UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

March 1, 2019

OFFICE OF THE
ADMINISTRATOR

R.D. James
Assistant Secretary of the Army for Civil Works
U.S. Department of the Army
108 Army Pentagon
Washington, D.C. 20310

Dear Mr. James:

This letter transmits the Clean Water Act (CWA) jurisdictional determination for Redwood City Salt Plant site ("the Salt Plant"). On March 18, 2015, EPA designated the Salt Plant as a "special case," as defined by the 1989 Memorandum of Agreement (MOA) between EPA and the Army Corps of Engineers regarding coordination on matters of geographic jurisdiction. Pursuant to the MOA, designation of the special case made EPA responsible for determining the extent to which the Salt Plant contained jurisdictional waters of the United States under the Clean Water Act.

After careful consideration of all relevant facts before the Agency in light of the applicable law and regulations, the EPA has concluded that the Salt Plant is non-jurisdictional fast land. EPA reached this conclusion considering the combination of circumstances at the Salt Plant, including the separation of the Salt Plant over a century ago from the surrounding waters, the federally-authorized excavating, filling, and industrial production and maintenance activities that have taken place at the Salt Plant since that time, and the use of water at the plant as merely a component of a highly engineered industrial operation. EPA's analysis is summarized in the enclosed determination document.

EPA's determination constitutes the position of the federal government on the CWA jurisdictional status of the Salt Plant, and its transmittal concludes the "special case" process. If you have any questions, please contact Lee Forsgren at forsgren.lee@epa.gov or (202) 564-0311.

Sincerely,

Andrew R. Wheeler
Acting Administrator

Enclosure

CC: Lt. General Todd T. Semonite, Commanding General, U.S. Army Corps of Engineers
Matthew Z. Leopold, General Counsel, EPA
Mike Stoker, Regional Administrator, EPA Region 9
Anna Wildeman, Principal Deputy Assistant Administrator, Office of Water, EPA

REDWOOD CITY SALT PLANT JURISDICTIONAL DETERMINATION

This document constitutes the determination by the U.S. Environmental Protection Agency's ("EPA") of the federal jurisdictional status of the Redwood City Salt Plant for purposes of the Clean Water Act ("CWA"). This CWA jurisdictional determination applies to the Redwood City Salt Plant site ("the Salt Plant" or "the site"). The site is approximately 1,365 contiguous acres adjacent to Westpoint Slough, located near Seaport Boulevard, Redwood City, San Mateo County, California. EPA has concluded that the site does not include "waters of the United States" because the site was transformed into fast land before passage of the CWA and has not subsequently been overtaken by jurisdictional waters.

I. Introduction and Scope of Determination

This document constitutes the determination of the federal jurisdictional status of the Salt Plant by EPA for purposes of the CWA. This jurisdictional determination is based on Sections 404 and 502(7) of the CWA, 33 U.S.C. §§ 1344 and 1362(7), regulations of the U.S. Army Corps of Engineers (ACOE) at 33 C.F.R. § 328.3(a) and of EPA at 40 C.F.R. § 230.3(o), relevant case law, and EPA and ACOE guidance, including the agencies' January 19, 1989 "Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the Clean Water Act" ("1989 MOA").

A. Geographic Scope of Determination

This CWA jurisdictional determination applies to the Salt Plant, an area of approximately 1,365 contiguous acres adjacent to Westpoint Slough, located near Seaport Boulevard, Redwood City, San Mateo County, California. This determination does not address the jurisdictional status of the areas on the exterior side of the perimeter levees of the Salt Plant.

B. Procedural Background

1. Requests for a Jurisdictional Determination

On November 12, 2009, DMB Redwood City Saltworks ("Saltworks") requested that the San Francisco District of ACOE prepare a preliminary jurisdictional determination ("PJD") under Section 10 of the Rivers and Harbors Act ("RHA") and Section 404 of the CWA for 1,478 acres in and adjacent to the Salt Plant.[1] Saltworks made this request in conjunction with a permit application, filed with Redwood City, for a proposed urban development and tidal marsh restoration project on the site. On April 14, 2010, ACOE issued a PJD in accordance with ACOE Regulatory Guidance Letter 08-02, stating that wetlands and other waters on the site may

[1] According to its submission, Saltworks is a venture whose principals are DMB Pacific Ventures, LLC, and Westpoint Slough, LLC, which is an affiliate of Cargill, Incorporated. The Salt Plant is owned by Cargill Point, LLC, an affiliate of Cargill, Inc. Request for Approved Jurisdictional Determination, from David C. Smith, DMB Redwood City Saltworks, to Jane Hicks, Chief, Regulatory Division, ACOE, and Jason Brush, Manager, Wetlands Office, EPA Region 9, May 30, 2012, with exhibits ("AJD Application").

be jurisdictional under the RHA and CWA.[2] Saltworks engaged in public outreach for the proposed project, but withdrew its application with Redwood City on May 4, 2012.[3]

On May 30, 2012, Saltworks requested that ACOE and EPA prepare final jurisdictional determinations (referred to as "Approved Jurisdictional Determinations" or "AJDs" by ACOE) under the RHA and CWA for the site.

