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10.388.01

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**VIA EMAIL, FACSIMILE, AND U.S. POST**  
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Jane Hicks, Division Chief  
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**Re: Citizens Committee to Complete the Refuge's Comments Regarding the  
Army Corps of Engineers' Preliminary Jurisdictional Determination for the  
Cargill Salt Ponds in Redwood City, California.**

Dear Ms. Hicks:

We are writing this letter on behalf of our client, the Citizens Committee to Complete the Refuge ("CCCR"), in response to the request of Cargill Salt dated November 12, 2009 for a preliminary jurisdictional determination by your office for Cargill's Redwood City Saltworks. CCCR believes that Cargill's Redwood City "Saltworks" contain Special Aquatic Sites ("SAS") as defined by the Clean Water Act, and would like to take this opportunity to explain the special features of those salt ponds and why you should consider them to be SAS in reviewing Cargill's request.

## INTRODUCTION

In 1899 Congress passed the Rivers and Harbors Act (33 U.S.C. §§ 407 *et seq.*), which served as a precursor to the Clean Water Act's section 404 "dredge and fill" permit system currently enforced by the Army Corps of Engineers. In 1948 Congress enacted the Federal Water Pollution Control Act (33 U.S.C. § 1251 *et seq.*), which established broad statutory standards to protect the nation's waters against pollution, and barred the filling of aquatic lands except by permit. Congress' adoption in 1972 of comprehensive Amendments to the Federal Water Pollution Control Act became the primary basis of the Clean Water Act as we know it today. In addition and complementary to these federal laws, in 1969 the California Legislature enacted the Porter-Cologne Water Quality Control Act (Water Code §§ 13000 *et seq.*) to "preserve, enhance and restore the quality of the State's water resources," and to provide a state permitting process to implement the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) and related provisions. These federal and state laws, and the regulations that implement them,

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establish the primary regulatory context for your review of Cargill's proposed development.

Cargill's "Redwood City Saltworks" Project ("Saltworks" or "Project") is proposed to fill and convert to urban development 1,400 acres of salt ponds owned by Cargill in Redwood City, California. The salt ponds are currently separated from San Francisco Bay by levees. However, they are still hydrologically connected to the Bay by natural overland flow, groundwater flow, and occasional overtopping of the levees during high tides and storm events. These ponds contain existing salt pan and high marsh habitat that warrants protection, as well as former salt marsh habitat degraded by industrial salt production that should be restored.

In 1940, Cargill's predecessor, Stauffer Chemical Company, received a permit from the United States War Department to construct the dikes and levees that separate First Slough and Westpoint Slough from the Bay. Before this artificial separation, the salt ponds were tidal marshes. Now that the salt ponds are no longer in use for salt production, Cargill proposes to fill part of the ponds to allow for residential and commercial development. Allowing such a project to proceed would devastate the natural hydrology of the surrounding environment, eliminate extensive potential restored habitat for fish, mammals, birds and other wildlife, and violate the Clean Water Act's comprehensive regulatory regime.

### **THE CLEAN WATER ACT AS APPLIED TO THE SALTWORKS PROJECT**

Urban development such as the Saltworks Project that involves the discharge of fill material into waters of the United States requires a dredge and fill permit from the Army Corps of Engineers under section 404 of the Clean Water Act, 33 U.S.C. § 1344. The pertinent Clean Water Act regulations prohibit the granting of section 404 permits if "there is a practical alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a). A presumption that practical, environmentally preferable alternatives exist arises if the "activity associated with a discharge which is proposed for a special aquatic site . . . does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not water dependent)." 40 C.F.R. § 230.10(a)(3). The presumption that there are practical, environmentally preferable alternatives is applicable unless and until the proponent of the discharge "clearly demonstrate[s] otherwise." *Id.* All practical alternatives to discharge in special aquatic sites are presumed to have less adverse impact, unless clearly demonstrated otherwise. *Id.* Thus, where the presumption applies, the permit applicant bears the burden of providing "detailed, clear, and convincing information proving that an alternative with less adverse impact is impracticable." *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1269 (10th Cir. 2004). Furthermore, such information provided by a permit applicant must be independently verified by the Corps. *Id.*

