and agricultural resources." FAC, ¶23. The FAC more particularly explains:

10 "Agricultural land in the Delta is particularly susceptible to oxidation of organic
11 soil, causing interior elevation 'subsidence.' Subsidence is the degradation,
12 sinking, and loss of soil. It is the result of microbial decomposition of oxygenated
13 (aerobic) organic soils, causing soil loss and lowered field elevations. The
14 presence of oxygen in the soil, introduced when the soil is tilled before planting,
15 enables soil microbes to consume peat for its nutrient content; releases carbon to
16 the atmosphere; and causes field elevations to subside. In turn, subsided field
17 elevations increase seepage from adjacent riverine channels; increases residual
18 salts in root zones, reducing agricultural productivity; and increase levee
19 liquefaction risks." FAC, ¶19.

20 The Delta has been subsiding since the 19th century; that is, as soon as the marshes
21 were drained and the soil was exposed to air. Trial Transcript (Eaton) 153:4-10.
22 Subsidence was occurring on Staten Island when TNC acquired Staten Island. Trial
23 Transcript (Eaton) 153:11-13. Critically, it is not known how much subsidence has
24 occurred on Staten Island since TNC took over the island in 2001. Trial Transcript
25 (Cosio) 598:10-598:24. It is not known whether seepage under Staten Island levees has
26 increased over time since 2001; it has not been measured. Trial Transcript (Smith)
27 1550:19-1591:2.

28 From 2001, when DWR assumed the SPCE, until 2016, DWR took no steps to
oversee or monitor compliance with the SPCE. See, Trial Transcript (Ziegler) 1159:10-
16; (Bradbury) 1507:20-23; (Harrell) 1541:10-22; (Smith) 1703:16-18; 1704:6-18.

Beginning in 2013, environmental organizations approached DWR regarding
concerns about the management of Staten Island. Trial Transcript (Bradbury) 1514:11-
17; 1517:5-9; Trial Exhibit 62; Trial Exhibit 481 (Bradbury Deposition Designations)

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2 39:4-40:8.

3 In 2014, DWR employee Mike Bradbury wrote, “there is no doubt that [TNC is] not
4 managing the island in the best interest of wildlife.” Trial Transcript (Bradbury) 1516:2-
5 22; Trial Exhibit 62 - 62.00002; Trial Exhibit 481 (Bradbury Deposition Designations)
6 111:3-112:11.

7 In 2017, DWR was notified that the condition of Staten Island’s levees was
8 concerning; that the southern part of the island had subsided significantly; that the peat
9 soils were becoming alkaline due to salt accumulation; and, that oxidative subsidence
10 was causing greenhouse gas emissions. Trial Transcript (McCormick) 58:15-59:7;
59:17-24; 60:3-14; 94:1-8.

11 In 2018, DWR was aware of a report by the Delta Conservancy that stated that in the
12 southern part of Staten Island, “agricultural production [was] diminishing due to wet and
13 salty soil conditions caused mainly by subsidence.” Trial Exhibit 85 - 85.000003.

14 In 2019, DWR was notified that the southern end of Staten Island was experiencing
15 “reduced yields due to subsidence and the accumulation of salt.” Trial Exhibit 86 -
16 86.00022; see also Trial Transcript (Smith) 1728:5-19; 1733:11-1734:16.

17 DWR acknowledged that the levees on Staten Island had not been sufficiently
18 maintained and that more could have been done to restore wetlands and natural habitat.
Trial Transcript (McCormick) 60:18-61:2.

19 Critically, DWR never took any action to enforce the SPCE against TNC or to
20 demand corrective action. Trial Transcript (Smith) 1689:17-22.

21 DWR never conducted any studies of soil subsidence or water seepage on Staten
22 Island. See, Trial Transcript (Bradbury) 1519:10-21; (Harrell) 1550:18-1551:12; Trial
23 Exhibit 482 (Brock Deposition Designations) 113:12-25.

24 DWR did not assess the risk of failure or breach of Staten Island levees or evaluate
25 whether the levees meet the PL 84-99 standard. Trial Transcript (Lobato) 802:23-26;
803:10-23.

26 DWR never analyzed the interior slopes of Staten Island levees, their waterside
27 erosion, levee crown height, levee stability, or whether there is seepage under Staten
28 Island’s levees. Trial Transcript (Lobato) 847:23-852:1; (Smith) 1711:27-1712:2;
1714:19-1715:5; 1749:10-26.

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2 For the first time, *in 2016*, in response to complaints, DWR adopted a protocol for
3 monitoring compliance with the SPCE. See, Trial Transcript (Harrell) 1530:11-15;
4 1530:22-1531:10; Trial Exhibit 484 (Smith Deposition Designations) 86:18-25; 88:21-
5 89:4. The SPCE monitoring protocol involved reviewing an annual operating report that
6 TNC staff provided, visiting the property for one day, and “relying on [TNC staff] to
7 explain how they manage the property, why they manage it that way, and what results
8 they are getting.” Trial Transcript (Harrell) 1531:28-1532:4; 1542:22-1543:19; 1544:12-
9 1545:27; (Smith) 1569:17-1570:19; 1708:18-20; 1710:11-1711:22; Trial Exhibit 484
10 (Smith Deposition Designations) 117:20-118:5; 150:9-17; 239:2-11; Trial Exhibit 990;
11 Trial Exhibit 991 (monitoring protocol).