2. EPA "Special Case" for Clean Water Act Jurisdictional Determination

A definitive, official determination as to the presence of jurisdictional aquatic resources can only be made by means of an approved jurisdictional determination.[4] The 1989 MOA between EPA and ACOE provides that, for purposes of Section 404 of the CWA, EPA may designate certain jurisdictional determinations as "special cases" and make the final determination on the jurisdictional status of potential waters of the United States. These determinations are binding on the United States and represent its position in any subsequent federal action or litigation.

In 2014, the Chief Counsel for ACOE prepared two memoranda outlining "Legal Principles to Guide the Approved Jurisdictional Determination for the Redwood City Salt Plant."[5] The Chief Counsel stated that "[t]he site has been highly altered to facilitate the salt manufacturing process," and "[t]his alteration of the site and a century of industrial salt making have eliminated any trace of the prior marshland or wetland character of the site."[6] Furthermore, he concluded that "areas that were lawfully filled, either before the passage of the CWA or pursuant to a CWA permit, are no longer subject to CWA jurisdiction."[7] The Chief Counsel's conclusion was that "the Corps should not assert CWA jurisdiction over the industrial process (pickle and bittern) liquids at the Redwood City site."[8]

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[2] Letter from Jane M. Hicks, Chief, Regulatory Division, ACOE San Francisco District, to David Smith, DMB Associates (Apr. 14, 2010), AJD Application, Ex. 22.
[3] Letter from John Paul Bruno, General Manager and Senior Vice President, Redwood City Saltworks, to the Honorable Alicia Aguirre, Mayor, City of Redwood City (May 4, 2012), AJD Application, Ex. 25.
[4] ACOE Regulatory Guidance Letter No. 16-01 at 2 (Oct. 2016).
[5] Memorandum from Earl H. Stockdale, Chief Counsel, ACOE, "Legal Principles to Guide the Approved Jurisdictional Determination for the Redwood City Salt Plant," (Jan. 9, 2004) ("Stockdale Memo"); Memorandum from Earl H. Stockdale, Chief Counsel, ACOE, "Supplement to 'Legal Principles to Guide the Approved Jurisdictional Determination for the Redwood City Salt Plant' 9 January 2014," (Mar. 25, 2014) ("Stockdale Supplement").
[6] Stockdale Memo at 16.
[7] *Id.* at 17. The Chief Counsel also concluded that "The fact that the majority of the area within the Redwood City site was improved in a manner that did not necessarily raise the elevation above that of the MHW does not make this principal any less applicable. A CWA jurisdictional determination must be based on the site conditions today and not some prior site condition that no longer exists." *Id.* at 17-18 (citing *United States v. Milner*, 583 F.3d 1174, 1195 (9th Cir. 2009).
[8] *Id.* at 23.

On March 18, 2015, ACOE sent an email to EPA indicating that ACOE intended to "finalize and sign" a determination that "the site is not jurisdictional under the CWA" and attaching an unsigned memorandum for the record explaining the basis for this conclusion.[9] That same day, EPA sent a letter to ACOE designating the site's CWA jurisdictional determination as a special case under the 1989 MOA.

3. ACOE Rivers and Harbors Act Section 10

Congress enacted the Rivers and Harbors Act of 1899 to promote water transportation and commerce by protecting the navigability of the nation's waterways. Section 13 of the RHA, 33 U.S.C. § 407, which prohibited the discharge of "refuse" into any "navigable water" or its tributaries, or on the banks of a navigable water or its tributaries "whereby navigation shall or may be impeded or obstructed," provided an exception for refuse "flowing from streets and sewers . . . in a liquid state," and authorized the Secretary of War to issue permits for deposits of refuse if "anchorage and navigation will not be injured." 33 U.S.C. § 407. Because of this focus on navigability, the Corps defines "navigable waters of the United States" as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4.

Notwithstanding EPA's designation of the site's CWA jurisdictional determination as a special case, ACOE retained the authority to determine RHA jurisdiction. ACOE issued an AJD with respect to the RHA on March 19, 2015.[10] ACOE determined that only certain areas in the eastern section of the site are jurisdictional under Section 10 of the RHA. The total area of these double-sided sloughs was calculated to be 56.87 acres. ACOE did not find RHA jurisdiction for any part of the western section of the site, stating that in the past the Army had either portrayed that portion as non-jurisdictional improved lands, or had explicitly determined that the area was non-jurisdictional.

The scope of RHA jurisdiction is relevant to the permitting history of the Salt Plant, but not to EPA's determination as to whether the site is jurisdictional under the CWA.

II. The Redwood City Salt Plant

Prior to development, the Salt Plant was an area of tidal marsh interspersed with numerous sloughs. Currently, the site consists of levees, building pads, and industrial ponds constructed for salt production.

