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CITIZENS COMMITTEE TO COMPLETE THE REFUGE

October 14, 2015

Jared Blumenfeld
Regional Administrator
Environmental Protection Agency, Regional IX
75 Hawthorne Street
San Francisco, California 94105

RE: Redwood City Saltworks Jurisdictional Determination

Dear Mr. Blumenfeld:

We are writing on behalf of San Francisco Baykeeper and the Citizens Committee to Complete the Refuge ("CCCR") regarding the jurisdictional determination being conducted for 1,365 acres of salt ponds owned by Cargill Point, LLC in Redwood City, California ("Redwood City Salt Ponds" or "Salt Ponds"). DMB Redwood City Saltworks (the "Applicant") [1] requested a formal jurisdictional determination under the Rivers and Harbors Act and the Clean Water Act for the Redwood City Salt Ponds.[2] Baykeeper and CCCR are greatly concerned by the position asserted by the U.S. Army Corps of Engineers ("Corps") in the January 9, 2014 memorandum written by Earl H. Stockdale ("Stockdate Memo"), and appreciate that EPA has designated the jurisdictional determination under the Clean Water Act as a special case. We urge EPA not to follow the guidance expressed in the Stockdale Memo, but rather to appropriately apply the current regulatory definition of "waters of the United States" and determine that the Salt Ponds are jurisdictional under the Clean Water Act.

Baykeeper is a non-profit public benefit corporation that works to protect and enhance the water quality and natural resources of San Francisco Bay, its tributaries, and other waters in the Bay Area, for the benefit of its ecosystems and communities. Baykeeper has over three thousand members who use and enjoy San Francisco Bay and other waters for various recreational, educational, and spiritual purposes. Baykeeper works to protect and restore the tidal marshes and wetlands along San Francisco Bay in order to preserve natural communities, aid our human communities in adapting to sea-level rise, and provide access to recreation and natural spaces to Bay area residents.

The Citizens Committee to Complete the Refuge has an ongoing history of interest in wetlands protection, wetlands restoration, and wetlands acquisition. CCCR was originally formed in 1965. Our senior members were part of a group of citizens who became alarmed at the degradation

[1] The Applicant is a joint venture whose principals are DMB Pacific Ventures, LLC and Westpoint Slough, LLC. The real property of the Redwood City Salt Ponds is owned by Cargill Point, LLC, an affiliate of Cargill, Inc. ("Owner" or "Cargill).

[2] Letter from David C. Smith to Jane M. Hicks and Jason Brush, re: DMB Redwood City Saltworks Salt Plant, Redwood City, San Mateo County, California (May 30, 2012) ("JD Request").

of the Bay and its wetlands. We joined together, and with the support of Congressman Don Edwards, requested that Congress establish a wildlife refuge. The process took seven long years and in 1972 legislation was passed to form the San Francisco Bay National Wildlife Refuge. We turned to Mr. Edwards again, and in 1988 (the first year he submitted it) his legislation to double the size of the Refuge was signed into law, the wildlife refuge which now appropriately bears his name. Our membership is approximately 2,000 people and we have the support of 40 local and national organizations - League of Women Voters, hunters, environmental groups, etc. While we are still interested in the acquisition of land for the Refuge we recognize the Bay does not exist in isolation from surrounding natural resources. Watershed protection is absolutely necessary. Accordingly, CCCR engages in a variety of regulatory processes, using the Clean Water Act, California Environmental Quality Act, and the Endangered Species Act to protect wetlands, plants and wildlife in San Francisco Bay.

For decades, CCCR and Baykeeper have been leading advocates for the wetlands, wildlife and water quality of San Francisco Bay on behalf of the San Francisco Bay National Wildlife Refuge and those who treasure the Bay's habitats, recreational values and aesthetics. We have worked to protect wetlands, endangered and sensitive species' habitat, and undeveloped areas along the edges of the Bay. If we wish to ensure the sustainability and diversity of bay ecosystems, protection of these areas, such as the Redwood City Salt Ponds, will become even more critical as sea level rises.[3]

I. Description of the Salt Pond System

The Redwood City Salt Ponds consist of a series of ponds that were constructed in the early to mid-1900s by impounding tidal marshes of San Francisco Bay and tidal sloughs that are tributaries to San Francisco Bay.[4] The Salt Ponds are separated from San Francisco Bay by earthen dikes or levees.[5] The Owner actively maintains the levees and dikes that create the Salt Ponds.[6]

The hydrological exchange and continuity of water from San Francisco Bay ("Bay water") with the Salt Pond system occurs through the operation of the Salt Pond system itself. The Salt Ponds are flooded with a "vast quantity" of tidal Bay water that is subjected to evaporation and

[3] The 2015 State of the Estuary Report prepared by the San Francisco Estuary Partnership indicated that undeveloped areas around San Francisco Bay, like the Redwood City Salt Ponds, are key to preserving wildlife and preparing our communities for sea-level rise. The San Francisco Estuary Partnership, State of the Estuary 2015, Status and Trend Updates on 33 Indicators of Ecosystem Health, *available at* http://www.sfestuary.org/wp-content/uploads/2015/10/SOTER_2.pdf. The report noted that "sustaining diverse wildlife [in San Francisco Bay] involves conserving remaining habitats and restoring new ones," and in particular, pointed out that restored salt ponds provide important habitat for many species of fish and shrimp, including overwintering and potential spawning habitat for state-listed longfin smelt. *Id*. at 26, 38. Further, the report discussed the threat of sea-level rise on our communities, stating that decision-makers should "protect the existing undeveloped space, create more of it if possible, and protect it fromm future development." *Id*. at 63-64.

[4] *See* Peter R. Baye, Ph.D., Regulatory Analysis of Clean Water Act Section 404 and Rivers and Harbors Act Section 10 Jurisdiction at Redwood City Salt Ponds, San Mateo County, California (April 2010) ("Baye Report") at 5, attached hereto as Exhibit 1.

[5] *See id.* at 7-8.