12 Since 2016, DWR has annually engaged in a single three-to-four hour trip per year to
13 Staten Island. DWR’s review of information as part of its easement monitoring has been
14 limited entirely to documents that TNC provided to DWR. Trial Transcript (Smith)
15 1710:28-1711:5. DWR did not independently verify any conclusions in the easement
16 monitoring reports. Trial Transcript (Harrell) 1546:21-1547:9; (Smith) 1556:9-13;
17 1562:21-1563:13; 1564:26-1565:1; 1574:7-13; 1579:8-17; 170:12-18; 1710:11-1711:22.

18 Each year from 2016 to 2019, DWR has reached the summary conclusion that TNC
19 has fully complied with SPCE. Trial Exhibits 950, 951, 952, and 953. Through its
20 monitoring reports, DWR gave its stamp of approval to TNC’s actions on Staten Island.
21 Trial Transcript (Smith) 1692:12-20; 1717:1-16.

22 In evaluating compliance with the SPCE, DWR did not measure soil subsidence or
23 otherwise take any soil measurements or samples. Trial Transcript (Smith) 1711:23-26.

24 In evaluating compliance with the SPCE, DWR did not analyze the slope of Staten
25 Island’s levees, waterside erosion, or the proximity of toe ditches to the levees. Trial
26 Transcript (Smith) 1749:10-21.

27 In evaluating compliance with the SPCE, DWR did not evaluate levee integrity in any
28 way beyond a *visual inspection from a car*. Despite acknowledging that maintaining
levees is essential to the preservation of agricultural lands on Staten Island, *DWR had no
knowledge of the condition of Staten Island’s levees at the time TNC acquired the
island, or of Reclamation District 38’s work on the levees*. For example, DWR did not
ask whether Staten Island levees had experienced any leaks or sloughing, and DWR was

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2 unaware that the levees had exhibited three boils and a deep crack in 2017. Trial
3 Transcript (Smith) 1569:12-16; 1578:26-1579:7; 1611:24-1612:3; 1614:18-24; 1746:18-
4 26; 1746:27-1747:12; 1748:17-23; 1748:26-1749:5; 1750:27-1752:15; Trial Exhibit 484
5 (Smith Deposition Designations) 125:10-22.

6 In evaluating compliance with SPCE, DWR did not consider levee seepage, riparian
7 habitat, or greenhouse gas emissions. See, Trial Transcript (Smith) 1711:23-1712:12;
8 1715:19-1716:1; Trial Exhibit 484 (Smith Deposition Designations) 151:8-152:19;
9 156:22-157:7; 181:7-12.

10 DWR did not evaluate whether TNC's activities may have an effect on adjacent
11 waterways of the Mokelumne River. Trial Transcript (Smith) 1768:21-25. DWR did not
12 consider the risks to Staten Island of catastrophic flooding. Trial Transcript (Smith)
13 1714:19-1715:5.

14 DWR never performed any scientific or engineering observations of Staten Island.
15 See, Trial Transcript (Harrell) 1550:18-1551:12; (Smith) 1690:5-8; Trial Exhibit 484
16 (Smith Deposition Designations) 41:3-9; 130:16-131:3; 132:21-24; 181:21-24; 221:24-
17 222:6.

18 DWR never took any steps to learn about subsidence's effect on the levees, and
19 farming on Staten Island. Trial Transcript (Smith) 1740:2-1741:12; 1737:27-1739:2;
20 Trial Exhibit 482 (Brock Deposition Designations) 139:11-19; 130:19-131:1.

21 DWR never exercised any authority under the SPCE to force TNC to address issues
22 of subsidence, seepage, agricultural productivity, or levee integrity. See, Trial Exhibit
23 484 (Smith Deposition Designations) 192:20-24; 193:6-11; 194:4-8; 196:15-197:1;
24 134:18-21; 154:12-15.

25 Thus, the Court finds that DWR took no action to oversee or monitor TNC's activities
26 pursuant to the SPCE from 2001-2016; that is, for 15 years. And then, when it began its
27 monitoring programs, DWR continued to do nothing. It did not investigate or do any
28 studies; monitoring observers did not even get out of their vehicles on site visits. DWR
simply took the word of TNC – without verifying the same – and signed off. The Court
finds that DWR merely “rubber-stamped” TNC's activities, without exercising any
discretion as required by the SPCE.

Accordingly, the Court finds that DWR abused its discretion by **refusing to exercise**

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2 **its discretion.** See, *AIDS Healthcare Foundation v. Los Angeles County Department of*
3 *Public Health* (2011) 197 C.A.4th 693, 704 [“Mandamus will lie to command the exercise
4 of discretion, that is, to compel some action.”]; see also, *Morris v. Harper* (2001) 94
5 C.A.4th 52, 62-63 [“A refusal to exercise discretion is itself an abuse of discretion.
6 Accordingly, ...mandamus ... lie[s] to command the exercise of discretion—to compel
7 some action upon the subject involved....”]; see also, *Sunset Drive Corp. v. City of*
8 *Redlands* (1999) 73 C.A.4th 215, 222. DWR’s decision to do nothing is arbitrary and
9 capricious; there is no evidentiary support for DWR’s decision to do nothing. *Alejo v.*
10 *Torlakson* (2013) 212 C.A.4th 768, 780.