A. Early History

At the turn of the twentieth century, a number of commercial-scale salt production operations began along the edges of San Francisco Bay. The lands and waterways around the Port of

[9] Email from Major General John W. Peabody, ACOE, to Kenneth J. Kopocis, Deputy Assistant Administrator for Water, EPA (Mar. 18, 2015).
[10] Major General John W. Peabody, ACOE, "Basis for Rivers and Harbors Act of 1899 Section 10 Approved Jurisdictional Determination, Redwood City Saltworks" (Mar. 19, 2015).

Redwood City underwent intensive commercial development. Development of the Salt Plant began in 1901. By 1902, the Redwood City Salt Company and the West Shore Salt Company leased or owned portions of the site.[11] The Redwood City Salt Company operated its salt works, including evaporators, crystallizers, and other industrial ponds constructed for salt production, on approximately 432 acres (of a total 1,784 acres of leased land) east of Redwood Creek and southwest of First Slough. West Shore Salt Company owned and operated 192 acres of additional salt works on the southern portion of the present-day crystallizers. According to the local newspaper, the industrial salt production ponds produced their first salt crops in October 1902. "Water was taken in from San Francisco Bay by pumps and/or inlets, concentrated into brines by solar evaporation in sequential basins, and moved into small rectangular crystallizers to eventually crystallize as salt that was then harvested by hand."[12]

The Stauffer Chemical Company consolidated these operations in 1907. By approximately 1930, the operators in the western section had dredged the bottoms of most of the salt production ponds and eventually obliterated the traces of some, but not all, original tidal sloughs. In addition, by 1931, the Redwood City Harbor Company, the salt companies, and ACOE had erected levees separating the former marshlands between Redwood Creek, Westpoint Slough, and First Slough from San Francisco Bay and the adjacent sloughs.[13] A 1931 survey of the Salt Plant shows that the 603-acre area had been converted into industrial salt making facilities, filled areas, and reclaimed marsh.[14] Stauffer later became the Leslie Salt Company. Cargill, Inc. purchased Leslie Salt in 1978.

ACOE began issuing permits pursuant to Section 10 of the Rivers and Harbor Act (RHA) in the early twentieth century. EPA is not aware of any RHA permits issued for salt processing operations at the Salt Plant prior to 1940. There are records indicating that ACOE did issue some RHA permits to construct salt processing infrastructure (e.g. levees, dams, siphons, and pipelines) by various companies in south San Francisco Bay in the 1920-1960s, including permits for expansion of the Salt Plant.[15] The RHA permit record shows the intensive expansion of salt pond facilities in the South Bay during this time, including the establishment of pipeline connections among plant sites to consolidate operations.

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[11] San Francisco Estuary Institute, *Redwood City Draft Technical Memo*, March 22, 2016, ("SFEI 2016").
[12] Michael Josselyn, Ph.D., WRA, Inc., *Early History of Redwood City Salt Plant Site* (Feb. 27, 2012), AJD Application, Ex. 5 ("Early History Report").
[13] *See* WRA, Inc., Summary of Historic Levee Construction (Feb 2012), AJD Application, Ex. 6.
[14] Michael Josselyn, Ph.D., WRA, Inc., Topographic Sheets Denote Marsh Elevations Above Mean High Water (Feb. 27, 2012) ("Marsh Elevations Report"), AJD Application, Ex. 7, at 2-3 and Attachments B, C, USGS Sheet 4643 (Jul. 1, 1931).
[15] Department of the Army, ACOE, San Francisco District, June 20, 2013. Permit summary for South Bay projects from 1905-2010.

B. Permit History

1. 1940 RHA Section 10 Permit

On December 8, 1939, Leslie Salt's predecessor, Stauffer Chemical, submitted a permit application to the War Department to dam First Slough, which separated the existing industrial salt production ponds from the undeveloped eastern section of the site, and to construct levees around the eastern section.[16] The application shows the base of the proposed dam five feet below Mean Lower Low Water (MLLW) and 13 feet below Mean Higher High Water (MHHW) in First Slough. It also shows "marsh land" to be at the elevation of MHHW. The plan accompanying the application also shows that the former marshland areas between Redwood Creek, Westpoint Slough, and First Slough had been converted to salt making operations previously, so the permit only authorized obstruction and conversion of the areas of the Salt Plant that ACOE deemed subject to RHA jurisdiction, First Slough and Westpoint Slough.

Pursuant to Section 10 of the RHA, on January 14, 1940, the War Department granted the permit:

> To construct an earth dyke or levee across and along the bank of First Slough, and along the banks of Westpoint Slough and an unnamed tributary thereof, in Westpoint Slough, at about 1.0 mile southeasterly of the mouth of Redwood Creek, San Mateo County, in accordance with the plans shown on the drawing attached hereto marked "Proposed Dam and Levee East of Redwood Cr., San Mateo County, California, Application by Stauffer Chemical Co., Dated Dec. 1939"[.]

The War Department's December 9, 1939, public notice for the permit included a map, attached to the application and incorporated into the permit, showing most of the western section of the site as "Salt Evaporating Ponds," west of an "Existing Levee," and a smaller part to the north as "Reclaimed Marsh." The map shows the eastern section of the site as marshland with large and minor sloughs throughout.

