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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND ITS ADMINISTRATOR,

Defendants.

REDWOOD CITY PLANT SITE, LLC,

Intervenor-Defendant.

CASE NO: 3:19-cv-05941-WHA (lead case)

Consolidated with

No: 3:19-cv-05943-WHA

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to the Court's September 5, 2020 Questions re Cross-Motions for Summary Judgment, Dkt #79, Plaintiffs submit the following supplemental memorandum.

1. To what extent did the decision maker or anyone advising the decision maker on the matter consider the Region 9 proposed decision? The government so far has evaded answering this. Please give a forthright answer.

While EPA is in the best position to explain the *extent* to which the Region 9 jurisdictional determination ("Region 9 JD") was considered by the EPA Administrator or employees advising him, it is undisputed that the Region 9 JD was considered *at least indirectly*, and thus belongs in the administrative record here. EPA has stated that the Region 9 JD is one of eleven "documents that the decision-maker considered, directly or indirectly (*e.g.*, through staff) in making the March 1, 2019 determination[,]" Dkt. #66 at 2, and admits in its briefing that the Region 9 JD was "intended to facilitate or assist development of the [agency's] final position" on the jurisdictional status of the Salt Ponds and "had a role in the development of EPA's final action." Dkt. #70 at 5-6. Indeed, as EPA itself notes, the Region 9 JD and the Final JD "contain[] much of the same or substantially similar historical, operational, and hydrological facts concerning the Salt Plant, insofar as they pertained to the fast-land doctrine[.]" *Id*. at 6. This is sufficient to show that EPA wrongly excluded the Region 9 JD from its administrative record.

Even though the Region 9 JD must be included in the record because it was at least indirectly considered, it is clear that the Administrator never (a) actually examined and rationally took into account the well-reasoned analysis of the experts in the Region 9 office with the most on-the-ground experience with the Salt Ponds—including the San Francisco Estuary Institute, the consultant retained by the Region to assist with that analysis; (b) weighed the conflicting evidence in the record regarding the bottom elevation and potential for tidal influence of the Salt Ponds, crucial to the "fast land" analysis; or (c) applied any factors beyond Cargill's desired outcome when reversing the federal government's long-standing position that the Salt Ponds are jurisdictional waters of the United States. *See* AR000874, AR000888, and AR000904 (Clean Water Act section 404 permits issued by the Army Corps of Engineers, including for maintenance of levees and other infrastructure at the Salt Ponds).

2. If built immediately before the 1972 Act, would a subdivision built on former wetlands but completely sealed off from the Bay by strong, tall levees with no pipes or gates connecting to the Bay have been subject to the Act (a) if the ground level in the subdivision was one foot lower than the high water mark or (b) if it was filled in and always one foot higher than the high water mark. Assume the ground has been dry at all relevant times except for rain. All parties must answer as to both contingencies and quote from closest decisions on point. Provide contra authority as well.

Scenario A

A site where historical wetlands were completely sealed off from the Bay, completely dried (or drained), and then developed into a subdivision at an elevation below the high water mark, all prior to the passage of the Clean Water Act, would not be subject to the Act's jurisdiction because, as the Court states, it remained dry at all times except for rainwater, and thus there were no waters or wetlands existing at the site and the preexisting waters or wetlands had not returned. However, the hypothetical site is not fast land because it is not upland or above the high water mark.

Scenario B

A site where historical wetlands were completely sealed off from the Bay, completely dried (or drained), and then completely filled and developed into a subdivision at an elevation above the high water mark, all prior to passage of the Clean Water Act, would not be subject to the Act because, as both dry and upland, it is as fast land. Where a site is converted to fast land prior to the passage of the Act, it is non-jurisdictional unless it is subsequently overtaken by jurisdictional waters.

Analysis

The absence of water of any kind since the passage of the Clean Water Act in 1972 makes both hypothetical scenarios non-jurisdictional. However, only the hypothetical site in scenario B is fast land. And neither hypothetical site is akin to the Redwood City Salt Ponds ("Salt Ponds") at issue here, which was neither dry nor upland at the time of passage of the Act, is not "completely sealed off" from the San Francisco Bay even today, and is not a development akin to a subdivision.