11 **For these reasons, the Court finds in favor of WPF on the 1st cause of action for**
12 **issuance of a writ of mandate.**

13 However, the injunctive relief sought by WPF goes too far. WPF asks for the
14 attainment of specific goals and standards to be met and to be met by certain deadlines.
15 While the Court may compel the exercise of discretion by DWR, it cannot compel DWR
16 to exercise its discretion in a particular manner. *Morris v. Harper* (2001) 94 C.A.4th 52,
17 62-63; *Hollman v. Warren* (1948) 32 C.2d 351, 354-356.

18 At the heart of this issue is the failure of DWR to do anything in terms of oversight
19 and monitoring, and also, DWR’s failure to do anything in terms *of being able to* oversee
20 and monitor TNC’s activities on Staten Island pursuant to the SPEC.

21 The Court notes that the SPEC requires TNC to maintain Staten Island in the same or
22 better condition as on the date it was acquired by TNC, subject to normal wear and tear.
23 Trial Exhibit 43 (SPCE) 3.C. But since 2001, DWR has done nothing to inform itself of
24 the baseline condition of Staten Island in order that DWR could be able to measure and
25 evaluate and oversee and monitor whether TNC’s activities are detrimentally affecting
26 Staten Island’s agriculture and/or wildlife habitat.

27 Discretion cannot be exercised without knowledge or information. See, *for example,*
28 *Stuart v. Stuart* (1962) 209 Cal.App.2d 478, 483 [“discretion of the trial judge, based on
his knowledge of the whole case background”]; see also, *Sierra Club v. County of*
Sonoma (2017) 11 C.A.5th 11, 22 [“actions by a local agency are discretionary when they
require the exercise of the administrator's subjective judgment”]; see also, “discretion.”
Merriam-Webster.com. 2020. <https://www.merriamwebster.com> (28 February 2020) -

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2 “individual choice or judgment.”

3 As detailed above, DWR has not done anything as an exercise of its discretion
4 pursuant to the SPCE and further, DWR has not done anything to establish or inform
5 itself of a baseline from which it can exercise discretion for oversight and monitoring of
6 Staten Island.

7 To that end, **the Court mandates that DWR conduct a baseline study or**
8 **evaluation of Staten Island to enable DWR to exercise its discretion in its oversight**
9 **and monitoring of Staten Island pursuant to the SPCE, going forward.**

10 **2nd Cause of Action – Destruction of Public Trust Natural Resources v. DWR**

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12 The State and its subdivisions; i.e., DWR, share responsibility under the public trust
13 doctrine for protecting natural resources and those entities may not approve of destructive
14 activities without giving due regard to the preservation of those resources. *Center for*
Biological Diversity, Inc. v. FPL Group, Inc. (2008) 166 Cal. App. 4th 1349.

15 In *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434, 441, 446,
16 the California Supreme Court explained:

17 “[T]he public trust is more than an affirmation of state power to use public
18 property for public purposes. It is an affirmation of the duty of the state to protect
19 the people's common heritage of streams, lakes, marshlands and tidelands,

20 ...

21 ***The state has an affirmative duty to take the public trust into account in the***
22 ***planning and allocation of water resources, and to protect public trust uses***
23 ***whenever feasible.*** (Emphasis added.)

24 The Third District Court of Appeal recently explained in *Environmental Law*
Foundation v. State Water Resources Control Bd. (2018) 26 Cal.App.5th 844, 857:

25 “The [public trust] doctrine is expansive. [Citation.] ‘The range of public trust
26 uses is broad, encompassing not just navigation, commerce, and fishing, but also
27 the public right to hunt, bathe or swim. [Citation.] Furthermore, the concept of a
28 public use is flexible, accommodating changing public needs. [Citation.] For
example, an increasingly important public use is the preservation of trust lands ‘
“in their natural state, so that they may serve as ecological units for scientific

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2 study, as open space, and as environments which provide food and habitat for
3 birds and marine life, and which favorably affect the scenery and climate of the
4 area.” [Citation.]”“

5 Citing *National Audubon, supra* @ 441, the Third District Court of Appeal re-iterated
6 that the public trust doctrine is “an affirmation of the duty of the state to protect the
7 people's common heritage.”

8 Staten Island is protected by the public resources doctrine.

9 Accordingly, DWR has “an affirmative duty to take the public trust into account ...
10 and to protect public trust uses whenever feasible.” *National Audubon Society v.*
11 *Superior Court* (1983) 33 Cal.3d 419, 446. More particularly, DWR owes a public trust
12 duty to protect the natural resources of Staten Island. DWR may not approve activities
13 on Staten Island without giving due regard to the preservation of Staten Island’s natural
14 resources. *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal. App.
4th 1349.

15 The duty is discretionary and how DWR goes about its protection of Staten Island’s
16 natural resources is up to DWR and cannot be second-guessed by third-parties or the
17 courts. *Hollman v. Warren* (1948) 32 C.2d 351, 354-356. But, for the same reasons
18 enunciated in the discussion of the petition for writ of mandate, above, the Court finds
19 that DWR abused its discretion by **refusing to exercise its discretion** as part of its
20 responsibilities under the public trust doctrine.

21 **Accordingly, the Court finds in favor of WPF on the 2nd cause of action for**
22 **violation of the public trust doctrine.**

23 **3rd and 4th Cause of Action – Public and Private Nuisance, Respectively, v. DWR**
24 **and TNC**

25 **Right to Farm Act**

26 California Civil Code, § 3482.5 (commonly referred to as the Right to Farm Act)
27 reads, in pertinent part, as follows:

28 No agricultural activity, operation, or facility, or appurtenances thereof,
conducted or maintained for commercial purposes, and in a manner consistent
with proper and accepted customs and standards, as established and followed by

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2 similar agricultural operations in the same locality, shall be or become a nuisance,
3 private or public, due to any changed condition in or about the locality, after it has
4 been in operation for more than three years if it was not a nuisance at the time it
5 began.