In 1941, Leslie Salt began construction of the current facilities at the Salt Plant, including the large rectangular crystallizer beds in the western section of the site.[17] Leslie Salt initiated construction of the First Slough dam and the levees along Westpoint Slough in 1943 and worked throughout the 1940s to construct the Salt Plant by leveeing, excavating, filling, and compacting the Salt Plant to create the crystallizer beds, pickle ponds, bittern ponds, facility headquarters, and multi-use areas. The levees authorized under the 1940 permit were completed in or around 1946, and the crystallizers were completed in 1950.[18]

Construction drawings for the crystallizer beds show that these structures were constructed with a clay bottom that would be flat and hard, such that the crystallizers would be graded and leveled

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[16] War Department, Section 10 Permit issued to Stauffer Chemical Company, January 16, 1940.
[17] Ver Planck, W.E., *Salt in California*, State of California Department of Natural Resources, Division of Geology and Mines, Bulletin 175 (1958).
[18] Early History Report at 18 & Figures 11, 12; 1946 aerial photographs of First Slough dam, Westpoint Slough, and Food Slough levees.

after each salt harvest.[19] By 1951, all of the Salt Plant work was completed and the current borders and operations of the Salt Plant established, and the plant first began shipping salt product. Since that time, the Salt Plant has continuously produced salt, using its construction equipment and grading and leveling the crystallizers with each salt crop.

2. 1947 Dredging Permit

On March 19, 1947, Leslie Salt submitted to the War Department a permit application to dredge parts of Redwood Creek, a salt pond adjacent to Redwood Creek, and an area in Westpoint Slough.[20] The dredged material was proposed to be placed in the western section of the enclosed evaporation ponds, in the location of the present-day crystallizers. The discharge location was identified generally as "Area to be Filled." It is likely that the dredged material was used to create and maintain internal levees within the industrial salt production ponds, since spreading the material across the western section would have interfered with salt production, and later aerial photographs do not show filled areas, other than the levees.

On April 28, 1947, the War Department issued a permit allowing Leslie Salt to dredge a total of 1.5 million cubic yards of material from the four discrete areas. From 1950 to 1951, Leslie Salt constructed the current large crystallizer beds and internal levees within the "Area to be Filled".[21]

3. Pipeline Connection to Newark

On February 9, 1951, ACOE issued a permit for Leslie Salt to construct an eight-inch pipeline across the Dumbarton Strait, apparently between the Newark and Redwood City plant sites.[22] The available records show that this was the first pipeline constructed to facilitate brine transfer between the two salt pond complexes. ACOE permitted a larger 20-inch pipeline across the Dumbarton Strait in 1964. According to a report from 1972, all of Leslie Salt's plants could be operated as independent units, although the pipelines facilitated pond utilization as needed.[23] System maps from the 1980s and 1990s depict unidirectional flow from the Newark plant to the Redwood City plant.[24] Prior to connecting the Redwood City plant to the Newark plant, and at subsequent times, the Redwood City plant took seawater directly into some of the industrial salt production ponds, via intake manifolds and pumps.[25] From 1951 to at least 2002, Leslie Salt (later Cargill) imported seawater through the intake pipe and tide gate structure located at First Slough (between ponds 4 and 8E) to desalt the crystallizer beds and desalting pond (Pond 10).[26] In 2000 and 2001, Cargill constructed new intake pipes on Pond 1 of the Ravenswood Complex

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[19] Redwood City Salt Plant Crystallizer Grading Drawings 772 (1949), AJD Application, Ex. 10.
[20] War Department, Permit Issued to Leslie Salt Company, April 28, 1947.
[21] Early History Report, AJD Application, Ex. 5.
[22] ACOE Permit summary (2013).
[23] CDM Inc., Report on Proposed Discharge of Bittern to San Francisco Bay, prepared for Leslie Salt (Mar. 31, 1972).
[24] Leslie Salt Company, Southbay Production Facilities, base aerial photography (Apr. 1985).
[25] Early History Report; *see also* Cargill Salt Division, Letter to ACOE requesting disclaimer of jurisdiction for Cargill's Redwood City Plant Site, (Feb. 28, 2002).
[26] Cargill Salt Maintenance Work Plan Report 2002-2003 (Apr. 2002).

(formerly part of the Redwood City plant) to bring in seawater to improve brine flow.[27] In addition, stormwater that fell on the industrial salt production ponds was periodically discharged from the First Slough pipe to the Bay, authorized first by a San Francisco Regional Water Quality Control Board (Regional Board) Individual NPDES permit and Waste Discharge Requirements (WDR) (CA0028690, Orders 82-59 and 88-163),[28] then later by a State Water Resources Control Board General NPDES permit (91-13DWQ; 97-03DWQ).[29] The site remains under General NPDES permit coverage, but it is unclear whether discharges via the First Slough pipe still occur and, if so, at what frequency.