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Thus, in order to obtain a 404 permit for fill in an SAS, the applicant must prove to the Corps that the proposed project is the least environmentally damaging practicable alternative (“LEDPA”) that will achieve the project’s purpose. To determine a project’s LEDPA, the project applicant must conduct a section 404(b)(1) Alternatives Analysis. The LEDPA determination is considered the “steepest hurdle” in obtaining a 404 permit. If the proposed project is not the LEDPA, the Corps *may not* approve the project or grant a 404 permit. To ensure compliance with the EPA Guidelines, first the applicant must prepare an analysis to provide the Corps with the necessary information to determine if the U.S. Environmental Protection Agency’s (“EPA’s”) section 404(b)(1) Guidelines (40 C.F.R. 230) have been followed. Then the Corps must – independently of the applicant’s submissions – ensure that the project complies with the EPA Guidelines. Projects that do not comply with the Guidelines will not receive a permit. If a project does comply with the Guidelines, a permit will be granted “unless issuance would be contrary to the public interest.” 33 C.F.R. § 323.6(a).

The LEDPA requirement is intended to *avoid* environmental impacts to SAS instead of mitigating impacts after they occur. EPA Region IX has stated that the LEDPA determination “should ensure that most projects are sited out of the nation’s water and that only projects that are absolutely necessary and environmentally acceptable receive permits.” Yocom et al., *Wetlands Protection Through Impact Avoidance: A Discussion of the 404(b)(1) Alternatives Analysis*, 9 WETLANDS 283, 296 (1989).

EPA Region IX generally considers the alternatives involving the least amount of filled waters and those that avoid ecologically-significant areas such as special aquatic sites (“SAS”) to be the least damaging. The EPA prefers avoidance of impacts to mitigation, and mitigation measures are not generally considered until *after* the LEDPA has been selected. To determine the LEDPA, the project applicant must generate a list of practicable alternatives for the Corps’ review. A practicable alternative is one that is “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” *Bering Strait Citizens v. U.S. Army Corps*, 524 F.3d 938, 947 (9th Cir. 2008), quoting 40 C.F.R. § 230.10(a). The basic purpose of the project must be identified because only alternatives that practicably meet the project’s basic purpose should be considered. *Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407, 409 (9th Cir. 1989).

“The Corps has discretion to characterize the project’s basic purpose in the first instance, including whether to accept or reject the applicant’s characterization of that purpose.” *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1366 (11th Cir. 2008 (Kravitch, J., concurring)). In doing so, the Corps must take the applicant’s goals and purpose into account. *Louisiana Wildlife Federation v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985). But “an applicant cannot define a project in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable.” *Sylvester v. U.S. Army Corps of Engineers*, *supra*, 822 F.2d at

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409. "If an applicant did so and the Corps adopted the applicant's characterization of the project's purpose, the Corps would have abused its discretion." *Sierra Club v. Van Antwerp*, *supra*, 526 F.3d at 1366.

The "overall project purpose" is the "basic project purpose plus consideration of costs and technical and logistical feasibility." U.S. Army Corps of Engineers, Plantation Landing Permit Elevation Decision (1989) at 289. "Overall project purpose" does not include secondary project purposes, site specific secondary requirements, project amenities, desired size or desired return on an investment. A project's basic purpose is the generic function of the activity. Since the Saltworks Project's purpose is housing, its basic purpose is to provide shelter.

Thus, the applicant for a section 404 permit must provide detailed information about the project for the Corps' use in determining the practicability of the alternatives and eliminating non-practicable ones. The applicant must provide sufficient evidence to the Corps demonstrating that the proposed project is the LEDPA and that all impacts to the site have been avoided to the extent practicable. The applicant has the burden of proving to the Corps that no less environmentally damaging practicable alternative is available and that the project fully complies with section 404(b)(1) Guidelines. The Corps has the final word on determining if the LEDPA has been selected. The Corps employs a "practicability presumption" where the project is not water dependent and would discharge into a special aquatic site. A project is water dependent when it requires access or proximity to, or siting within a water of the United States to fulfill its basic purpose. If the project is not water dependent and will cause a discharge into a SAS, the Corps will presume that practicable alternatives exist. Because that is the case here, the Cargill project cannot proceed, as we explain below.