6 The seminal case on the application of Civil Code, §3482.5 is *Rancho Viejo LLC v.*
7 *Tres Amigos Viejos LLC* (2002) 100 C.A.4th 550. The case explains that there are seven
8 (7) elements that must be met before the bar applies. The *Rancho Viejo* Court wrote:

9 “For section 3482.5, subdivision (a)(1) to apply, defendant must satisfy seven
10 requisites: The activity alleged to be a nuisance must be (1) an agricultural activity
11 (2) conducted or maintained for commercial purposes (3) in a manner consistent
12 with proper and accepted customs and standards (4) as established and followed by
13 similar agricultural operations in the same locality; the claim of nuisance arises (5)
14 due to any changed condition in or about the locality (6) after the activity has been
15 in operation for more than three years; and the activity (7) was not a nuisance at
16 the time it began.”

17 Moreover, and important to this discussion is the recognition by the courts that the
18 Right to Farm Act is intended to protect existing farm operations from encroaching
19 suburbs. See, *Rancho Viejo LLC v. Tres Amigos Viejos LLC* (2002) 100 C.A.4th 550,
20 562.

21 The Right to Farm Act (Civil Code, §3482.5) does not apply in this case and
22 therefore, it does not bar WPF’s public and private nuisance claims.

23 First, to apply the Right to Farm Act in this case would be to ignore the legislative
24 purpose of the Act. As WPF argues, it is the failure of Defendants to address and correct
25 subsidence on Staten Island that is at the core of this complaint; it is not the fact that
26 agricultural activity is taking place. In fact, the remedy sought by WPF is to compel a
27 different type of agricultural activity.

28 Secondly, Defendants did not establish the required seven (7) elements necessary for
the application of Civil Code, §3482.5. For example, Defendants did not establish the
existence of a “changed condition;” i.e., element 5. Since 1993, organizations controlled
by or overseen by Dino Cortopassi have developed and continuously maintained a four-
season wetlands habitat in Brack Tract, named the Black Hole. Trial Transcript
(McCormick) 87;7-12; (Cortopassi) 185:19-23; 192:20-18; 303:22-304:4. The “change”
upon which Defendants rely to argue the application of the Right to Farm Act is simply in

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2 how title to the property is held. Defendants have not established a “*changed condition*
3 *in or about the locality*” as required by Civil Code section 3482.5.

4 **Nuisance**

5 CACI 2020 sets forth the factual elements required for a public nuisance cause of
6 action. CACI 2021 sets forth the factual elements for a private nuisance cause of action.
7 Common to both causes of action is the element that Defendant, by acting or failing to
8 act, created a condition that is one or more of the following: 1) harmful to health; 2)
9 indecent or offensive to the senses; 3) an obstruction to the free use of property, so as to
10 interfere with the comfortable enjoyment of life or property; 4) unlawful obstruction of
11 the free passage or use, in the customary manner, or any navigable lake, or river, bay,
12 stream, canal, or basin, or any public park, square, street, or highway; or, 5) a fire hazard
13 or other potentially dangerous condition to plaintiff’s property. See also, Civil Code
14 §§3479, 3480, 3481; *Koll-Irvine Center Property Owners Assn. v. County of Orange*
(1994) 24 C.A.4th 1036, 1040.

15 “An essential element of a cause of action for nuisance is damage or injury.” *Helix*
16 *Land Co. v. City of San Diego* (1978) 82 C.A.3d 933, 950.

17 In this case, WPF alleges that Defendants “have created and then failed to address a
18 condition in which there are present serious *risks* that Staten Island will be permanently
19 flooded, ... and that *there will be harm* to Staten Island’s ... neighboring islands due to
20 disruption of the river channel and heightened pressure on nearby levees.” FAC,
¶¶88,100. (Emphasis added.)

21 Importantly, nuisance claims cannot be premised on the fear of the prospect of future
22 harm. *Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 C.A.4th
23 1036, 1041. And while prospective nuisances may be enjoined, the evidence must show
24 that the danger is probable or imminent. *Helix Land Co. v. City of San Diego* (1978) 82
C.A.3d 933, 950-951.

25 The evidence did not establish that the activities of TNC on Staten Island have
26 created a condition such that it is probable or imminent that Staten Island’s levees will
27 fail and/or Staten Island will flood. See, evidence below:

28 WPF’s expert is not aware of any condition on Staten Island that has had any
effect on Brack Tract since 2001. Trial Transcript (Cosio) 589:8-589:11. Mr.
Cortopassi testified that the way WPF is able to use the Black Hole has not been

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2 affected by any condition of Staten Island. Trial Transcript (Cortopassi) 345:25-
3 346:3.

4 In using the word “risk,” WPF uses the word to refer to the risk of Staten Island’s
5 levees failing sometime between 2019 and 2030. Trial Transcript (Cosio) 577:7-
6 577:19. The basis for Mr. Cosio’s opinion of risk is his review of the 2009 Delta
7 Risk Management Study. As Mr. Cosio understood, there is a calculated risk
8 between 2005 and 2030. Trial Transcript (Cosio) 577:7-28. As Mr. Cosio
understood, the Delta Risk Management Study concluded that Staten Island’s
levees have only a five to seven percent chance of failing over a 25-year period.
Trial Transcript (Cosio) 577:7-578:5; 580:10-581:9.