4. Later State and Federal Permits

Since 1972, Leslie Salt and Cargill have considered options for disposal of bittern into the San Francisco Bay. According to available documentation, bittern has been stored onsite in various industrial salt production ponds at different times (ponds 4, 8E, 9, 9A, and 10)[30] and sent to the Newark plant via Cargill's transbay pipeline or barges.[31]

By the 1980s, Cargill was subject to federal and state permits pertaining to operations improvement and maintenance (O&M) activities, such as dredge lock construction, levee repair, rip-rap renewal, and replacement of gates, pipes, pumps and siphons. In some instances, the O&M permits covered new system improvement work, such as spot repairs with land-based equipment of the crystallizer beds and installation of a new 16-inch pipeline and associated infrastructure to pump brines and bittern from the Redwood City plant to the Newark plant.[32] Cargill modified the pipeline to better control the brines and bittern within its entire South Bay salt production system as it was reduced by the transfer of vast acres to the South Bay Salt Ponds Restoration Project.

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[27] Cargill Salt Maintenance Report, (Mar. 22, 1999).

[28] San Francisco Regional Water Quality Control Board: WDID 2417125001, Order No. 82-59, NPDES No. CA0028690, Waste Discharge Requirements for Leslie Salt Company, Redwood City Facility (Nov. 1982); WDID 2417125001, Order No. 88-163, NPDES No. CA0028690, Waste Discharge Requirements for Leslie Salt Company, Redwood City Facility, (Nov. 1988); Administrative Extension of NPDES Permit Nos. CA0028703, CA0028690, and CA0028681 for Cargill's Newark, Redwood City, and Napa facilities (Nov. 1, 1993).

[29] SWRCB, Notice of Intent for General Permit to Discharge Stormwater Associated with Industrial Activity, WQ Order No. 91-13-DWQ (Apr. 1, 1992); Notice of Intent for Existing Facility Operators to Comply with the Terms of the General Permit to Discharge Stormwater Associated with Industrial Activity, WQ Order No. 97-03-DWQ (June 11, 1997).

[30] Regional Board, November 30, 2012 Inspection of Cargill, Inc.'s Redwood City Salt Plant in San Mateo County and Newark Plant in Alameda County; Regional Board, Staff handwritten notes for August 9, 1990 inspections conducted on Leslie Salt's Newark and Redwood City plants ("1990 Staff Notes"); Cargill Salt 2001-02 Maintenance Report (Oct. 2002); Cargill Salt 1999-2000 Maintenance Report (Sept. 2000); Cargill Salt 1998-99 Maintenance Report (Aug. 1999).

[31] 1990 Staff Notes.

[32] Cargill Salt Maintenance Reports, *supra* n.30.

Starting in 1988, ACOE issued permits under CWA Section 404 to Cargill for operations and maintenance covering existing levees and infrastructure for Cargill's facilities around the San Francisco Bay area.[33] Cargill regularly stated that it reserved the right to claim that the type and location of the work described in the permits and work plans is outside ACOE jurisdiction and/or exempt from 404 CWA permit requirements. Specifically, the cover letters to Cargill's ACOE permit applications and annual reports pursuant to permit requirements have typically included the following language:

> Cargill historically has reserved its right to argue that the type and location of the work described in the enclosed work plan is outside the jurisdiction of the Corps and/or exempt from permit requirements under section 404(f) of the [CWA] . . . [and in its current permit application/report] Cargill does not waive—and expressly reserves—its position that the work described in [the] work plan is outside Corps jurisdiction and/or exempt from permit requirements.[34]

In another letter connected with its Section 404 permit application, Cargill has definitively stated its position that the activities authorized by its permit are "exempt from regulation" under CWA section 404 and that "a permit for such activities is not required."[35]

Cargill has received a water quality certification for Cargill's salt pond maintenance activities from the Regional Board.[36] In addition, the San Francisco Bay Conservation and Development Commission (BCDC) also issued permits covering the O&M activities under the McAteer-Petris Act.[37]

C. The Nature of the Salt Production Process

1. <u>The Nature of the Industrial Salt Production Ponds</u>

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[33] Department of the Army Regional Permit No. 17040E98 (Aug. 30, 1988); Department of the Army Regional Permit No. 19009S98 (July 10, 1995); Department of the Army Regional Permit No. 19009S98 (Nov. 29, 1995); Department of the Army authorization for coverage under Nationwide Permits 3 and 18, File No. 2008-00146S (Apr. 16, 2008); Department of the Army authorization for coverage under Nationwide Permits 3 and 18, File No. 2008-00146S (Oct. 2, 2008); Department of the Army Permit, File No. 2008-00160S (Sept. 10, 2010).

[34] *See, e.g.*, Cover Letters to the Cargill Maintenance Work Plan 2015-2016, Feb. 26, 2015, ACOE Permit 2008-00146S; Advance Notification of Proposed Work, Cargill Salt's June 2014-May 2015 Maintenance Work Plan, ACOE Permit 2008-00146S; and Cargill Salt Completed Work Plan, June 2013-May 2014, ACOE Permit 2008-00146S.

[35] Letter from Cargill to Lt. Col. Michael J. Walsh, District Engineer, San Francisco District, ACOE at 2 (Jan. 13, 1995).