[6] *See, e.g.*, Corps' Permit No. 19009S98, attached hereto as Exhibit 2, authorizing Cargill to maintain solar salt facilities in south San Francisco Bay, including the Redwood City Salt Ponds.

concentration by enclosure within impoundments of the Bay's salt marshes.[7] Bay water flows into salt ponds fitted with intake structures ("intake ponds") through tide gates during the highest tides and when the salinity of the water is highest.[8] When the whole salt pond system was intact, 30,600,000 tons of Bay water entered the intake ponds annually.[9] Salt pond series are designed so that the flow of brine from pond to pond is by gravity through control gates, with some pumping needed where old sloughs must be crossed.[10]

The concentration of Bay water into brine is diluted by rainfall in winter and spring. The whole salt pond system received 42,000,000 tons of seasonally re-evaporated rainfall.[11] Rain water lies on the surface of strong brine (stratifies by density) and subsequently mixes with it appreciably when strong winds drive wind-wave turbulence.[12] Extra area of concentrator ponds are designed to accommodate pond leakage (seepage) and dilution of rain water.[13]

Hydrological connectivity between the Salt Ponds and San Francisco Bay also occurs during the repair and maintenance of the levee system. The repair and maintenance of the Salt Pond levee system has always been conducted by a barge-mounted clamshell dredge, The Mallard. [14] The Mallard enters the salt pond system from San Francisco Bay through a dredge lock. The Mallard dredges a tidal canal in a salt marsh to the dredge lock, breaches the dredge lock to connect the tidal canal, and enters the dredge lock's tidal pond. The dredge then dams the tidal breach in the dredge lock berm at high tide, and breaches the salt pond perimeter levee to enter the non-tidal canal within the salt pond. The salt pond canal is dredged deep below the former salt marsh surface, to maintain at least 4-feet draft for the dredge to navigate. The canal also is a "borrow ditch," mined for mud to repair the levees. Some canals are constructed exclusively as navigation "short-cuts" across ponds, rather than borrow pits. When the dredge/levee repair work is done within a salt pond system, the dredge exits by running the dredge lock process in reverse. All these activities and features have been authorized under Section 404 and Section 10 jurisdiction by USACE permits since the late 1980s.[15]

The salt pond and dredge operations together exhibit the continuity of the navigable waterbody, San Francisco Bay, and the salt ponds, including the Redwood City Salt Ponds. First, all the water itself within the entire salt pond is San Francisco Bay water and rainwater – annual input historically of 30,600,000 tons and 42,000,000 on average, respectively.[16] Bay and salt pond water

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[7] Ver Planck, W.E. 1958. Salt in California. State of California Department of Natural Resources, Division of Geology and Mines, Bulletin 175 at 47. Excerpts of Chapter 2 of Ver Planck 1958, which describes the salt recovery process, are attached hereto as Exhibit 3; the entire publication is *available at* https://archive.org/details/saltincalifornia00verprich.

[8] Ver Planck 1958 at 47, 50.

[9] Ver Planck 1958 at 47.

[10] Ver Planck 1958 at 46.

[11] Ver Planck 1958 at 43.

[12] Ver Planck 1958 at 50.

[13] Ver Planck 1958 at 50.

[14] *See* excerpt from report prepared by Wetlands Research Associates in 2000, attached hereto as Exhibit 4, describing the mechanics of the dredge lock system.

[15] *See e.g.*, Corps' Permit No. 19009S98, attached hereto as Exhibit 2; *see also* Memorandum for Record re Permitting History, Mallard Use of Redwood City Ponds, and Dredge Lock Access (January 12, 2009), attached hereto as Exhibit 5.

[16] Ver Planck 1958 at 43, 47.

surface are continuous during navigation of the dredge through this stepwise entry and exit process. Occasionally, salt pond levees or dredge lock dams "blow out" during lock egress/entry process, and temporarily exchange water directly between the Bay and salt ponds. The dredge's barge navigates continuously between Bay and salt pond.

II. The Redwood City Salt Ponds Are a "Water of the United States."

On June 29, 2015, EPA and the Corps (collectively, the "Agencies") published the final rule defining waters that are regulated by the Clean Water Act ("jurisdictional waters" or "waters of the United States").[17] In addition to traditional navigable waters, such as waters that are subject to the ebb and flow of the tide, the Agencies define jurisdictional waters as categorically including impoundments of and waters adjacent to otherwise jurisdictional waters.[18] In doing so, the Agencies have determined that impoundments and adjacent waters have a significant nexus to other jurisdictional waters."[19]

The Redwood City Salt Ponds are waters of the United States for several reasons. First, the Salt Ponds with reasonable improvements would be subject to the ebb and flow of the tide. Second, the Salt Ponds are impoundments of otherwise jurisdictional waters, namely San Francisco Bay, tidal marshes, and tidal sloughs. Third, the Salt Ponds are also waters that are adjacent to these otherwise jurisdictional waters. Accordingly, the Redwood City Salt Ponds are regulated by the Clean Water Act.

A. The Waters Where the Redwood City Salt Ponds Are Would Be Subject to the Ebb and Flow of the Tide if Reasonable Improvements Were Made.

All traditional navigable waters are waters of the United States.[20] Traditional navigable waters are those "waters which are currently used, or were in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide."[21] The Agencies' definition makes clear that a water need only be susceptible for use in commerce or subject to the ebb and flow of the tide to be a traditional navigable water.[22] For example, waters that are navigable only with improvements such as locks, canals, dams, or widening or deepening are "navigable waters."[23]

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[17] Definition of "Waters of the United States" Under the Clean Water Act, 80 Fed. Reg. 37,053 (June 29, 2015) ("Clean Water Rule" or "Rule"). The Rule became effective August 28, 2015. *Id*. at 37,073. On October 9, 2015, the Sixth Circuit ordered a temporary stay of the Clean Water Rule until the court has decided challenges to the Rule. This letter assumes that the Rule will be upheld, but notes where the analysis may change if the Rule is overturned.

[18] 80 Fed. Reg. at 37,073; 33 C.F.R. § 328.3(a)(4), (6).

[19] 80 Fed. Reg. at 37,073-75, 37,080; *see also* U.S. Environmental Protection Agency & U.S. Dept. of the Army, Technical Support Document for the Clean Water Rule: Definition of Water of the United States (May 27, 2015) ("Technical Support Document") at 224-232, 275-326.

[20] Technical Support Document at 190; *see* 33 C.F.R. § 328.3(a)(1).

[21] Technical Support Document at 190.

[22] *See id*. at 190-196.

[23] *The Montello*, 47 U.S. 430, 439-444; *United States v. Buday*, 138 F. Supp.2d 1282, 1291 (D. Mont. 2001); *see also United States v. Appalachian Electric Power Co*., 311 U.S. 377, 406-407 (stating that with waters which with "reasonable improvements" may become navigable are "navigable waters" even if the improvements have not yet been built).