If the hypothetical site in scenario A had retained water or wetlands, or if it subsequently became water or wetlands, even if completely separated from the Bay, it would likely be an impoundment of navigable water or a water adjacent to a jurisdictional water, either of which would be jurisdictional. Similarly, if the hypothetical site in Scenario A contained ponds, rivers, sloughs, lakes, or other waters, those portions would be jurisdictional. And under hypothetical scenario B,

waters on the site could be jurisdictional depending on how they were created, where they were located, and how they interacted with San Francisco Bay, a traditionally navigable water.

The legal authority compelling these conclusions is found in three places. First, the regulatory definitions of waters of the United States in effect at the time EPA issued the Final JD, which include impoundments, adjacent waters, and waters with a significant nexus to waters of the United States, even where those waters are "separated" from a traditionally navigable water, but do not generally include dry lands where waters no longer exist. Second, the case law interpreting waters of the United States in the context of man-made barriers or separation. And third, the case law regarding fast lands, both before and after the Clean Water Act, which demonstrate that only lands *above* the high water mark can be fast land.

All waters of the United States are subject to the protections of the Clean Water Act. At the time the Final JD was issued, waters of the United States were defined to include (1) actual navigable waters (e.g., San Francisco Bay), (2) waters which are, were, or could be navigable, including all waters subject to the ebb and flow of the tide, (3) impoundments of waters of the United States, and (4) waters adjacent to other waters of the United States, including wetlands and impoundments. *See* 33 C.F.R. § 328.3(a) (2015–2019); 40 C.F.R. § 230.3(o) (2015–2019); see also *Rapanos v. United States*, 547 U.S. 715, 753–57 (2006) (rejecting assertion of CWA jurisdiction over wetlands that do not abut, or do not have significant nexus to, any navigable-in-fact water). The definition does not include dry lands or wholly developed lands *without* water.

The Clean Water Rule, in effect in California at time of the Final JD included in its definition of waters of the United States "all impoundments of waters otherwise identified as waters of the United States." 40 C.F.R. § 230.3(o)(1)(iv). Impoundments and adjacent waters are jurisdictional for both legal and scientific or technical reasons. Technically, impoundments and adjacent waters affect the chemical, physical, or biological make up of other waters. This is true at the Salt Ponds. *See* AR 577 at 592–93, 612 (SFEI Technical Memo); *see also* AR 2593 at 2618 (Dr. Baye Analysis); Baykeeper Complaint, Dkt. #1, and EPA Answer to Baykeeper Complaint, Dkt. #24 at ¶¶ 77, 78, 100. Because impoundments of water (including the Salt Ponds) affect waters of the United States, they are jurisdictional under the Act.

Legally, impounding a water of the United States does not make the water non-jurisdictional. *See S. D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379 n.5 (2006) (a party cannot "denationalize national waters by exerting private control over them."). The Ninth Circuit agrees: "it is doubtful that a mere man-made diversion would have turned what was part of the waters of the United States into something else and, thus, eliminated it from national concern." *U.S. v. Moses*, 496 F.3d 984, 988 (9th Cir. 2007), cert. denied, 554 U.S. 918 (2008); *see also Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210, 1218 (D. Or. 2009) (holding that man-made berms which severed historic connection between wetlands and creek "cannot eliminate the CWA's jurisdiction over a water of the United States.").

Also instructive is *United States v. Ciampitti*, 583 F. Supp. 483 (D.N.J 1984), *aff'd*, 772 F.2d 893 (3rd Cir. 1985), *cert. denied*, 467 U.S. 1014 (1986). In *Ciampitti*, the Court explained that because a site was regulable wetlands prior to it being filled and dried, the filling of the wetlands did not convert the site to non-jurisdictional fast land. As the Court stated: "Wetlands separated from other waters of the United States by manmade dikes or barriers, natural river burns, beach dunes and the like are specifically defined as adjacent wetlands [citation], therefore making them 'waters of the United States' for regulatory purposes." *Id.* at 494.