[36] Regional Board, Water Quality Certification for Maintenance Activities and System Improvements to be Conducted Between November of 2009 and November of 2019 at the Cargill Solar Salt Systems in Alameda and San Mateo Counties, Site No. 02-01-C-994, August 3, 2010.

[37] San Francisco Bay Conservation and Development Commission, Permit No. 4-93 (Mar.14, 1995, as amended through Aug. 29, 2002), Amendment Three to Permit No. 4-93 (Aug. 29, 2002).

Cargill and its predecessors configured the levees on the site to move highly saline process water and brines sequentially through a series of industrial salt production ponds to produce salt and hold residual bitterns. The levees are intended to separate the salt production process from direct inputs of San Francisco Bay, except for limited circumstances when water is pumped in or out of the ponds, and occasions when Cargill moves its floating dredge, *The Mallard*, into the industrial salt production ponds. The industrial salt production ponds were not excavated from dry land.

2. The Salt Production Process

The salt production process begins when Cargill pumps seawater into evaporation ponds at its Newark plant, across San Francisco Bay from the site. The seawater is moved through a series of containment cells as the salinity increases. According to Cargill, after approximately four to five years of solar evaporation at the Newark plant, the highly saline process water is transferred by pipe to the Salt Plant.

The industrial salt production ponds at the Salt Plant are connected to each other. Process water pumped from the Newark plant first enters Ponds 7a, 7b, 7c and 8w (the "pickle complex") at the Salt Plant, where additional solar evaporation occurs until the solution is saturated, at which point the highly saline process water is transferred to Ponds 1-9, a series of "crystallizer" cells where the salt precipitates out of suspension. The residual bittern is pumped into Ponds 8e, 9, and 9a, where it is stored until sold, taken by barge to the Newark plant, or recycled back into the salt production process.[38]

The salt that remains on the surface of the crystallizer cells is mechanically scraped from the ground and loaded into trucks to be moved offsite. There is also a "desalting pond" (Pond 10) on the northwest side of the crystallizer ponds, where salt is further removed from the bittern liquid. A water intake is located on Pond 4, which connects to First Slough, where Cargill has at times brought water in from the Bay.[39]

Cargill's levees are periodically maintained by a floating clamshell dredge, *The Mallard*, which accesses them via an excavated tidal channel at either of two pre-approved dredge lock locations.[40] *The Mallard* is the only dredge that operates within the salt ponds; the site lacks the physical capacity to support navigation for interstate commerce.

III. CWA jurisdiction over waters of the United States

1. The definition of waters of the United States

The Clean Water Act prohibits any discharge of pollutants, including dredged or fill material, into navigable waters except as permitted by the CWA. 33 U.S.C. § 1311(a). The Act defines

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[38] AJD Application, Attachment B, at 3-4.

[39] Letter from Mr. Robert Douglass, Cargill Salt, to Lt. Col. Timothy S. O'Rourke, District Engineer, ACOE, San Francisco District, re: Disclaimer of Jurisdiction for Cargill's Redwood City Plant Site (Feb. 28, 2002).

[40] For additional information as to how *The Mallard* accesses the salt ponds, see the descriptions contained in the following documents: U.S. Fish and Wildlife Service (USFWS) (1995), WRA (2000), BCDC (1995), and BayKeeper (2015).

"discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." *Id*. § 1362(12)(A). The "navigable waters" over which the CWA exercises this protective jurisdiction are defined in Section 502(7) of the CWA as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). EPA and ACOE regulations currently in effect in the State of California define the scope of waters of the United States to include traditional navigable waters, interstate waters, the territorial seas, tributaries of any of the above-mentioned waters, impoundments of jurisdictional waters, waters adjacent to any of the above-mentioned waters, and certain types of waters that have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas. *See* 40 C.F.R. § 230.3(o); *see also* 33 C.F.R. § 328.3(a) (ACOE regulation). This regulatory definition is the subject of litigation. EPA and ACOE have proposed regulations that would repeal and revise this definition. *See* Proposal to Recodify Preexisting Rule, 82 Fed. Reg. 34,889 (July 27, 2017); Supplemental Notice of Recodification of Preexisting Rule, 83 Fed. Reg. 32,337 (July 12, 2018); Proposal to Revise the Definition of "Waters of the United States," 84 Fed. Reg. 4,154 (Feb. 14, 2019). This determination does not implicate either the litigation or the scope of the regulatory definition currently in effect, however, because it is based on the transformation of the site into fast land prior to passage of the CWA.

2. <u>CWA Jurisdiction over Fast Land</u>

The CWA requires a permit for the discharge of dredged and fill material into "the waters of the United States." 33 U.S.C. § 1362(7). A statute is presumed not to be retroactive, and nothing in the CWA suggests that Congress intended to override that presumption. *See Landgraf v. USI Film Prods*, 511 U.S. 244, 270-71 (1994) (explaining presumption against retroactive application of statutes); *see also Golden Gate Audubon Soc., Inc. v. U.S. Army Corps of Engineers*, 717 F. Supp. 1417, 1422 (N.D. Cal. 1988) (amended order) ("[T]he regulatory definition does not retroactively extend the Corps' jurisdiction over areas that have been transformed into dry land."). As discussed further below, CWA jurisdiction includes only areas that are currently waters, not areas that were legally converted to fast land, or converted to fast land prior to passage of the CWA.