The tidal waters of San Francisco Bay would ebb and flow throughout the diked baylands of the Redwood City Salt Ponds, but for the dikes and levees that created the Salt Ponds.[24] Therefore, the only improvement that need be made to make them subject to the ebb and flow of the tide and a part of the navigable San Francisco Bay is the removal of the levees. If, as the case law states, the possibility of constructing a dam renders a waterbody jurisdictional as a navigable water, then certainly removal of a similar improvement – like the levees surrounding the Salt Ponds – would render the Salt Ponds jurisdictional as a traditional navigable water.[25]

B. The Redwood City Salt Ponds Are Impoundments of Otherwise Jurisdictional Waters.

The Redwood City Salt Ponds are also jurisdictional because they are impoundments of San Francisco Bay, as well as tidal salt marshes and sloughs along the shoreline of San Francisco Bay, all of which are jurisdictional waters.[26]

1. The Salt Ponds Are Impoundments.

An "impoundment" is a body of water separated by earthen dike, levee, or other barrier from a larger body of water. Neither the Clean Water Act, nor the Clean Water Rule, provides a regulatory definition distinct from this standard hydrological term. Because the Redwood City Salt Ponds are waterbodies created by diking off waterbodies - San Francisco Bay, tidal sloughs, and tidal marshes - the Salt Ponds fall squarely into the definition of impoundment.[27]

The Applicant claims that the Salt Ponds are not impoundments, but are rather "expoundments," because they are intended to keep out the water of San Francisco Bay.[28] The Applicant clearly created this term for the purposes of its argument; an "expoundment" is not a hydrological or engineering term. The Applicant's novel redefinition is unavailing.

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[24] Baye Report at 25. The Applicant acknowledges that the marshlands at Redwood City Salt Pond site were below mean higher high water mark, which is below the high tide line (i.e., "subject to the ebb and flow of the tide"). *See* JD Request, Appendix B at 14, note 35.

[25] This is especially true, since the permit authorizing the creation of most of the Redwood City Salt Ponds (Ponds 7A, 7B, 7C, 8E, 9A, and 9) included an express reservation allowing the United States to force of the removal of the levees. *See* Stockdale Memo at 11. Thus, there can be no argument that removing that the levees is within the discretion of the government and therefore would be "reasonable."

[26] *See* Baye Report at 5. The Early History of Redwood City Salt Plant Site prepared by WRA on behalf of the Applicant, found at Exhibit 5 of Appendix B of the JD Request ("WRA History"), confirms that the Redwood City Salt Ponds were created by constructing levees within marshes and sloughs. *See* WRA History at 2-4 (construction began by constructing dam across Steinberger Creek), 5-7 (early ponds created by constructing levees in marshes and sloughs), 15 (showing that post-1940 salt ponds constructed by building dams and levees across sloughs and marshes); *see also* JD Request, Appendix B at Exhibit 4 (map of Redwood City Salt Ponds site in 1857).

[27] Relict tidal drainage topography, including First Slough, remains evident in aerial photographs of the Redwood City Salt Ponds from the 1940s to the present. Baye Report at 7, 33-35.

[28] JD Request, Appendix B at 34-35.

All water within the Salt Ponds, including the most concentrated brines, originates as saline tidal water from San Francisco Bay, with gains and losses from natural rainfall and evaporation. [29] Cargill and its predecessor, Leslie Salt Co., have repeatedly stated that all hypersaline brines of the solar salt industrial facility, expressly including bittern salts, are "concentrated Bay water," with bittern distinguished merely as "concentrated bay water with sodium chloride removed."[30] Cargill has never disputed that the brines in the Salt Ponds originate as tidal Bay water entering the Salt Ponds through controlled intake structures. The levees exclude normal tidal flows from entering the Salt Ponds, but they also retain Bay water within them.

Moreover, the Salt Ponds function as an "impoundment" and the nominal "expoundment" depending on the tidal cycle. During highest tides when the Bay water surface is higher than the Salt Pond water surface, the Salt Pond levees act as an "expoundment" by preventing Bay water from entering the Salt Ponds. During all low tides when the Bay water surface elevation stands below the Salt Pond water surface, the Salt Pond levees act as an impoundment by preventing waters within the Salt Ponds from flowing into the Bay. Hydrologically, it is not possible for the Salt Ponds to be exclusively an "expoundment" in a tidal waterbody that fluctuates above and below the water surface of the Salt Ponds.

The Stockdale Memo and the Applicant also characterize the Redwood City Salt Ponds as an industrial facility in order to argue that the Salt Ponds are not under the jurisdiction of the CWA.[31] Baykeeper and CCCR recognize that the Salt Ponds are water bodies that have been created by diking off tidal wetlands and sloughs for the purpose of producing salt. However, as impoundments, they are jurisdictional. Neither the Clean Water Act, nor the Clean Water Rule, make exceptions for impoundments based on their use.[32] As noted in the Technical Support Document, the purposes of impoundments can be for many different reasons, such as flood control, water supply, irrigation, energy generation, containment of mine tailings, recreating, or pollution control.[33] However, the purpose of the impoundment is irrelevant; it is the function – to separate a body of water into different segments – that defines an impoundment. Therefore, the fact that the Salt Ponds were diked off from the Bay for the purpose of salt production does not affect whether or not they are jurisdictional waters.

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[29] *See* Ver Planck 1958 at 43, 47, 50; *see also* Cargill Salt – About –Solar Ponds, available at http://www.cargill.com/salt/about/san-francisco-bay-salt/sustainable-salt-making/solar-ponds/index.jsp, last accessed on October 9, 2015, attached hereto as Exhibit 6 (Cargill website stating that Bay water is pumped into ponds).

[30] Baye Report at 7 (*citing* Letter from Washburn, E.B. to California Regional Water Quality Control Board re Leslie Salt Co. Waste Discharge Requirements, NPDES No. CA 0007013, dated March 12, 1985. Washburn and Kemp (law firm) representing Leslie Salt Co.).

[31] *See* Stockdale Memo at 21; *see also* JD Request, Appendix B at 3, 5, 25-27, note 49.

[32] Moreover, until the Clean Water Rule was recently adopted, the definition of "waters of the United States" expressly included all waters "which are used or could be used for *industrial purpose by industries in interstate commerce*." 33 C.F.R 328.3(a)(3)(iii) (2014). Although Baykeeper and CCCR recognize that courts questioned this portion of the definition, the rulings never stated that waters used as part of an industrial process could not be jurisdictional, as Cargill implies.

[33]Technical Support Document at 226.