#### **THE SALTWORKS PROJECT IS NOT WATER-DEPENDENT**

As noted, if a project is not water-dependent and will cause a discharge into an SAS, the Corps will presume that practicable alternatives exist. A project is water dependent when it requires access or proximity to, or siting with a water of the United States to fulfill its basic purpose. *Sierra Club v. Antwerp*, *supra*, 526 F.3d at 1366; *Bering Strait Citizens v. U.S. Army Corps of Engineers*, *supra*, 524 F.3d at 947. The Corps has even found dams, reservoirs and piers to be non-water dependent, because although they do require access to water, they do not need to be sited within an SAS. Schultz, Jon, "The steepest hurdle in obtaining a Clean Water Act section 404 permit: complying with EPA's 404(b)(1) guidelines' least environmentally damaging practicable alternative requirement," *UCLA Journal of Environmental Law & Policy*, June 22, 2006, 8. available at <<http://www.thefreelibrary.com/The+steepest+hurdle+in+obtaining+a+Clean+Water+Act+section+404...-a0150966539>>. If part of a multi-part project is water dependent but the rest is not, the overall project purpose is *not* water dependent. U.S. Army Corps of Engineers, Permit Elevation, Twisted Oaks Joint Venture (1991) at 6, 8. For this

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reason, dams, reservoirs and piers are not automatically considered water dependent, as they may involve non-water dependent uses. Furthermore, even where their only intended uses require access to water, they do not necessarily need to be sited in an SAS. Similarly, housing, restaurants, cafes, bars, retail facilities and convenience stores are not water dependent, even when part of a waterfront development. Plantation Landing, *supra*, at 12.

The Salt Works Project is a housing development, and housing developments do not require access to or proximity to waters of the United States, much less to an SAS. Therefore the Project is not water dependent. Since the Saltworks Project is not water dependent and will cause a discharge into waters of the United States, the Corps must presume that a practicable alternative exists.

Cargill may assert that since part of the Salt Works Project calls for rehabilitation of wetlands, the entire project is water dependent. However, separate project components that are not linked functionally are traditionally considered separate for purposes of section 404(b)(1). Yocom et al., Wetlands Protection Through Impact Avoidance: A Discussion of the 404(b)(1) Alternatives Analysis, 9 WETLANDS 283 (1989). Furthermore, as noted, housing is not water dependent, even when part of a waterfront development. Plantation Landing at 12. Since housing is not water dependent, the Corps must presume the existence of practicable alternatives that are not sited within an SAS.

### **SPECIAL AQUATIC SITES AND THE SALTWORKS PROJECT**

Even if the Corps somehow determined - erroneously - that the Saltworks Project is water dependent, as noted above it may not be sited within an SAS unless it is the LEDPA. 40 C.F.R. § 230.10(a)(3). Since the Saltworks Project is sited within an SAS (see analysis below) the Corps must determine that the Saltworks Project is the LEDPA before the Project can be approved. To overcome the presumption that a non-SAS LEDPA exists, Cargill must show by clear and convincing evidence that there are no practicable alternatives which will not cause a discharge into a SAS. This presumption requires the Corps to take a "hard look" at the possibility of using environmentally preferable sites and discouraging discharges in SASs, and provides an incentive to avoid construction in wetlands. The Corps, moreover, has the last word on water-dependency determinations. Cargill cannot overcome this presumption here, as we discuss below.

Cargill hired Wetlands Research Associates, Inc. to prepare a *Special Aquatic Habitat Assessment* ("Report") for its Redwood City salt ponds in June 2002. The Report asserted that vegetation was largely absent from the site and that no wetlands were found within the study area. The Report notes, however, that the soil is hydric, and confirms its historic condition as a tidal marsh. The Report relies on the Corps Manual, which states that "not all areas having

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hydric soils will qualify as wetlands. Only when a hydric soil supports hydrophytic vegetation and the area has indicators of wetland hydrology may the soil be referred to as a 'wetland soil.'" Based on its bare 3 1/2-page discussion (of which half was a lengthy quotation of the SAS' regulatory definition), the Report concluded that "no Special Aquatic Sites exist on the Cargill Redwood City Plant Study Area." This conclusion is manifestly mistaken, as we show below.