In 1978, the Ninth Circuit Court of Appeals held that salt ponds belonging to the Leslie Salt Company, which were separated by dikes from regular tidal inundation, were subject to the CWA, but declined to hold that jurisdiction extended to areas that were "fast land" or "improved solid upland" as of the date of the passage of the CWA. *Leslie Salt Co. v. Froehlke*, 578 F. 2d 742, 756 (9th Cir.1978). In *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009), the Ninth Circuit more directly addressed the limits of CWA jurisdiction over areas that were dry upland when the statute was passed, holding that "if 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." *Milner*, 583 F.3d at 1195. The court explained that even if fast land has been maintained and prevented from becoming submerged through artificial means, if the activity does not affect waters, excavating, filling, and other work does not pose the type of concern that the CWA is meant to address. *Id*.

ACOE and EPA addressed the absence of CWA jurisdiction over fast land in developing the regulatory definition of "waters of the United States." In 1977, ACOE issued revised final

regulations implementing its CWA Section 404 program, following adverse court decisions which found the original definition to be too limited. 42 Fed. Reg. 37,122 (July 19, 1977). In the preamble, ACOE expressed its policy on previously impacted waters of the United States: "Our intent under Section 404 is to regulate discharges of dredged and fill material into the aquatic system as it exists and not as it may have existed over a record period of time." *Id.* at 37,128. In 1980, EPA stated "[w]hen a portion of the Waters of the United States has been legally converted to fast land by a discharge of dredged or fill material, it does not remain waters of the United States subject to section 301(a). The discharge may be legal because it was authorized by a permit or because it was made before there was a permit requirement." 45 Fed. Reg. 85,336, 85,340 (Dec. 24, 1980). Former waters converted to fast lands before enactment of the CWA (or legally by permit) are not "waters of the United States" for purposes of the CWA.

IV. The Salt Plant is Non-Jurisdictional Fast Land

The Salt Plant was transformed from tidal marsh and sloughs into upland—a highly managed industrial salt processing facility separated from the aquatic environment of the San Francisco Bay—decades prior to the passage of the CWA, and therefore is fast land not subject to the CWA. Ninth Circuit case law and the agencies' interpretations of CWA jurisdiction leave no doubt that a water converted to fast land prior to the enactment of the CWA is not jurisdictional. Neither the relevant judicial opinions nor prior agency interpretations define with precision the meaning of areas that are nonjurisdictional fast land as of the passage of the CWA. However, certain key principles derived from the cases and prior agency interpretations, when applied to the history and characteristics of the Salt Plant, provide the basis for determining that this salt facility is nonjurisdictional fast land. These facts include: (1) the development of the site and its transformation into upland and separation from Bay waters 70 years before passage of the CWA; (2) the numerous federal permitting actions authorizing development of the site and its separation from Bay waters beginning 50 years prior to passage of the CWA; (3) the highly managed industrial operations of the Salt Plant, including the movement of the salt processing substances to successive clay-bottomed crystallizer basins; (4) that the water present at the plant is piped in from another plant after processing there; and (5) that the water at the plant is merely a component of the plant's industrial processing activity until ultimately it evaporates or turns into a byproduct. All of these facts when considered together support the conclusion that the Salt Plant is nonjurisdictional fast land.

The first fact described above, that the site was converted to upland containing a highly managed industrial salt processing facility separated from the aquatic environment of the San Francisco Bay prior to passage of the CWA, is the most significant to this determination. Though some of the characteristics of the site are different from the shore defense structures that the Ninth Circuit viewed as fast land in *Milner*, the court's reasoning and analysis in that case directly supports this determination. Specifically, the fact that the tidal waters were transformed into upland prior to the passage of the CWA was central to the court's holding in *Milner* that the area at issue was no longer a water of the United States. As described above and in the above-cited documents, the Salt Plant was developed beginning in 1901, including the construction of levees and dikes separating the site from surrounding waters as well as basins for evaporation, rectangular crystallizers, and other steps in the production process. By 1930, the bottoms of most of the ponds were dredged and the western section of the site was separated from the Bay. Beginning in 1940, the additional extensive excavating, filling, and compacting of the eastern section of the site converted the entire area into an industrial facility, complete with crystallizer beds, pickle

ponds, bittern ponds, facility headquarters, and a multi-use area. This development was completed prior to the passage of the CWA in 1972, a fact critical to the Ninth Circuit's holding that the land in *Milner* is not jurisdictional. Present-day management of the facility is consistent with its historical conversion to fast land.