The fast land case law is also relevant in analyzing the hypothetical sites described in the Court's question, as well as the Salt Ponds at issue in this case. Fast land is not a statutorily or regulatorily defined term. Instead, it derives from the case law. Prior to the passage of the Clean Water Act, the concept of fast land arose frequently in takings cases where a government entity had flooded a landowner's property that was adjacent to a river or had acted to improve the navigability of a river or body of water. *See, e.g., United States v. Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592 (1941). In determining whether a taking occurred, and the scope of the taking that was compensable, courts analyzed the relationship between the high water mark and the rights of the property owner. A host of different cases reached the same basic result: land that is upland of the high water mark is "fast land" and is compensable when taken by the government. Land below the high water mark is not fast land and is not compensable, even if the landowner has some form of property rights over a portion of that land.

As the Supreme Court explained in *United States v. Willow River Power Co.*, "the riparian owner has no right as against improvements of navigation to maintenance of a level below highwater mark, but it is claimed that there is a riparian right to use the stream for run-off of water at this level. High-water mark bounds the bed of the river. *Lands above it are fast lands and to flood them is a taking for which compensation must be paid*." *United States v. Willow River Power Co.*, 324 U.S. 499, 509 (1945) (emphasis added). This is consistent with a long series of cases over the prior thirty years dealing with takings of property, upland and below the high water mark, to improve the navigability of rivers. *See, e.g., United States v. Chicago*, 312 U.S. at 597, 599 (holding that no compensation is owed for a taking of property below the high water mark, but that property above the high water mark is not traditionally subject to a government right of navigation, making compensation required when upland is flooded); *id.* at fn. 9 and fn. 12 (collecting prior cases).

Subsequent to the Clean Water Act, the Ninth Circuit has applied fast lands determinations to Clean Water Act disputes in a limited number of cases. Most directly on point is *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009). In *Milner*, the Court made four significant findings related to the application of the fast land doctrine. First, the Court equated "fast land" with "improved solid upland." *Milner*, 583 F.3d at 1194 (citing *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 754 (9th Cir. 1978). Second, the Court held that fast land is not protected by the CWA because "discharge on fast land would not actually be in the waters of the United States." *Id.* at 1195. Third, where the land is dry and "does not reach or otherwise have an effect on the waters, excavating, filling and other work does not present the kind of threat the CWA is meant to regulate," even if the land is dry because of "artificial means." *Id.* Fourth, fast land can become submerged and re-enter CWA jurisdiction. *Id.*

Combining those principles together, the Court concluded:

> [I]f land was dry upland at the time the CWA was enacted, it will not be considered part of the waters of the United States unless the waters actually overtake the land, even if it at one point had been submerged before the CWA was enacted or if there have been subsequent lawful improvements to the land in its dry state.[fn] In short, in such a situation, the waters of the United States are demarcated by the reach of the high tide line, but not as it would be in its unobstructed, natural state if the fill or obstruction was in

> place at the time the CWA was enacted or if there was a legally authorized filling or improvement done after the enactment of the CWA.

Id. The Court also explained that there are some limited exceptions to this rule that allow for broader application of the CWA to lands that are above the high water mark or where the CWA applies to dry land. *Id.* at 1195, fn. 15.

Applying the definitions of waters of the United States and of fast land to the two hypotheticals, the lack of any water at all is determinative. Because there is no water at the developed hypothetical sites, they are not jurisdictional. The presence of water under scenario A would necessarily change that outcome. And the presence of water under scenario B could lead to jurisdiction over that hypothetical site as well.

Most importantly, the "dryness" of the hypothetical sites is not the condition of the Salt Ponds. *See, e.g.,* AR 2061 (roosting and feeding waterbirds at Pond 10 while inundated), AR 2298-99 (water visible at Salt Ponds). Nor does the record demonstrate that the entire Salt Ponds was ever filled and elevated. As Region 9 concluded, only 95 acres of the Salt Ponds were filled to an elevation above the high water mark. *See* Region 9 JD at 1. The remainder of the Salt Ponds is below the high water mark, and is never dry. This is true today, just as it was when the Act was passed. Thus, unlike the sites in scenarios A and B, the Salt Ponds are jurisdictional under the Clean Water Act.