By letter dated June 28, 2002, Lieutenant Colonel Timothy S. O'Rourke of the Corps advised Cargill that "[b]ased on your consultant's June, 2002, *Special Aquatic Habitat Assessment*, it appears that wetlands and other special aquatic sites are not present on the Redwood City Plant Site. We encourage Cargill to further develop its analysis of this issue so that all parties interested in the evaluation of this permit decision have a clear understanding of how the alternative analysis will need to be framed."

Based on a Memorandum for Record it prepared on July 10, 2009, the Corps suggests that its preliminary jurisdictional determination ("PJD") would show the site to consist of 1270 acres of "other waters" and no wetlands. The memo correctly states that the purpose of the Cargill project is housing. The memo also reveals uncertainty as to how to apply the "normal circumstances" test for determining the presence of wetlands at the site. Consequently, Cargill agreed to refrain from proceeding further with the PJD until more guidance came from Corps headquarters as to how to apply "normal circumstances" to the site.

Neither the Corps nor EPA has conducted an independent, fact-based assessment of the Cargill site's qualification as a special aquatic site. Instead, to date both agencies have relied on the same woefully deficient, 3 1/2-page Report that Cargill prepared in 2002. Based on that scant and conclusory Report, EPA Regional Director Alexis Strauss advised Cargill by letter dated July 17, 2002 that "within the levees surrounding the Plant Site . . . there are no areas that EPA would consider to be special aquatic sites as that term is defined." The letter concedes, however, that the site "does have the potential for significant function if it is restored."

Notwithstanding Colonel O'Rourke's request that Cargill "further develop its analysis of [the SAS] issue so that all parties interested in the evaluation of this permit decision have a clear understanding of how the alternative analysis will need to be framed," Cargill has not pursued a more in-depth study of the salt ponds, even though the site has "the potential for significant aquatic function if it is restored." The conclusions reached in the *Special Aquatic Habitat Assessment* Report lack a proper grounding in scientific fact and are not based on a full evaluation of the hydrologic importance and habitat values of the salt ponds.

EPA Region 9 appears to agree that a proper analysis of the Cargill site remains to be performed. By letter dated January 5, 2010 Regional Director Strauss advised Corps District Engineer Lt. Col. Laurence M. Farrell of EPA's "expectations concerning closer coordination

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between EPA and the Corps as the permitting process moves forward on the [Cargill] project.” The letter identifies “important recent factors that warrant careful consideration in determining whether and how a development project at this site can be permitted under the Clean Water Act.”

Director Strauss noted that even though EPA had requested to be consulted by the Corps before it formulated any regulatory or legal interpretations applying the Clean Water Act to the Cargill project, EPA was not consulted when the Corps prepared its October 2, 2009 Memorandum on how the “normal circumstances” requirements of wetlands applies to the Cargill site. The letter emphasizes that “EPA does not necessarily agree with [the Corps’] analysis or conclusions,” and confirms that information contained in EPA’s July 17, 2002 letter is outdated and no longer represents EPA’s thinking about permitting at the Cargill site.

EPA’s letter points out that “[a]s there may be other special aquatic sites present at areas of the project site proposed for fill, a permit application and associated project alternatives should be evaluated based on the criteria established at 40 CFR 230.10(a)(3) regarding presumption of no-fill alternatives for any proposed non-water dependent activity.” Finally, the letter addresses the fact of sea-level rise, and notes that “development in areas subject to inundation due to sea level rise expected to occur as a result of climate change” must be limited.

