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4 *Attorney for Defendants U.S. EPA and its*
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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA

8 SAN FRANCISCO BAYKEEPER; SAVE
9 THE BAY; COMMITTEE FOR GREEN
FOOTHILLS; CITIZENS' COMMITTEE
10 TO COMPLETE THE REFUGE; and STATE
OF CALIFORNIA, by and through
11 XAVIER BECERRA, ATTORNEY GENERAL,

12 Plaintiffs,

13 v.

14 U.S. ENVIRONMENTAL PROTECTION
AGENCY AND ITS ADMINISTRATOR,

15 Defendants,

16 REDWOOD CITY PLANT SITE, LLC,

17 Intervenor-
18 Defendants.

Case No: 3:19-cv-05941-WHA (lead case)

Consolidated with

Case No: 3:19-cv-05943-WHA

**DEFENDANTS' AND INTERVENOR-
DEFENDANTS' RESPONSE TO
COURT'S ORDER OF SEPTEMBER 5,
2020**

19 Pursuant to the Court's Order dated September 5, 2020 (ECF No. 79), the defendants,
20 United States Environmental Protection Agency and its Administrator ("EPA"), and the
21 intervenor on the side of the defendants, Redwood City Plant Site, LLC ("Redwood"),¹ answer
22 the Court's questions as follows:

23 1. The decision maker, or those advising the decision maker, fully considered the
24 contents of the November 2016 draft, a prior draft of EPA's final decision. EPA previously
25 communicated that fact in March 2020, when it filed a privilege log which included, *inter alia*,
26 the November 2016 draft. *See* Notice of Filing Privilege Log (ECF No. 66), at 2:7-11 ("... EPA

27 _____
28 ¹ Redwood takes no position with respect to Question 1 and joins with EPA in the
responses to Questions 2 and 3.

1 hereby provides a log of deliberative documents that the decision-maker considered, directly or
2 indirectly (*e.g.*, through staff) in making the March 1, 2019 determination.”). EPA reiterated that
3 fact in May 2020, when opposing Plaintiffs’ motion challenging the adequacy of the
4 administrative record. *See* Opp’n (ECF No. 70), at 1:28 to 2:2 (same). In addition, the
5 declaration from an agency official that EPA filed in May 2020 addresses this fact. *See*
6 Declaration of Dennis Lee Forsgren, Jr. Asserting Deliberative Process Privilege (ECF No. 70-1),
7 at ¶ 8 (“This document was generated as part of lengthy internal discussion about the
8 jurisdictional status of the Redwood City site. . .”). And as EPA and Redwood noted in their
9 summary judgment reply, “[c]omparing the draft document with EPA’s final decision shows that
10 the latter contains much of the same or substantially similar historical, operational, and
11 hydrological facts concerning the Salt Plant, insofar as they pertained to the fast-land question.”
12 Combined Reply and Opp’n (ECF No. 69), at 18:2-5.

13 2. Based on the information provided, it appears that the landowners in both of the
14 Court’s hypotheticals would have very strong arguments that their parcels qualify as fast land.
15 The hypotheticals highlight two facts: historical (*i.e.*, pre-Clean Water Act) separation of
16 property from tidal waters and historical changes in ground elevation. With respect to the latter
17 fact, although the degree to which the placement of fill material raised the elevation of each
18 property differs, constructing homes in either hypothetical would have necessarily required
19 earthmoving and grading (*i.e.*, filling) activities behind the levees. The historical conversion of
20 the Salt Plant involved similar activities. *See* EPA’s decision at 5 (“Leslie Salt initiated
21 construction of the First Slough dam and the levees along Westpoint Slough in 1943 and worked
22 throughout the 1940s to construct the Salt Plant by leveeing, excavating, filling, and compacting
23 the Salt Plant to create the crystallizer beds, pickle ponds, bittern ponds, facility headquarters, and
24 multi-use areas.”) [AR 000007]; S.J. Mot. (ECF No. 56), at 9:14 to 10:15 (summary of pre-CWA
25 filling activities at the site, citing historical permit, bulletin, and other documents).