2. San Francisco Bay and Its Tidal Marshes and Sloughs Are Jurisdictional.

As stated above, the Redwood City Salt Ponds were created by impounding portions of San Francisco Bay, tidal sloughs, and tidal marshes. These waters are "otherwise jurisdictional waters." San Francisco Bay is inarguably a traditional navigable waterbody. CWA jurisdiction over tidal waters, such as San Francisco Bay, "extends to the high tide line."[34] Thus, every part of San Francisco Bay up to the Bay's high tide line is jurisdictional, including the tidal sloughs and tidal marshes which were impounded to create the Redwood City Salt Ponds. Moreover, the tidal sloughs, such as First Slough, Westpoint Slough, and Flood Slough, are traditional navigable waters in their own right, as well as tributaries to San Francisco Bay, and are thus jurisdictional for these reasons.[35] Finally, the tidal marshes impounded to create the Salt Ponds are also jurisdictional as waters that are bordering and adjacent to San Francisco Bay and the tidal sloughs.[36]

The Applicant argues that the Redwood City Salt Ponds are not jurisdictional under the CWA because the Salt Ponds were created prior to the passage of the Clean Water Act in 1972.[37] Yet the Clean Water Rule makes no exceptions for waters that were impounded prior to the enactment of the Clean Water Act, and thus, this fact is irrelevant. The Salt Ponds continue to be impoundments of waters that are otherwise jurisdictional under the Clean Water Act (*i.e.*, San Francisco Bay, tidal slough, and tidal marshes) and are jurisdictional.[38]

C. The Redwood City Salt Ponds Are Waters Adjacent to Jurisdictional Waters.

In addition, the Salt Ponds are jurisdictional because they are waters adjacent to jurisdictional waters.[39] Like impoundments, the Agencies have determined categorically that waters adjacent to otherwise jurisdictional waters "work together to maintain the chemical, physical, and biological integrity of the downstream traditional navigable waters . . . because of their hydrological and ecological connections to, and interactions with, those waters." 80 Fed. Reg. 37,069. The Redwood City Salt Ponds are "adjacent waters" because of their proximity to Westpoint Slough and San Francisco Bay.

1. The Salt Ponds Border and Neighbor Other Covered Waters.

Adjacent is defined as "bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of [33 C.F.R. section 328.3]," including traditional navigable waters

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[34] 33 C.F.R. § 328.4(b)(1); *United States v. Milner*, 583 F.3d 1174, 1194 (9th Cir. 2009). The high tide line is "the line of intersection of the land with the water's surface at the maximum height reached by a rising tide." 33 C.F.R. § 328.3(d). The Applicant acknowledges that the marshlands at Redwood City Salt Pond site were below mean higher high water mark, which is below the high tide line. *See* JD Request, Appendix B at 14, note 35.

[35] 33 C.F.R § 328.3(a)(5). These sloughs are identified on maps created by Wetland Research Associates. *See* JD Request, Appendix B at Exh. 6. The Corps has recognized that First Slough and an unnamed slough, which continue to be visible in aerial photos of the Salt Ponds, were navigable waters. *See* Approved Jurisdictional Determination Form for Redwood City Salt Plant, File No. 26726S; *see also* Baye Report at 34.

[36] 33 C.F.R. § 328.3(a)(6); *see* Technical Support Document at 231 (example of jurisdictional impoundment is an "impoundment of a wetland that meets the definition of adjacent water under the rule").

[37] JD Request, Appendix B at 5.

[38] 33 C.F.R. § 328.3(4).

[39] 80 Fed. Reg. 37,075; 33 C.F.R. § 328.3(a)(6).

and tributaries.[40] As stated in the Technical Support Document, "waters separated from other 'waters of the United States' by constructed dikes or barriers, natural river berms, beach dunes and the like are adjacent."

The Salt Ponds border, are contiguous with, and neighbor San Francisco Bay and Westpoint Slough.[41] Westpoint Slough, a traditional navigable water and tributary to San Francisco Bay, borders the levee that creates the Salt Ponds.[42] Moreover, since the high tide line of San Francisco Bay is at the levees, San Francisco Bay, in fact, borders the Salt Ponds, as well.[43]

In addition, the Salt Ponds "neighbor" San Francisco Bay. Neighboring is defined as including waters that are "within 1,500 feet of high tide line of traditional navigable water."[44] The Clean Water Rule "provides that with respect to the boundaries for adjacent waters the entire water is jurisdictional as long as the water is at least partially located within the distance threshold, and the agencies interpret the rule to apply to any single water body or wetland that may straddle a distance threshold." Thus, because the easternmost border of the Salt Ponds (if not the entire Redwood City Salt Pond site) is within 1,500 feet of the high tide line (i.e., the levees), the Salt Ponds "neighbor" San Francisco Bay and are jurisdictional.

2. The Salt Ponds Are Waters.

The Ninth Circuit in *Leslie Salt v. Froehlke* held that waters within Salt Ponds are not outside the jurisdiction of the Clean Water Act, merely because they are held within the Salt Pond levees. "The water in Leslie's salt ponds, even though not subject to tidal action, comes from the San Francisco Bay to the extent of eight to nine billion gallons a year. We see 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."[45] Yet the Stockdale Memo and the Applicant ignore this binding precedent (and logic) to assert a novel argument that the Redwood City Salt Ponds are not jurisdictional because the liquids in the ponds are not "waters."[46]

Both the Stockdale Memo and the Applicant rely on a portion of *Rapanos v. United States* where the plurality states that a "water of the United States" must first be a "water."[47] The *Rapanos* plurality was concerned about imposing CWA jurisdiction over areas where water was present infrequently and that were far from traditional navigable waters, a situation that is not presented by the Redwood City Salt Ponds. The *Rapanos* plurality describes the area at issue in that case as "land

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[40] 33 C.F.R. § 328.3(c)(1).

[41] *See* JD Request, Appendix B at Exhibit 2. In the JD Request, Applicant argues that *San Francisco Baykeeper v. Cargill* precludes a finding of jurisdiction due to adjacency. JD Request, Appendix B at 31. This argument has been mooted by the Clean Water Rule, which expands the adjacency category to all waters, not only wetlands. However, if a court overturns this portion of the Rule, *see supra* note 17, this analysis may be improper, but the fact that the Redwood City Salt Ponds are traditional navigable waters and/or impoundments would not be effected.

[42] JD Request, Appendix B at Exhibit 2.

[43] *See* JD Request, Appendix B at 11 (stating levees cut off Salt Ponds from ebb and flow of tide).

[44] 80 Fed. Reg. 37,081; 33 C.F.R. § 328.3(c)(2)(iii).

[45] *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 755 (9th Cir. 1978).

[46] *See* Stockdale Memo, 13-21; JD Request, Appendix B at 25, 30.