9 WPF’s expert has not done any analysis or evaluation to predict the likelihood of
10 Staten Island’s levees failing or breaching over any period of time. Trial
Transcript (Cosio) 576:1-6.

11 Because Mr. Cosio does not know how much subsidence has occurred on Staten
12 Island since TNC took over, he cannot calculate how much, if any, additional
13 force has been placed on the island’s levees due to subsidence since TNC’s
acquisition. Trial Transcript (Cosio) 598:10-598:24.

14 TNC’s expert hydrologist, Dr. Deverel, stated that based on the different
15 characteristics of the soil layering and the movement of water in the silty sand, the
16 data indicates that there is a very low likelihood that flooding on Staten Island
would have any effect on the Black Hole. Trial Transcript (Deverel) 775:26-
776:10.

17 Robert Wagner’s firm, Wagner & Bonsignore, is the district engineer for four
18 reclamation districts, including Staten Island’s Reclamation District 38. Trial
19 Transcript (Wagner) 1264:9-14; 1270:18-22. In Mr. Wagner’s opinion, he is not
concerned that Staten Island’s levee system will fail or that Staten Island will
20 flood. Trial Transcript (Wagner) 1324:27-1325:8; 1325:12-20. Based upon a
bathymetric survey, land survey, physical inspection, and stability slope analysis,
21 Mr. Wagner’s expert opinion is that Staten Island’s levee system is in pretty good
22 shape. Trial Transcript (Wagner) 1290:19-1291:7.

23 Staten Island has not experienced a levee failure since 1906. Trial Transcript
(Wagner) 1324:27-1325:11.

24 The entire Staten Island levee system fits within the Hazard Mitigation Plan
25 standards for Delta levees. Trial Transcript (Wagner) 1291; 9-11; 1268:13-
1269:1; (Cosio) 557:13-557:16.

26 Moreover, in the event a flood did occur on Staten Island, the water would get
27 transmitted through the peat soil, through the tidal mud months later, and down to
28 the silty sand, and the water would move through the sands at a rate of about a
hundred feet per year. The water that reaches the silty sands under Staten Island
that moves toward Brack Tract would then encounter the pressures from the

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2 Mokelumne River, which would limit the ability of the water to move toward
3 Brack Tract and would tend to contain groundwater movement. If water on
4 Staten Island were to make its way past the Mokelumne River toward the Black
5 Hole, the water would then have to make its way up through the clay layer into
6 the peat layer on the Black Hole to have any potential effect on the Black Hole.
7 Trial Transcript (Deverel) 766:7-767:20; 791:3-9. Based on the different soil
8 characteristics and layering underneath Staten Island and the Black Hole, the
9 movement of water, and the slow movement of water in the silty sand, the data
10 indicate that there is a very low likelihood that there would be any effect on the
11 Black Hole if Staten Island flooded and there is a very low likelihood that
12 flooding on Staten Island would cause seepage onto the Black Hole. Trial
13 Transcript (Deverel) 775:26-7766:10; 787:12-26.

14 WPF's expert could not conclude that if Staten Island flooded, it would be more
15 likely than not for a levee breach to occur on Brack Tract. Trial Transcript
16 (Cosio) 589:12-16. WPF's expert could not opine on whether there would be an
17 effect on the Black Hole property that would be more likely than not to occur in
18 the event of a Staten Island flood. Trial Transcript (Cosio) 592:3-11. WPF's
19 expert could not opine on whether a Staten Island flood would have a measurable
20 water quality effect on neighboring islands because he would need a modeling
21 analysis performed, and such an analysis was not completed. Trial Transcript
22 (Cosio) 592:12-593:3.

23 TNC monitors the levees on the waterside of Staten Island on a daily basis. Trial
24 Transcript (Zelege) 1048:17-1048:28. On the roadside, TNC makes sure the road
25 is accessible and repairs potholes. Trial Transcript (Zelege) 1049:1-1049:4. On
26 the landside, TNC looks for leaks in the levee and ensures that the levees are dry.
27 Trial Transcript (Zelege) 1049:5-1049:8. TNC watches for rodents and works
28 with outside consultants on the issue. Trial Transcript (Zelege) 1053:2-1053:16.
TNC has put rock, known as rip rap, on the riverside of the levee. Trial
Transcript (Zelege) 954:24-28.

WPF's expert, Gilbert Cosio, is the lead engineer for Reclamation District 2033.
Reclamation District 2033 (RD 2033) is the reclamation district for Brack Tract.
Trial Transcript (Cortopassi) 348:2-5; 6-13. Mr. Cosio testified that he would
inform the Reclamation Board for RD 2033 about any threats to the levees of
Brack Tract. Mr. Cosio has never reported to RD 2033 Board that Staten Island
was in imminent danger of flooding. Mr. Cosio has never told the RD 2033
Board that Staten Island was any kind of risk to Brack Tract. Based on his
analysis, Mr. Cosio saw nothing that gave him reason to believe that Staten
Island's levees were in worse condition in 2019 than they were in 2001. Trial
Transcript (Cosio) 543:23-544:3; 544:23-26; 557:27-558:14.