All of these factors weigh heavily in favor of designating the Cargill site as an SAS. A proper view of the facts and governing law demonstrates that the Cargill site easily qualifies for this designation. Special aquatic sites “are geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region. (See section 230.10(a)(3)).” 40 C.F.R. § 230.3(q-1). SASs include sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs, and riffle and pool complexes. Subpart E of EPA Guidelines (40 C.F.R. § 230.40-230.45.) It is undisputed that the salt ponds do not qualify as a coral reef or a riffle and pool complex. However, they do qualify for classification as a sanctuary or refuge, wetland, or mud flat, as we show below.

Sanctuaries and refuges “consist of areas designated under State and Federal law or local ordinances to be managed principally for the preservation and use of fish and wildlife resources.” 40 C.F.R. § 230.40(a). Although the Cargill salt ponds are not yet owned or managed by the State of California or the Federal Government, they do qualify as an area that Congress *has designated* for inclusion in a refuge or sanctuary. On October 28, 1988, Congress passed Public Law 100-556, which increased the Fish and Wildlife Service’s acquisition authority for the Don Edwards San Francisco Bay National Wildlife Refuge to a total of 43,000 acres. The authorized boundary of the Don Edwards San Francisco Bay National Wildlife Refuge includes Tracts 165

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and 166 identified in the September 1990 Land Use Protection Plan of the U.S. Fish and Wildlife Service for the Don Edwards San Francisco Bay National Wildlife Refuge. The maps provided in the Land Use Protection Plan show the boundaries of areas approved by Congress for inclusion in the San Francisco Bay National Wildlife Refuge. The plan selects "abandoned salt ponds" as the highest priority for acquisition, and specifically identifies Tracts 165 and 166 for restoration. Those two tracts include the Cargill salt ponds in Redwood City. Therefore the Cargill site is within a designated refuge and accordingly should be considered to be an SAS.

The fact that the Cargill site has not yet been *acquired* for refuge use does not diminish the fact that it has been *designated* for such acquisition and use. Moreover, this site's priority for acquisition is now much higher than it was just a few years ago. In 1990 the salt ponds were still in active industrial use, which placed them in Priority 3 for acquisition. But today, the salt ponds are no longer in commercial use, advancing them to Priority 1 for acquisition. When the salt ponds are finally acquired by the Fish and Wildlife Service, they will be readily restored to a salt-marsh habitat. This pond complex presents an opportunity to preserve and restore a range of habitats from existing mudflat to tidal marsh. Examples of such restored salt marsh habitats abound. For instance, decommissioned salt ponds in Newark that were acquired in 1974 have since recovered and now serve as a sparkling example of how salt ponds can be restored to salt pan and salt march habitat. Similarly, in Napa, portions of Cargill's Napa County East Side salt plant are being restored to salt marsh wildlife habitat by the California Department of Fish and Game's Napa Marsh Unit.

The site's high priority for acquisition and restoration is also highlighted by Redwood City's Strategic General Plan. That plan reflects the City's recognition of the importance of the salt ponds as recoverable open space. The areas designated as "open space" in the Redwood City Plan include the Leslie Salt (now Cargill) salt ponds, the South San Francisco Bay National Wildlife Refuge, and publicly owned recreational facilities. The General Plan declares that "[d]ue to the sensitive nature of these open space areas, it should be assumed that they will remain open space forever."

The San Francisco Bay Area Wetlands Ecosystem Goals Project (1999) reconfirms the compelling biologic justification for the Don Edwards Refuge's designation of the Cargill salt ponds, amplifying the ecological significance of the site in its regional context - precisely as special aquatic sites are defined in 40 C.F.R. § 230.3(q-1). The Goals Project states that "[t]he Redwood City crystallizers and associated salt ponds offer the opportunity to maintain and enhance shorebird and waterfowl habitat in close proximity to the large tidal flats that are so important for foraging shorebirds." The Goals Project goes on to recommend that the salt ponds be modified to serve as "salt pan habitat for shorebirds and waterfowl."

In summary, the Cargill site qualifies as an SAS by virtue of its designation by Congress



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for inclusion within the Don Edwards National Wildlife Refuge, and its recognition as publicly valued open space and wildlife habitat in local and regional land use plans.