[47] Stockdale Memo at 19 (*citing Rapanos*, 547 U.S. 715, 731 (2006)); JD Request, Appendix B at 29-30.

with sometimes-saturated soil conditions [where] the nearest body of navigable water was 11 to 20 miles away."[48] The plurality defined "'waters of the United States' [to] include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in streams, oceans, rivers, lakes, and bodies of water forming geographical features. . . . None of these terms encompasses transitory puddles or ephemeral flows of water."[49]

It is arguable whether the *Rapanos* plurality was ever good law, but with the adoption of the Clean Water Rule, this portion of the *Rapanos* opinion is moot. The Agencies have addressed whether ephemeral waters are jurisdictional.[50] The Rule also addresses the plurality's concern with a waters proximity to navigable waters by limiting the definition of "neighboring" to those waters that are within a certain distance of other jurisdictional waters.[51] As explained above, the Salt Ponds fall within this jurisdictional category. Therefore, the Stockdale Memo's and Applicant's focus on this portion of the *Rapanos* plurality decision is unwarranted after adoption of the Clean Water Rule.

Even if this portion of the *Rapanos* decision were relevant, the Salt Ponds meet the definition of a "water" proposed by the *Rapanos* plurality. The Salt Ponds are filled with water from San Francisco Bay, as even the Applicant and Owner have stated. While the level and salinity of the water in the Salt Ponds may change depending on the time of year and the type of pond, the Salt Ponds are bodies that function like typical waters. From 2009-2015, CCCR member, Matthew Leddy, has documented that all Redwood City Salt Ponds visible from publicly-accessible land, hold water and support large numbers of resting, feeding, and foraging shorebirds and waterbirds.[52]

In short, the Stockdale Memo argues that *Rapanos* stands for the premise that water pumped from the Bay into the salt ponds is no longer jurisdictional, overturning *Froehlke's* holding.[53] *Rapanos* in no way addressed this question. Rather, as stated above, that case was solely focused on ephemeral waterbodies far from navigable waters, which is not at all like the Redwood City Salt

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[48] *Rapanos*, 547 U.S. at 720.

[49] *Id*. at 732-33 (internal quotations omitted).

[50] *See, e.g.*, 80 Fed. Reg. 37,057-58 (finding that ephemeral streams that quality as tributaries under the rule, i.e. have bed and banks and an ordinary high water mark) are "chemically, physically, and biologically connected to downstream waters").

[51] *See* 80 Fed. Reg. 37,081; 33 C.F.R. § 328.3(c)(2).

[52] A summary of Mr. Leddy's observations are attached to this letter as Exhibit 7. In addition, Mr. Leddy has posted several videos of significant populations of birds foraging in the ponds. The videos are available here:

- San Francisco Bay shorebirds on Cargill Crystallizer Pond 1, Redwood City, CA on November 27, 2010, available at https://youtu.be/JIIapaPHLs0
- American Avocets foraging in Cargill Crystallizer Pond 1, Redwood City, CA on March 19, 2013, available at https://youtu.be/805d7vsB2hE
- Shorebirds foraging on Cargill Crystallizer Pond 2, Redwood City, CA on December 15, 2012, available at https://youtu.be/0hzCiDi1Bkc
- 1700 "peeps" foraging in Cargill Crystallizer Pond 2, Redwood City, CA on December 9, 2014, available at https://youtu.be/24GlHq-i_Zg
- Black-necked Stilts foraging in Cargill Crystallizer Pond 3, Redwood City, CA on December 15, 2012, available at https://youtu.be/2PpsHZp40_g
- Foraging and roosting shorebirds on Cargill Pond 10, Redwood City CA on April 17, 2011, available at https://youtu.be/poQp-P4Ndyo

[53] Stockdale Memo at 23.

Ponds that hold Bay water, support wildlife, and exhibit functions similar to natural salt ponds and other types of waters.

a) The Redwood City Salt Ponds Are Similar to Natural Salt Ponds and Other Types of Waters.

As explained in the Baye Report, some salt ponds were historically natural features of San Francisco Bay wetlands, and thus are not inherently artificial. Small-scale natural salt ponds (salt pans) form hypersaline brines and crystalline salt even today. These natural hypersaline waterbodies are biologically similar to other types of waterbodies, such as saline playa lakes, soda lakes, and salt lakes that have been found to be jurisdictional. The industrial salt pond system in South San Francisco Bay was modified from natural antecedent salt ponds that produced saturated brines and crystallized salt (halite).[54] The largest natural salt pond – the Crystal Salt Pond near San Lorenzo – has been documented to be a natural impoundment of a tidal marsh and creek system.[55] In addition, small salt ponds form internally within salt marshes of San Francisco and San Pablo Bays, in both remnant prehistoric salt marshes as well as historic-era salt marshes.[56] Natural salt ponds can evaporate in late summer, forming saturated brines and crystalline salt films or crusts, like industrial salt ponds such the Redwood City Salt Ponds.[57]

Salt concentrations in artificial salt pond brines, like the Redwood City Salt Ponds, range from that of San Francisco Bay (polyhaline; near marine salinity) to saturated brine at crystallization.[58] The same range of salinities occurs in natural salt pans (marsh depressions producing hyperhaline brines and even salt crusts during summer neap tides) within tidal salt marshes of San Francisco Bay. There is no qualitative chemical or biological distinction between hyperhaline brines produced through evaporation of natural salt pans or artificial salt ponds, like the Redwood City Salt Ponds. Microbial activity, including photosynthesis (primary productivity) and respiration, occur in all stages of brine formation, and because brine concentrations fluctuate with annual rainfall (diluting to lower concentration brines during rainfall), there is no permanent geographic separation of saturated brines as a distinct "type" of brine within salt pond systems, whether natural or artificial.[59]

In addition, the Redwood City Salt Ponds are hydrologically similar to playa lakes (pans forming capillary evaporite salt crusts) and natural inland saline lakes.[60] Playa lakes are natural salt evaporation basins, such as the flats bordering Great Salt Lake in Utah.[61] In the notice of the Clean

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[54] Baye Report at 11.

[55] *Id.*; *see also* Grossinger, R. and Brewster, E., A Geographic History of San Lorenzo Creek Watershed, San Francisco Estuary Institute Regional Watershed Program (December 2003) at 7, attached hereto as Exhibit 8.

[56] Baye Report at 11.

[57] *Id.*

[58] *See* Ver Planck 1958.

[59] Baye, P., Plants of the San Francisco Bay Salt Ponds (2000), published in Goals Project 2000, Baylands Ecosystem Species and Community Profiles: Life Histories and Environmental Requirements of Key Plants, Fish and Wildlife. Prepared by the San Francisco Bay Area Wetlands Ecosystem Goals Project, P.R. Olofson, editor. San Francisco Bay Regional Water Quality Control Board. Baye 2000 is attached hereto as Exhibit 9.