3. What is the significance of the pipe at the Cargill facility that allows Bay water to flow into a cell (when the valve is open)? Quote from closest decisions on point.

The fact that, as admitted by Cargill and EPA, a pipe allows water from San Francisco Bay to flow into the Salt Ponds demonstrates that the Site is not fast land, but is subject to CWA jurisdiction as water of the United States.

Under *Milner*, "land that was dry upland at the time the CWA was enacted, … will not be considered part of the waters of the United States unless the waters actually overtake the land." 583 F.3d at 1195. In reaching the conclusion that the Salt Ponds is fast land, EPA relied on several factors, "the most significant" of which was "the development of the site and its transformation into upland and separation from Bay waters 70 years before passage of the CWA." AR 000013 (Final JD

at 11). However, the evidence in the record demonstrates that the Salt Ponds continues to be connected to the San Francisco Bay via a pipe and is overtaken by waters from Bay. Based on this and other evidence in the record, EPA's conclusion in the Final JD violated the Administrative Procedure Act.

The Ninth Circuit's decision in *Leslie Salt v. Froehlke* supports the conclusion that the Site is not fast land. In *Froehlke*, the court evaluated the scope of CWA jurisdiction over Leslie Salt's salt ponds in San Mateo County. *Froehlke*, 578 F.2d at 745-46. The site had been diked prior to the CWA's passage but the court observed that "[t]he water in Leslie's salt ponds, even though not subject to tidal action comes from the San Francisco Bay." *Id.* at 745, 755. The court found that the salt ponds are subject to CWA jurisdiction, explaining that it "see[s] no reason to suggest that the United States may protect these waters from pollution while they are outside of Leslie's tide gates but may no longer do so once they have passed through these gates into Leslie's ponds." *Id.* at 755-56. Here, like in *Froehlke*, water in the Salt Ponds "comes from the San Francisco Bay" via the pipe allowing water from the Bay to flow directly into the Site, as well as the pipe from Cargill's Newark Salt Ponds which also transports to the Salt Ponds water originating in the Bay.

To the extent that Defendants and Intervenors assert that this Court should disregard or give little weight to the fact that Bay water directly flows into the Site via the pipe because the water is used for industrial purposes, *see* EPA Opp. at 13, 15, this assertion lacks any merit. As EPA previously concluded, "[c]ase law and regulations make clear that the CWA can encompass waters that are part of a manmade industrial system." AR 2038 at 2044 (EPA Office of the General Counsel Memorandum, Jan 13, 2017).

Finally, the existence of the pipe referenced in the Court's question provides support for a determination that the Salt Ponds is subject to CWA jurisdiction. Applying the definition of waters of the United States in effect at the time the Final JD was issued, the site was both an impoundment of waters of the United States, 40 C.F.R. § 230.3(o)(1)(iv) (2015–2019), and retained a "significant nexus" to the traditional navigable waters of San Francisco Bay. *Id.* § 230.3(o)(1)(viii); *see Rapanos v. United States*, 547 U.S. 715, 780 (2006) (Kennedy, J., concurring in the judgment); *San Francisco Baykeeper v. West Bay Sanitary Dist.*, 791 F. Supp. 2d 719, 766 (N.D. Cal. 2011) (channel connected

to San Francisco Bay via man-made tidal gates supported WOTUS finding); Region 9 JD at 44 (finding that Salt Ponds' hydrologic connection to San Francisco Bay via "intentional, periodic discharges of excess rainwater from the ponds through tide gates and pipes" and "potential unintentional discharges into First Slough through leaky tide gates or pipes" supported finding of significant nexus).

Respectfully submitted,

Dated: September 10, 2020

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ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(i)(3)

I, Eric J. Buescher, attest that concurrence in the filing of this document has been obtained from the other signatories. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of September, 2020, at Burlingame, California.

/s/ Eric J. Buescher
ERIC J. BUESCHER