In *Leslie Salt Co.*, the Ninth Circuit held that navigable waters extend to the water's reach in its "unobstructed, natural state," and that CWA jurisdiction does not terminate once waters pass through tide gates into salt ponds. 578 F. 2d at 754-55. The Ninth Circuit clarified in *Milner*, however, that *Leslie Salt* did not extend CWA jurisdiction to all places "the water would theoretically reach, partly out of concerns that such a ruling swept too broadly and unnecessarily included 'fast land' or 'improved solid upland.'" 583 F. 3d at 1194. Rather, *Milner* emphasizes that upland at the time the CWA was passed is not jurisdictional "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." *Id.* at 1195. The Salt Plant was fast land when the CWA was enacted, and it has not since been overtaken by surrounding waters; therefore, consistent with Ninth Circuit precedent, it is not jurisdictional under the CWA.

The separation of the site from the surrounding aquatic system further reinforces a determination that the site is not jurisdictional. The Salt Plant is separated from the surrounding water by levees; the only exchange of water occurs for purposes of occasional operation and maintenance of the Salt Plant's industrial operations. The primary example of this is the activity of the maintenance dredge, *The Mallard.* As described above, when necessary to repair dikes, *The Mallard* excavates a channel between the surrounding waters and the site. When *The Mallard* completes its maintenance work, the locks separating the Salt Plant from the surrounding marsh and Bay waters are closed. Pipes exist that may discharge stormwater that falls on the site into the surrounding waters, but the fact that an industrial facility discharges stormwater through pipes into a nearby water of the United States does not create the type of connection to the water necessary to render the site jurisdictional. The occasional exchange of water through the levees between the San Francisco Bay and the salt ponds for purposes of operating and maintaining the salt processing does not constitute waters "overtak[ing] the land," *see Milner*, 583 F.3d at 1195, and therefore does not render the Site jurisdictional under the CWA.

The fact that the site was developed pursuant to numerous federal government authorizations over the course of many decades also supports a finding that the site has been transformed into fast land. As described above and in the above-cited documents, beginning in 1920 and extending through the 1960s, ACOE issued permits for salt processing infrastructure such as levees, dams, siphons, and pipelines in the western section of the site. In 1940, the War Department issued a RHA Section 10 permit to construct levees around the eastern section of the site and further develop the entire site, followed by another permit in 1947 to dredge parts of Redwood Creek and fill areas that would become levees on the site. In 1951 and again in 1964, ACOE issued permits for the construction of pipelines to carry brine between Redwood City and the Newark plant site. Before the CWA was passed, the federal government authorized the conversion of the site from tidal marshland and sloughs to upland containing an industrial salt production facility.

EPA recognizes that the Salt Plant has different factual characteristics than the area the Ninth Circuit held to be fast land in *Milner*, most notably that process water and brine is at various

times present in some of the industrial salt production ponds at the site. Some might view the mere presence of process water in the industrial salt production ponds during the earlier stages of the evaporation process as counter to a determination that the site is fast land. However, this is not the case. The presence of process water in the industrial salt production ponds does not transform non-jurisdictional upland containing an industrial facility into a water of the United States. The operation encompasses a series of containment cells with flat, hard clay bottoms graded and leveled with earthmoving equipment following every round of salt production. The brine used for salt production at the Salt Plant does not typically come directly onto the site from the San Francisco Bay, but rather is piped in from another facility where it has already undergone processing for four to five years. The brine that is regularly moved from one pond to the next, undergoing further evaporation, until it is transferred to crystallizer cells, where the salt is removed for production and the residual bittern, essentially a waste product, is disposed of. To the extent brines are pooled at the facility, they are integral to, and carefully managed as a part of, the industrial process of salt production. Process water and brine at the plant is simply a component of a highly engineered industrial operation that bears no relationship to the aquatic system. The process water and brine in the salt ponds is used in a controlled industrial process to create salt until the water essentially disappears through evaporation or becomes bittern.

Finally, that Salt Plant has sought coverage for its operation and maintenance activities under a CWA section 404 permit does not undermine EPA's determination that the Salt Plant is not jurisdictional. A definitive, official determination as to the presence of jurisdictional aquatic resources can only be made by means of an approved jurisdictional determination.[41] No approved jurisdictional determination has been issued for the Salt Plant. In fact, no jurisdictional analysis of any kind was conducted in connection with the issuance of the Section 404 permits. A facility's choice to apply for a permit does not convert a nonjurisdictional site into a water of the United States subject to the authority of the federal government. Nonjurisdictional status is not something that can be waived through a permit application, and even if it could be waived, the Site's permit applications have been clear that they reserve the right to assert that its facilities are not jurisdictional.

In summary, considering the combination of circumstances at the Salt Plant, including the separation of the plant over a century ago from the surrounding waters, the federally-authorized excavating, filling, and industrial production and maintenance activities that have taken place at the site since that time and through today, and the regular manipulation of the process water and brine in the ponds through the industrial process until the waters no longer exist, EPA has determined that the Salt Plant is nonjurisdictional fast land.

V. Conclusion

Within the boundaries of the 1,365-acre site, EPA concludes that there are no "waters of the United States" for purposes of the Clean Water Act.

[41] ACOE Regulatory Guidance Letter No. 16-01 at 2 (Oct. 2016).