**Accordingly, the Court finds in favor of Defendants on WPF's 3rd cause of action
for public nuisance and on WPF's 4th cause of action for private nuisance.**

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2 **5th Cause of Action for Breach of Contract v. TNC**

3 **Standing**

4 Preliminarily, TNC submits that WPF is neither the owner nor the grantor of the
5 SPCE and therefore, it cannot enforce the easement through a breach of contract cause of
6 action. TNC further argues that WPF lacks third party beneficiary standing to enforce the
7 SPCE. Citing *Goonewardene v. ADP, LLC* (2019) 6 C.5th 817, 830, TNC argues that
8 WPF cannot show that it has benefitted by the terms of the SPCE; that it was a
9 motivating purpose for drafting the SPCE; and/or that permitting WPF to bring the action
10 as a third party beneficiary is consistent with the objectives of the easement.

11 The Court finds that WPF meets and satisfies each of the three requirements
12 enunciated by the Supreme Court in *Goonewardene v. ADP, LLC* (2019) 6 C.5th 815.

13 First, the SPCE was drafted for the benefit of the people of the State of California.
14 See, Trial Exhibit 43 (SPCE) 43.00003. As a non-profit organization dedicated to the
15 conservation of the Delta and its wildlife, WPF is a member of the public of the State of
16 California. Trial Exhibit 108 - 108.00002; see also, Trial Transcript (McCormick) 56:11-
15.

17 Secondly, the SPCE expressly acknowledges the benefits that Staten Island provides
18 to the State of California; that is, “(1) agricultural land preservation, including the
19 economic viability of agricultural operations; [and] (2) wildlife habitat; ” See, Trial
20 Exhibit 43 (SPCE). Again, as a California organization dedicated to the conservation of
21 the Delta and its wildlife and to the promotion of agriculture compatible with wetlands
22 conservation (Trial Exhibit 108 - 108.00002; see also, Trial Transcript (McCormick)
23 56:11-15) and a member of the public of the State of California, WPF is an entity for
24 which the conservation easement was specifically made; that is, WPF qualifies as being a
motivating purpose for the drafting of the conservation easement.

25 Thirdly, the SPCE expressly states “enforcement of this Conservation Easement is
26 essential to achieve its purposes [and the provisions are to be liberally construed to]
27 “effectuate its conservation purposes.” See, Trial Exhibit 43 (SPCE) ¶5B, ¶5H and ¶5I.
28 Civil Code §815.7(a) reads: “No conservation easement shall be unenforceable by reason
of lack of privity of contract or lack of benefit to a particular land”

Thus, the Court finds that WPF has standing as a third party beneficiary to enforce the SPCE through its breach of contract cause of action.

Breach of Contract

“A cause of action for breach of contract requires proof of the following elements: (1) existence of the contract; (2) plaintiff’s performance or excuse for non-performance; (3) defendant’s breach; and, (4) damages to plaintiff as a result of the breach.” *CDF Firefighters v. Maldonado* (2008) 158 C.A.4th 1226, 1239.

Referring back to the discussion in the 1st cause of action for writ of mandate, the Court re-iterates that there is no baseline condition of Staten Island in 2001 from which DWR could be able to measure and evaluate and oversee and monitor whether TNC’s activities are detrimentally affecting Staten Island’s agriculture and/or wildlife habitat. This fact makes it equally impossible for the Court to determine that TNC has breached the SPCE; that is, that TNC has failed to maintain Staten Island in the same or better condition as on the date that it was acquired by TNC, subject to normal wear and tear. Trial Exhibit 43 (SPCE) 3.C.

The evidence presented at trial established that the Delta has been subsiding since the 19th century; that is, as soon as the marshes were drained and the soil was exposed to air. Trial Transcript (Eaton) 153:4-10. Moreover, subsidence was occurring on Staten Island when TNC acquired Staten Island in 2001. Trial Transcript (Eaton) 153:11-13. Critically, it is not known how much subsidence has occurred on Staten Island since TNC took over the island in 2001. Trial Transcript (Cosio) 598:10-598:24. It is not known whether seepage under Staten Island levees has increased over time since 2001; it has not been measured. Trial Transcript (Smith) 1550:19-1591:2.

In fact, the evidence showed that TNC engaged in many studies and activities for the education, preservation and conservation of both agriculture and wildlife habitat on Staten Island. See, evidence below:

TNC sponsored Dr. Deverel’s research into soil subsidence on Staten Island. Trial Transcript (Deverel) 622:25-623:28.

TNC hired Dr. Deverel’s company, HydroFocus, to study alternative land uses on Staten Island and to examine greenhouse gas emissions. Trial Transcript (Deverel) 658:1-12.

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3 Dr. Deverel is working with TNC to develop 1,000 acres of wetlands on Staten
4 Island, which will include baseline monitoring of subsidence, water quality, and
5 greenhouse gases. The 1,000 acres of wetlands TNC has planned for Staten
6 Island will stop and reverse the effects of subsidence. Trial Transcript (Deverel)
7 725:22-726:16; 736:5-16; Trial Exhibit 949.

8 TNC shares its Staten Island research through peer-reviewed literature, papers,
9 presentations at conferences, and hands-on outreach such as tours of Staten
10 Island. TNC has preserved Staten Island as an economically viable farmland,
11 keeping the island in agricultural production. Trial Transcript (Golet) 1411:17-
12 1412:7; (Smith) 1600:8-13; (Zelege) 1016:22-26; Trial Exhibits 236; 770; 949.

13 Corn has been grown on Staten Island as far back as 1942. Trial Transcript
14 (Zelege) 1008:13-17. Corn was grown extensively in the Delta when TNC
15 acquired Staten Island. Trial Transcript (Eaton) 147:17-26.