26 *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009), is the closest decision on point,
27 although the United States is not aware of any precedent with the facts set forth in the Court’s
28 hypotheticals. *See Milner*, 583 F.3d at 1195 (“. . . [I]f land was dry upland at the time the CWA

1 was enacted, it will not be considered part of the waters of the United States unless the waters
2 actually overtake the land”); *id.* at 1194 (noting that a prior Ninth Circuit decision
3 referencing the fast-land doctrine, *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978),
4 “declined to hold that the waters of the United States extended to all places the water would
5 theoretically reach”). These passages from *Milner* indicate that elevation is not controlling
6 when applying the fast-land doctrine. As a result, the fact that the historical filling activities were
7 more vertically extensive (changed the bottom elevation more) in the Court’s second hypothetical
8 than in the first would not compel different results. Both historically transformed properties
9 would likely qualify as fast land.

10 The United States is not aware of any contrary authority. *See* Defendants’ S.J. Reply (ECF
11 No. 69) at 14:25-26 (“ . . . Plaintiffs provide no support for the notion that the fast-land doctrine
12 requires precise elevations.”). In response to the Court’s Order, Plaintiffs may point to *United*
13 *States v. Ciampitti*, 583 F. Supp. 483 (D.N.J. 1984), but it is distinguishable. The evidence
14 adduced in *Ciampitti* showed extensive tidal flow onto the site in question. *See* 583 F. Supp. at
15 492 (“The tidal flow was graphically depicted through ground and aerial photographs showing
16 water-filled tidal ditches and tidal creeks. Testimony from both the Government and the
17 defendants’ expert proved the movement of tidal flow from the west, south and east onto the
18 site.”). *See also* Combined Reply and Opp’n (ECF No. 69), at 12 n.7 (further distinguishing
19 *Ciampitti*). Similarly, *Golden Gate Audubon Soc., Inc. v. U.S. Army Corps of Engineers*, 796 F.
20 Supp. 1306 (N.D. Cal. 1992), is inapposite. There, the court held that “if a site has been legally
21 converted to dry land, so that it no longer meets the regulatory definition of ‘wetlands,’ that site
22 will not come under the Corps jurisdiction.” *Id.* at 1313. Here, the record shows that the Salt
23 Plant has not supported wetlands at any time since (well) before the passage of the CWA. *See,*
24 *e.g.,* Redwood’s JD request at 29 [AR 000060]. Plaintiffs do not contend otherwise or identify
25 any record evidence to the contrary.

26 3. EPA considered, but judged immaterial, the existence of a pipe at the Salt Plant that
27 allows Bay water to flow into a cell (when Cargill opens the valve). *See* EPA’s decision at 9 (“A
28 water intake is located on Pond 4, which connects to First Slough, where Cargill has at times

1 brought water in from the Bay.”) [AR 000011]. As a factual matter, EPA noted, *inter alia*, a
2 letter report Cargill sent to the Corps of Engineers a decade before it applied for an approved
3 Clean Water Act jurisdictional determination, which explained that, after completion of the salt
4 harvesting, Cargill could bring Bay water onto the Salt Plant in a controlled manner (through
5 pumping or hydraulic pressure) for use in certain desalting activities associated with the Plant’s
6 operation. 2002 Letter Report at 4 [AR 001109].

7 As a legal matter, EPA cited *Milner*, the closest decision on point. The Ninth Circuit
8 explained that if an area that would otherwise qualify as fast land subsequently “become[s]
9 submerged by the waters of the United States” – or, stated differently, if the waters surrounding
10 the putative fast land “actually overtake the land” – then the area at issue ceases to be fast land.
11 *Milner*, 583 F.3d at 1195. Here, EPA found that the circumstances associated with the pipe,
12 particularly its limited and controlled use of Bay water for desalting purposes, have not caused
13 Bay waters to “actually overtake” any particular cell (much less the site as a whole) and thus the
14 Salt Plant continues to qualify as fast land. *See* EPA’s decision at 12 [AR 000014]; Defendants’
15 S.J. Mot. (ECF No. 56) at 19:1-3.

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17 Dated: September 10, 2020

Respectfully submitted,

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23
24 Dated: September 10, 2020

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