[60] Baye Report at 19.

[61] *Id.*

Water Rule, the Agencies explain that playa lakes are jurisdictional where they meet the requirements of paragraphs (a)(1) through (a)(6) or (a)(8).[62] Implicitly, playa lakes are "waters."

The Applicant characterizes the Salt Ponds as fast lands that were converted prior to the enactment of the Clean Water Act, arguing that that the Salt Ponds are not jurisdictional.[63] However, this statement has no application at the Redwood City Salt Ponds. The Redwood City Salt Ponds were created by impounding San Francisco Bay and its tidal sloughs and marshes. They were never converted to *dry* land. As seen from the documentary evidence presented by CCCR and Baykeeper, as well as the documentation presented by the Applicant, the ponds are not "land," but ponds of hypersaline water.

b) The Fact that the Water Depth and Quality in the Salt Ponds Vary Does Not Impact Whether the Salt Ponds Are Jurisdictional.

While the depth and salinity of the water within the Salt Ponds fluctuates depending on the time of year and use of the pond, basing the jurisdiction of the Salt Ponds on their water level at any given time is unreasonable because the Owner controls the level within each Salt Pond. In 1986, the California Attorney General ("AG") wrote an opinion regarding the Bay Delta Conservation and Development Commission's ("BCDC's") jurisdiction over the Salt Ponds.[64] While the Salt Ponds may be categorized by type, all consist of Bay water.[65] For instance, concentrator and pickle ponds are filled with Bay water continuously or most of the time, and crystallizers and bittern ponds may be dry for portions of the year.[66] However, the AG noted that "it is not difficult to convert salt ponds from one type of use to another."[67] This fact led the AG to conclude that BCDC jurisdiction could not be dependent on the salt pond's use:

> *If BCDC's salt pond jurisdiction was construed as being limited to only one type of pond (for example, concentrators), then certain areas might pass in and out of BCDC's jurisdiction depending solely upon the fortuitous production patterns of the salt-making company. We doubt that the Legislature intended to make BCDC's jurisdiction so variable and uncertain.*[68]

Similarly, CWA jurisdiction cannot be based on the use of the salt pond or the amount and salinity of Bay water in the ponds at any given time. Such a conclusion would be arbitrary because it would mean that the Salt Ponds could pass in and out of jurisdiction at the whim of the Owner.

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[62] 80 Fed. Reg. 37,096.

[63] JD Request, Appendix B at 24-25 (*citing United States v. Milner*, 583 F.3d 1174, 1195 (9th Cir. 2009)).

[64] *See* Letter from John K. Van De Kamp, Attorney General, to Alan R. Pendleton, Executive Director of BCDC, Re: Request for an Informal Opinion Regarding BCDC Salt Pond Jurisdiction (July 3, 1986), attached hereto as Exhibit 10.

[65] *Id*. at p. 4.

[66] *Id*. at p. 4.

[67] *Id*. at p. 13.

[68] *Id*. at p. 13.

Further, the fact that water flowing into the Salt Ponds is controlled by artificial means does not bear on whether the Salt Ponds are jurisdictional.[69] In *United States v. Moses*, the Ninth Circuit found that a creek, which only flowed two months out of the year because of an upstream diversion, was jurisdictional.[70] In addition, dams and other impoundments necessarily affect the flow of downstream waters, yet there is no question that waters downstream of impoundments remain covered.[71]

II. As Impoundments and Adjacent Waters, the Salt Ponds Significantly Affect the Chemical, Physical and Biological Integrity of San Francisco Bay.

In the Clean Water Rule, the Agencies have determined that all impoundments and waters adjacent to jurisdictional waters have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas.[72] Therefore, it is no longer necessary to show on a case-by-case basis that the Redwood City Salt Ponds have a significant nexus to San Francisco Bay or the tidal sloughs bordering the Salt Ponds.

However, the Applicant makes several incorrect statements in its JD Request in an attempt to argue that the Salt Ponds are not hydrologically connected to the tidal sloughs or the Bay. For example, the Applicant asserts that "with the construction of the levees, the remainder of the Salt Plant was hydrologically separated from San Francisco Bay."[73] At other times, the Applicant states that the levees "permanently separated" the Salt Ponds from San Francisco Bay.[74] These statements are false.

First, as stated above, all water within the Salt Ponds originates from San Francisco Bay, and is replenished directly from the Bay through water control structures. The scale of this Bay water intake water diversion into the salt ponds was enormous when the salt ponds were running at full scale: annual intake of 30,600,000 tons of bay water.[75]

Second, waters within the Salt Ponds also are exchanged with the Bay through seepage. As the Agencies have stated, "all water retention structures are subject to seepage through their foundations and abutments."[76] At the Redwood City Salt Ponds site, bittern storage ponds (Ponds 9, 9a, and 8e) are converted concentrator ponds, and significant leakage has been documented to occur

[69] The hydrology of the Salt Ponds during the dry season is managed by artificial ditches and pumps and is defined from rapid filling with saturated brine and emptying of bittern. Baye Report at 8. The depth of brine in the Salt Pond varies according to the state of refilling or evacuation, and may be influenced by rainfall as well. Baye Report at 10 (*citing* Ver Planck 1958).

[70] *United States v. Moses*, 496 F.3d 984, 988-991 (9th Cir. 2007).

[71] *See* Technical Support Document at 226-227; *see also, e.g. South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (no question that waters which were controlled by series of levees, canals, pumps, and impoundments were waters of the United States).

[72] *See* 80 Fed. Reg. 37,075, 37,080-86; Technical Support Document, at 224-232, 275-326.

[73] JD Request at 5.

[74] *Id*., Appendix B at 26.

[75] Ver Planck 1958 at 47.

[76] Technical Support Document at 226 (*citing* U.S. Army Corps of Engineers 1992); *see also* Baye Report at 7 ("[p]erimeter levees are subject to leaching with rainwater and tidal influence").

in concentrator ponds.[77] The fact that the Applicant needs to maintain the levees shows that the structures are not permanent, nor do they stop all seepage of water between the Salt Ponds and the Bay.[78] Moreover, the Salt Pond waters are intermittently in connection with Bay water through navigation of Cargill's clamshell dredge, The Mallard, when it accesses the interior of the Salt Ponds through dredge locks that exchange Bay water through a series of controlled levee breaches across the dredge lock.[79] Thus, when this occurs, there is a direct hydrological connection between the Salt Ponds and the Bay. Salt pond levees or dredge lock dams have occasionally failed or "blown out" during lock egress/entry process and temporarily exchanged water directly between the Bay and salt ponds.