16 TNC's conservation efforts on Staten Island involve a multitude of species in
17 need of habitat, such as geese. Trial Transcript (Golet) 1407:1-1408:17; Trial
18 Exhibit 947.73. It was a wildlife-friendly practice for the previous Staten Island
19 ranch managers to crop corn because it was an important source of food for the
20 birds. Similarly, it was a wildlife-friendly practice for the previous Staten Island
21 ranch managers to flood parts of cornfields to provide roosting habitat in close
22 proximity with foraging habitat. Trial Transcript (Golet) 1413:9-25. The
23 agricultural practices when TNC acquired Staten Island were wildlife friendly for
24 sandhill cranes. Trial Transcript (McCormick) 81:26-82:5.

25 TNC has reduced the amount of corn grown on the island through crop
26 diversification. Trial Transcript (Golet) 1424:2-6. After taking ownership of
27 Staten Island, TNC planted pasture on Staten Island, providing early season
28 foraging habitat. Trial Transcript (Golet) 1416:28-1418:5; Trial Exhibit 236.
TNC plants triticales, a wheat-rye hybrid that is typically harvested in August or
late July, to provide the opportunity to flood fields for early season roosting sites
for sandhill cranes. Trial Transcript (Golet) 1418:6-26.

TNC's flooding of triticales fields on Staten Island provides shore bird habitat.
TNC staggers flooding agriculture fields on Staten Island to match the timing of
the arrival of the birds and prolong the opportunity for foraging invertebrates and
small animals. Trial Transcript (Golet) 1418:6-1419:17. TNC has added small
levees to larger agricultural fields on Staten Island to create distinct cells within
the fields that help control water depth for optimal crane roost habitat and create
shallow areas for shore birds. Trial Transcript (Golet) 1419:18-1420:13. TNC
cuts and mulches harvested cornfields to create habitat conditions for sandhill
cranes. Trial Transcript (Golet) 1420:14-1421:4. TNC creates thermal refuge
zones for smaller birds by leaving some harvested corn stalks uncut on the edge of
fields to provide a buffer against the wind. Trial Transcript (Golet) 1420:14-

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2 1421:4. TNC uses grain dryers on the island, which allows TNC to start
3 harvesting early, creating habitat for cranes early in the season. Trial Transcript
4 (Zelege) 1029:15-28.

5 In 2018, TNC began preparing 350 acres on Staten Island for growing rice. Trial
6 Transcript (Zelege) 906:8-18. TNC began growing 350 acres of rice on Staten
7 Island in 2019. Trial Transcript (Zelege) 906:8-18. TNC will expand its rice
8 cropping to 750 acres in 2020. Trial Transcript (Zelege) 1043:27-1044:10; Trial
9 Exhibit 770. To grow rice, TNC hired a consultant to teach the organization how
10 to grow rice in the Delta. Trial Transcript (Zelege) 1041:7-1042:21.

11 Dr. Golet called Staten Island “a thriving agroecosystem” and “an incredible
12 example of wildlife-friendly farming in action.” Trial Transcript (Golet) 1437:8-
13 12; Trial Exhibit 794.01.

14 TNC employs a full-time conservation manager on Staten Island, who is charged
15 with overseeing Staten Island environmental programs. Trial Transcript (Golet)
16 1426:6-25.

17 TNC conducts a large waterbird survey on Staten Island to record counts of large
18 waterbirds such as geese and swans. Trial Transcript (Golet) 1426:26-1428:8.
19 Overall, the cumulative use-days of greater sandhill cranes has increased in the
20 2014-2018 time period over previous counts in 2001-2009. In the 2014/2015 and
21 2017/2018 winters, the cumulative use-day counts of greater sandhill cranes was
22 more than double previously recorded highs. Trial Transcript (Golet) 1433:22-
23 1435:19; Trial Exhibit 794.01. In addition the results of the large waterfowl
24 survey work indicate that Staten Island has had peak counts of over 55,000
25 cackling geese, over 30,000 light geese, over 8,000 white-fronted geese, and over
26 1,000 tundra swans. Trial Transcript (Golet) 1436:17-1437:7; Trial Exhibit
27 794.01. Staten Island is very productive for supporting cranes and large
28 waterbirds. Trial Transcript (Golet) 1436:17-1437:7; Trial Exhibit 794.01.

21 TNC has hosted research efforts to determine efficient means of monitoring water
22 birds on Staten Island. Trial Transcript (Golet) 1408:1411:16; Trial Exhibit
23 947.63; 947.64.

24 TNC has researched cornfield management practices relating to crane preference.
25 Trial Transcript (Golet) 1424:7-17.

26 TNC has partnered with the Natural Resource Conservation Service, which pays
27 farmers to implement wildlife-friendly practices, to include mulching of corn as a
28 best practice. Trial Transcript (Golet) 1425:14-1426:5.

TNC collaborates with UC Merced, UC Davis, and others to conduct research on
Staten Island. Trial Transcript (Zelege) 1002:9-22.

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2 TNC has an ongoing commitment to significant additional development of rice
3 fields at Staten Island as well as wetland habitat areas on the island and a portfolio
4 of projects designed to demonstrate a path in long-term sustainability for Staten
Island. Trial Transcript (Ziegler) 1150:24-1151:9.