Mud flats are “broad flat areas along the sea coast and in coastal rivers . . . and in inland lakes, ponds and riverine systems . . . Coastal mud flats are exposed at extremely low tide and inundated at high tides with the water table at or near the surface of the substrate. The substrate of mud flats contains organic material and particles smaller in size than sand. They are either unvegetated or vegetated only by algal mats.” 40 C.F.R. § 230.42(a). The definition of mud flats in section 230.42(a) does not distinguish a mud flat from a playa, which likewise falls under the definition of waters of the United States in 40 C.F.R. section 230.3(s)(3). In the scientific literature, playa is a synonym for “salt pan.” *See* attached report of Peter R. Baye, Ph.D. Since the physical characteristics of playas and salt pans are consistent with the regulatory definition of mud flat, it follows that at least some playas/salt pans qualify as non-tidal mud flats.

In his attached report, Dr. Baye discusses the findings of Warnock *et al.* who determined that the Cargill salt ponds function as “mudflats” and “mud habitat” for shorebirds’ roosting and foraging needs. Dr. Baye’s analysis goes on to discuss the findings and writings of other reports recognizing the continuum of intertidal and supratidal mudflats as vital aquatic ecosystems, and concludes that the Cargill salt ponds qualify as mud flats under section 230.42(a).

In contrast to the discerning analysis presented by Dr. Baye and the broad definition of mud flat included in the governing regulation, Wetlands Research Associates’ conclusory rejection of the Cargill site as a mud flat is unpersuasive. Contrary to the Cargill Report’s unfounded assumption, the definition of mud flats does not require a tidal influence, nor does it require that the mud flat be in a purely natural state or that the hydrology be non-saline. The Cargill site clearly qualifies as a mud flat under the regulatory definition.

Wetlands are defined as “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” 40 C.F.R. § 230.41. According to the Corps’ October 2, 2009 Memorandum regarding how the “normal circumstances” test should be applied to Cargill’s site, “the normal circumstances on the Redwood City plant site are to be viewed as the site exists today, with normal salt production operations.” We respectfully disagree. Commercial salt production has ceased. Natural restoration processes are now underway. Those recovery processes will accelerate as the level of Bay waters rises, inexorably, with global warming. Additionally, as Dr. Baye has observed, there is already wetland habitat on the outboard sides of the levees.

Although the salt ponds are both saline, and diked off from the Bay, they will not remain so indefinitely, as Bay waters are rising due to global warming. The San Francisco Bay

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Conservation and Development Commission accordingly has authoritatively determined that by the year 2050, the Bay's level will rise by 16 inches, and by 2100, by 55 inches. This known rise in sea levels will easily breach the levees and dikes that separate the Cargill salt ponds from the Bay, thus allowing their natural recapture and restoration by the Bay.

### **THE CARGILL PONDS ARE A SPECIAL AQUATIC SITE AND CARGILL MUST SELECT AN ALTERNATE LOCATION**

As shown above, the Cargill site is entitled to protection as a Special Aquatic Site. If, as here, a project is *not* water dependent *and* proposes to discharge fill material into a Special Aquatic Site, the EPA Guidelines establish a regulatory presumption that a less environmentally damaging practicable alternative exists. The project applicant has the burden to clearly demonstrate otherwise. If this presumption is not rebutted, no permit may be issued. As noted above, the Saltworks Project is not water dependent, because its purpose is to build housing. To build the Project, fill material will be discharged into waters of the United States. Because the Project is planned to be built within a Special Aquatic Site (either a refuge, mud flat or wetland) Cargill has the burden of proving that no less environmentally damaging practicable alternative exists. Since this burden cannot be met, the Corps cannot issue a section 404 permit for Cargill's project, and Cargill must select an alternate location.

### **THE CARGILL SITE IS SUBJECT TO THE PUBLIC TRUST DOCTRINE**

The Public Trust Doctrine can be traced back to Roman law, which held that air, rivers, sea and seashore could not be privately owned because they were dedicated to the use of the public. English Common Law adopted the Roman concept and created the Public Trust Doctrine as we know it today, which protected public ownership of the navigable waters of the 13 original states. Thanks to the Equal Footing Doctrine, all states have the same "rights, sovereignty, and jurisdiction" over the shores of land beneath navigable waters as the 13 original states. *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845).