In addition, during storm events and/or high tides, the levees have been overtopped, causing exchange of water between the Salt Ponds and the Bay. Leslie Salt Co., a predecessor to the Owner, conceded at least one instance of direct tidal overtopping of a bittern pond levee and backflow of "diluted" bittern to San Francisco Bay that occurred in December 1982.[80] More recently (1999-2002), hundreds of thousands of gallons of bittern discharges have been reported, some from overtopping of levees.[81] This overtopping has and can lead to breaches of the levees. For instance, in the wet winter of 1995, the California Department of Fish and Wildlife (then Department of Fish and Game) breached a salt pond, Napa pond 2A, under emergency conditions to relieve pressure in the salt pond system and to prevent widespread levee failure due to overtopping.[82]

Finally, the Salt Ponds have a significant nexus to San Francisco Bay and the tidal sloughs bordering the Salt Ponds because of their biological connection.[83] Studies of modern salt ponds in San Francisco Bay have shown that specialized hypersaline microalgae (*Dunialiella salina*, the primary producer of salt ponds), and its primary aquatic invertebrae grazer brine shrimp (*Artemia franciscana*), inhabit natural and artificial salt ponds.[84] These species originated in natural salt ponds, and colonized the industrial salt pond system.[85] *Dunaliella* provides trophic support to brine flies, a key prey for some waterbird species foraging in late-state salt ponds and their levees.[86] Brine

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[77] Baye Report at 9.

[78] *See* Exhibits 2 and 5, authorizing Cargill to maintain solar salt facilities in south San Francisco Bay, including the Redwood City Salt Ponds. The Corps has authorized this work pursuant to Section 404 of the Clean Water Act, in addition to Section 10 of the Rivers and Harbors Act.

[79] The maintenance permit authorizes the use of dredge locks for The Mallard to access salt ponds. Permit No. 19009S98, Exhibit 2, at p. 2; *see also* description of dredge locks in Section I, *supra*.

[80] Baye Report at 9 (*citing* Letter from Washburn, E.B. to California Regional Water Quality Control Board (D. Smith) re: Leslie Salt Co. Waste Discharge Requirements, NPDES No. CA0007013, date February 4, 1985. Washburn and Kemp (law firm) representing Leslie Salt Co).

[81] Baye Report at 9 (*citing* Rogers, Paul, Cargill to Pay Fine for Toxic Brine Spill, San Jose Mercury News, November 7, 2007, attached hereto as Exhibit 11).

[82] *Id*.

[83] The Technical Support Document noted that waters have a significant nexus to adjacent waterbodies because of biological connections, such as providing foraging habitat for species that inhabit other jurisdictional waters. *See* Technical Support Document at 315-321.

[84] Baye Report at 11.

[85] *Id.* Brine shrimp grow in hypersaline brines between 70 and 220 ppt. This salinity range occurs during inevitable seasonal fluctuations in salinity caused by rainfall and partial mixing of lighter, diluted brines with heavier, concentrated brines. Annual rainfall of 42,000,000 tons was estimated to seasonally dilute the full-scale salt pond system. *See* Ver Planck 1958.

[86] Baye Report at 11.

shrimp are consumed by waterbirds inhabiting San Francisco Bay, including eared grebes, mallards, American avocets, Wilson's phalarope, whimbrels, California gulls, western and least sandpipers, willets, and greater yellowlegs. Many of these species have been documented foraging in the Redwood City Salt Ponds.[87]

Scientists studying the use of San Francisco Bay salt ponds have classified salt pond bottoms as "mudflats" in terms of bird habitat functions. Warnock et al. (2002) assessed waterbird species use of the salt ponds and concluded that salt ponds are important habitat for waterbirds in San Francisco Bay:

> *[E]ach year on high and low tides, salt ponds in San Francisco Bay are used by hundreds of thousands of waterbirds representing over 70 species. This habitat provides valuable roosting habitat to birds that have lost enormous amounts of traditional roosting sites to development around San Francisco Bay . . . . These ponds also serve as refuges for waterbirds in a disturbance-prone urban environment. Additionally, we have shown that this habitat provides foraging areas to many species of waterbirds that traditionally feed on tidal mudflats. This open foraging habitat may compensate, in part, for the roughly 40% of tidal mudflats lost in San Francisco Bay to landfills and dredging in the past 200 years.*[88]

Thus, the Salt Ponds have a significant biological nexus to San Francisco Bay because they provide essential habitat for waterbirds and shorebirds living in the Bay.[89]

In short, the Redwood City Salt Ponds are not hydrologically disconnected from San Francisco Bay, as the Applicant asserts. Rather, the waters of the Salt Ponds and of San Francisco Bay are exchanged through seepage and overtopping of the levees, and the Salt Ponds are biologically connected to San Francisco Bay. It is also important to note that the significant nexus is not considered by individual waterbodies but at a watershed level. As such, contrary to the Applicant's analysis, the Salt Ponds should not be considered in a vacuum but in combination with other similarly-situated bodies.[90]

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[87] *See* Exhibit 7 (Leddy observations of waterbirds at Redwood City Salt Ponds); see also San Francisco Bay National Wildlife Refuge Annual Narrative Report (U.S. Fish & Wildlife Service, 1988) at 23, attached hereto as Exhibit 12. In addition to providing food for waterbirds and shorebirds, brine shrimp were harvested within Cargill-managed salt ponds for sale in the 1980s and 1990s. *Id*. at 23, 54-55.

[88] Warnock, N. et al, Management and Conservation of San Francisco Bay Salt Ponds: Effect of Pond Salinity, Area, Tide, and Season on Pacific Flyway Waterbirds (2002) at p. 90, attached hereto as Exhibit 13.

[89] A biological connection also exists between the Salt Ponds and San Francisco Bay because of the transfer of invasive plant species that occurs between the two waterbodies. As stated in the Wetlands Research Associates report, Exhibit 4, Cargill has been unable to control the spread of peppergrass, an invasive species, through its dredge locks. Exhibit 4 at 8.

[90] *See, e.g.*, Technical Support Document at 229 (stating that the functional contributions of impoundments to the chemical, physical and biological condition of downstream waters should be considered at a watershed level).

III. The Redwood City Salt Ponds Are Not Exempt from Clean Water Act Jurisdiction as Waste Treatment Systems.

The Stockdale Memo and the Applicant characterize the waters within the Redwood City Salt Ponds as industrial byproduct in order to argue that the Salt Ponds are similar to waste treatment systems and are not under the jurisdiction of the CWA.[91] It is important to note that Cargill has historically taken the same position that CCCR and Baykeeper maintain in this letter. Cargill's counsel has declared that bittern storage ponds are not "waste treatment ponds" or "waste management systems," but holding ponds.[92] Cargill and the Applicant are now modifying their arguments in the JD Request to suit their current purposes.