5 In addition, WPF has failed to establish that it is probable or imminent that Staten
6 Island's levees will fail and/or Staten Island will flood. Thus, for purposes of this
7 cause of action for breach of contract, WPF has failed to establish any injury or
damage to it resulting from the alleged breaches. See, evidence below:

8 WPF's expert is not aware of any condition on Staten Island that has had
9 any effect on Brack Tract since 2001. Trial Transcript (Cosio) 589:8-
10 589:11. Mr. Cortopassi testified that the way WPF is able to use the Black
Hole has not been affected by any condition of Staten Island. Trial
11 Transcript (Cortopassi) 345:25-346:3.

12 In using the word "risk," WPF uses the word to refer to the risk of Staten
Island's levees failing sometime between 2019 and 2030. Trial Transcript
13 (Cosio) 577:7-577:19. The basis for Mr. Cosio's opinion of risk is his
review of the 2009 Delta Risk Management Study. As Mr. Cosio
14 understood, there is a calculated risk between 2005 and 2030. Trial
Transcript (Cosio) 577:7-28. As Mr. Cosio understood, the Delta Risk
15 Management Study concluded that Staten Island's levees have only a five
to seven percent chance of failing over a 25-year period. Trial Transcript
16 (Cosio) 577:7-578:5; 580:10-581:9.

17 WPF's expert has not done any analysis or evaluation to predict the
18 likelihood of Staten Island's levees failing or breaching over any period of
time. Trial Transcript (Cosio) 576:1-6.

19 Because Mr. Cosio does not know how much subsidence has occurred on
20 Staten Island since TNC took over, he cannot calculate how much, if any,
21 additional force has been placed on the island's levees due to subsidence
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22 TNC's expert hydrologist, Dr. Deverel, stated that based on the different
23 characteristics of the soil layering and the movement of water in the silty
sand, the data indicates that there is a very low likelihood that flooding on
24 Staten Island would have any effect on the Black Hole. Trial Transcript
(Deverel) 775:26-776:10.

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26 Robert Wagner's firm, Wagner & Bonsignore, is the district engineer for
27 four reclamation districts, including Staten Island's Reclamation District
38. Trial Transcript (Wagner) 1264:9-14; 1270:18-22. In Mr. Wagner's
opinion, he is not concerned that Staten Island's levee system will fail or
28 that Staten Island will flood. Trial Transcript (Wagner) 1324:27-1325:8;
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2 inspection, and stability slope analysis, Mr. Wagner's expert opinion is
3 that Staten Island's levee system is in pretty good shape. Trial Transcript
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5 Staten Island has not experienced a levee failure since 1906. Trial
6 Transcript (Wagner) 1324:27-1325:11.

7 The entire Staten Island levee system fits within the Hazard Mitigation
8 Plan standards for Delta levees. Trial Transcript (Wagner) 1291; 9-11;
9 1268:13-1269:1; (Cosio) 557:13-557:16.

10 Moreover, in the event a flood did occur on Staten Island, the water would
11 get transmitted through the peat soil, through the tidal mud months later,
12 and down to the silty sand, and the water would move through the sands at
13 a rate of about a hundred feet per year. The water that reaches the silty
14 sands under Staten Island that moves toward Brack Tract would then
15 encounter the pressures from the Mokelumne River, which would limit the
16 ability of the water to move toward Brack Tract and would tend to contain
17 groundwater movement. If water on Staten Island were to make its way
18 past the Mokelumne River toward the Black Hole, the water would then
19 have to make its way up through the clay layer into the peat layer on the
20 Black Hole to have any potential effect on the Black Hole. Trial Transcript
21 (Deverel) 766:7-767:20; 791:3-9. Based on the different soil
22 characteristics and layering underneath Staten Island and the Black Hole,
23 the movement of water, and the slow movement of water in the silty sand,
24 the data indicate that there is a very low likelihood that there would be any
25 effect on the Black Hole if Staten Island flooded and there is a very low
26 likelihood that flooding on Staten Island would cause seepage onto the
27 Black Hole. Trial Transcript (Deverel) 775:26-7766:10; 787:12-26.

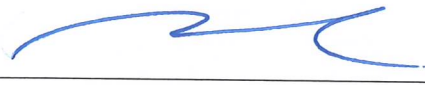
28 WPF's expert could not conclude that if Staten Island flooded, it would be
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likely than not to occur in the event of a Staten Island flood. Trial
Transcript (Cosio) 592:3-11. WPF's expert could not opine on whether a
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performed, and such an analysis was not completed. Trial Transcript
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WPF's expert, Gilbert Cosio, is the lead engineer for Reclamation District
2033. Reclamation District 2033 (RD 2033) is the reclamation district for
Brack Tract. Trial Transcript (Cortopassi) 348:2-5; 6-13. Mr. Cosio
testified that he would inform the Reclamation Board for RD 2033 about
any threats to the levees of Brack Tract. Mr. Cosio has never reported to
RD 2033 Board that Staten Island was in imminent danger of flooding.

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2 Mr. Cosio has never told the RD 2033 Board that Staten Island was any
3 kind of risk to Brack Tract. Based on his analysis, Mr. Cosio saw nothing
4 that gave him reason to believe that Staten Island's levees were in worse
5 condition in 2019 than they were in 2001. Trial Transcript (Cosio) 543:23-
544:3; 544:23-26; 557:27-558:14.

6 **Accordingly, the Court finds in favor of TNC on the WPF's 5th cause of action**
7 **for breach of contract.**

8
9 Dated: 7/9/2020



Barbara A. Kronlund
Judge of the Superior Court