Both the common law of the Public Trust Doctrine and California's Constitution make it clear that the state must protect the public's right to use and access tidal and submerged lands. *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892); Cal. Const., art. I, § 25 and art. X, § 4. The doctrine is "an affirmation of the duty of the state to protect people's common heritage of streams, lakes, marshlands and tidelands . . ." *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 441. Even tideland that has been conveyed by the State into private ownership is subject to the Public Trust, unless the land has already been filled and is beyond restoration. *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 534. If submerged and tidal lands have been filled, but they "are still physically adaptable for trust uses," the "interests of the public are paramount" and the lands are subject to the public trust." *Id.*

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The Cargill salt ponds are thus clearly protected under the Public Trust Doctrine and California's Constitution. Therefore the Saltworks Project is subject to the public's overarching right to use these lands for public navigation, wildlife habitat, recreation, open space and scientific study. Recognition of this fact will serve the public – and future generations – well. The Cargill ponds currently include invaluable mudflat/salt pan habitats, as well as lands with obvious potential for significant aquatic function. They represent a substantial portion of the open space land remaining in Redwood City. They should be protected against development and restored. "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." *National Audubon Society v. Superior Court, supra*, 33 Cal.3d at 446. The Corps' duty under the Clean Water Act to require Cargill to select a non-SAS site for its project complements and buttresses the Public Trust Doctrine.

#### NON-DEGRADATION

On February 8, 1968, Secretary of the Interior Stewart Udall authoritatively interpreted section 301(b)(1)(c) of the Clean Water Act to establish a "non-degradation policy" mandating that "[w]ater whose existing quality is better than the established standards as of the date on which such standards become effective will be maintained at their existing high quality." By adoption of Resolution No. 68-16 in that year, the California State Water Resources Control Board likewise declared that existing water quality was protected under California's Porter-Cologne Act, Water Code Section 13000 et seq. This policy prohibits new discharges into waters whose quality exceeds the applicable water quality standards unless the discharge is "necessary to accommodate important economic or social development" and the discharger adopts the "highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control." 40 C.F.R. § 131.12(2). This non-degradation policy had its origin in the Federal Water Pollution Control Act of 1948, which sought to prevent further degradation of the nation's waters, and in the Rivers and Harbors Act of 1899, which made it illegal to excavate, fill or alter any areas within the reach of that Act without a permit. Act of June 30, 1948, ch. 758, 33 U.S.C. §§ 1251 et seq.; Act of March 3, 1899, ch. 425, sec. 9, 30 Stat. 1151, 33 U.S.C. §§ 407 et seq.

The ongoing degradation of the Cargill site represents a substantial departure from and violation of the water quality protections established by the Clean Water Act, the Federal Water Pollution Control Act, and the Rivers and Harbors Act. Cargill must not be allowed to bootstrap its continuing evasion of those laws' express intent to prevent further degradation of the nation's waters, including the salt marshes that were impaired by construction of Cargill's salt ponds. In particular, Cargill may not evade compliance with the non-degradation policy by artificially maintaining the brine and bittern concentrations in its salt ponds so as to forestall the natural processes of recovery, including the emergence of intermittent mud flats as salt concentrations

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variably decline with rainfall, overland flow and natural subsidence/tidal overtopping of levees.

### CONCLUSION

There is no question but that the Cargill site currently supports Special Aquatic Sites. Accordingly, the special presumptions and protections applicable to such sites under section 404 of the Clean Water Act apply fully, as do the protections of the Public Trust Doctrine and the federal and state Anti-Degradation Policies.

Thank you for considering our views on this important matter.

Very truly yours,

  
Stephan C. Volker

Attorney for Citizen's Committee to Complete the Refuge

SCV:taf

Encl.: Peter R. Baye, Ph.D., Analysis of Clean Water Act Section 404(b)(1) "Special Aquatic Site" Status of Redwood City Saltworks Site, San Mateo County, California (January 2010)