While waste from salt production operations may be treated as a pollutant under the CWA, the Salt Ponds themselves are not waste treatment systems excluded from CWA jurisdiction. As stated in *West Virginia Coal Association v. Reilly*, EPA has taken the position that "the exclusion for treatment ponds was never meant to apply to treatment ponds constructed in waters of the United States."[93] *Reilly* concerned an impoundment of a tributary, about 1,000 feet downstream of a valley fill, which was proposed in order to settle out sediment in the water from the valley fill before being discharged downstream.[94] EPA asserted jurisdiction over both the in-stream treatment pond (*i.e.*, an impoundment) and the upstream portion of the tributary in between the valley fill and the treatment pond, and the court upheld this assertion of jurisdiction.[95] Similarly, because the Salt Ponds are impoundments of jurisdictional waters, they are not waste treatment ponds excluded from the CWA.

Moreover, the fact that the waters in the Salt Ponds have a higher saline concentration than typical Bay water does not indicate that they are not "waters" for Clean Water Act purposes.[96] Waters contained within impoundments often have different chemical characteristics than downstream waters, yet this fact does not impact their jurisdiction.[97] Moreover, as stated above, the salinity ranges found in the Salt Ponds are similar to the ranges seen in San Francisco Bay and salt pans found naturally within the Bay system.[98]

Finally, the fact that EPA has established effluent standards for process wastewater from solar evaporation processes does nothing to indicate that the Redwood City Salt Ponds are not jurisdictional.[99] Not all solar evaporation complexes that produce sodium chloride are constructed by impounding waters of the United States, as the Redwood City Salt Ponds were. A discharge of process wastewater from facilities that have evaporation ponds that were not constructed by

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[91] *See* Stockdale Memo at 21, note 94; *see also* JD Request, Appendix B at 3, 5, 25-27, note 49.

[92] Baye Report at 7 (*citing* Letter from Washburn, E.B. to California Regional Water Quality Control Board (D. Smith) re: Leslie Salt Co. Waste Discharge Requirements, NPDES No. CA0007013, date February 4, 1985. Washburn and Kemp (law firm) representing Leslie Salt Co.).

[93] *West Virginia Coal Association v. Reilly*, 728 F. Supp. 1276, 1290 (S.D. W. Va. 1989).

[94] *Id*. at 1281.

[95] *Id*. at 1289-1290.

[96] Stockdale Memo at 21; JD Request, Appendix B at 25 (The Stockdale Memo and the Applicant argue that the waters in the Salt Ponds are "industrial byproducts" and cannot be waters of the United States.)

[97] *See* Technical Support Document at 227-229 (noting that reservoirs behind dams retain sediment, meaning the waters upstream of a dam have a greater sediment content than the downstream waters).

[98] *See* Section II.C.2, *supra*.

[99] *See* 40 C.F.R. § 415.162.

impounding jurisdictional waters is undoubtedly a discharge of a pollutant subject to effluent limitations. However, the fact that EPA has promulgated effluent limits for bitterns that are being discharged from all sodium chloride solar production facilities does not indicate that the Redwood City Salt Ponds are not jurisdictional.

IV. Finding that the Redwood City Salt Ponds Are Jurisdictional Aligns with Past Army Corps Precedent.

Finally, the Corps has consistently asserted CWA jurisdiction over fill discharges in salt ponds within San Francisco Bay without distinguishing between salt pond types or water quality variables, such as salinity or ionic composition.[100] Failing to subject the Redwood City Salt Ponds to CWA jurisdiction would be a sharp departure from the Corps' past practice. In fact, the Corps has determined that a former pond that was part of the Redwood City Salt Pond site, Pond 10, was jurisdictional under the Clean Water Act as an impoundment.[101] In April 2008, the Corps determined that former industrial commercial crystallizer ponds in Napa previously owned by Cargill were jurisdictional.[102] These ponds, like the Redwood City Salt Ponds, were industrial crystallizer beds and industrial wash ponds that normally contained saturated or supersaturated brines.[103] In addition, under its Clean Water Act section 404 authority, the Corps also issued a permit to discharge fill material in approximately 4,155 acres of former industrial salt ponds for the South Bay Salt Pond Restoration Project.[104] The fact that the Corps issued a discharge permit under Section 404 indicates for the South Bay salt ponds shows that it determined the ponds were jurisdictional. Thus, finding that the Redwood City Salt Ponds are regulated under the Clean Water Act follows this precedent.

[100] Baye Report at 17.

[101] Letter from Calvin C. Fong to Mr. Radford Hall, November 7, 1996, attached hereto as Exhibit 14.

[102] *See* Approved Jurisdictional Determination Form for the Napa Plant Site Restoration Project, attached hereto as Exhibit 15; *see also* Dept. of Army Permit No. 400258N, attached hereto as Exhibit 16 (authorizing excavation and discharge of fill material in former industrial salt ponds); *see also* Baye Report at 16.

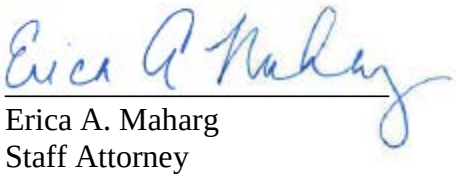
[103] Baye Report at 16.

[104] *See* Public Notice of Project: Phase I – South Bay Restoration Project, No. 27703S (January 15, 2008), attached hereto as Exhibit 17; *see also* Baye Report at 17.

Conclusion

For all these reasons, Baykeeper and CCCR urge EPA to find that the Redwood City Salt Ponds are jurisdictional. We are willing to expound upon or provide additional information to EPA regarding any of the issues raised in this letter, and we thank you for your time and consideration. Baykeeper and CCCR would like to meet with EPA Region 9 staff to discuss these issues, and we request a meeting at your earliest convenience. Please contact Erica Maharg at erica@baykeeper.org or 510-735-9700, x 106.

Yours very truly,



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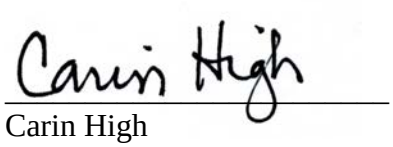

Carin High
Citizens Committee to Complete the Refuge

CC: Jessica Kao, EPA Region 9
Jason Brush, EPA Region 9