

**ADMINISTRATIVE APPEAL DECISION**

**PORT SONOMA (BERG HOLDINGS); FILE NUMBER 29095N**

**US ARMY CORPS OF ENGINEERS, SAN FRANCISCO DISTRICT**

**24 OCTOBER 2006**

**Review Officer:** James E. Gilmore, U.S. Army Corps of Engineers, Southwestern Division

**Appellant & Representatives:** Eleanor M. Roman, JT Wick; Berg Holdings Appellant; Brenna Moorhead, Robert Uram; Sheppard Mullin, John Zentner, Zentner & Zentner

**District Representatives:** Dan Martel and Merry Goodenough

**Appeal Meeting:** 12 September 2006

**Authority:** Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C § 403) and Section 404 of the Clean Water Act (33 U.S.C. § 1344)

**Background Information:** On 15 July 2004, Ms. Michelle Galvin, of Zentner and Zentner, (Z&Z) submitted a packet to the US Army Corps of Engineers' San Francisco District (District) requesting verification of a wetland delineation completed on behalf of Berg Holdings (Appellant). The project site is identified as Port Sonoma Marina and is located on the east side of the Petaluma River and immediately south of Highway 37, Petaluma, Sonoma, County, California (the site).

On 18 October 2004, the District conducted a site visit to review the Appellant's completed delineation. Based on information obtained during the site visit, the District requested that Z&Z submit a revised delineation map and additional information regarding the history of the project site. By letters dated 20 December 2004 and 18 January 2005, Z&Z submitted revised delineation reports to the District. After reviewing the revised delineation report, District staff and representatives of Z&Z conducted a second site visit on 5 May 2005. During the 5 May 2005 site visit, the District determined that the existing Dredge Containment Management Areas (DCMA) and existing sand storage management area met the criteria in the Corps' 1987 Wetland Delineation Manual (WDM) to be identified as wetlands and that these wetlands were subject to the Corps jurisdiction under Section 404 of the Clean Water Act. Based on the information obtained during the 5 May 2005, site visit, the Appellant's environmental consultant was again asked to revise the delineation report.

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By letter dated 2 December 2005, the Appellant's consultant submitted the revised delineation report as requested by the District<sup>1</sup>. A site visit was conducted on 26 January 2006 to review the revised delineation report and map. Based on the site visit, the District again requested that the delineation map be revised. The Appellant's consultant submitted revised maps to the District on 14 and 22 February 2006 and 22 March 2006.

On 9 May 2006, the District issued an approved jurisdictional determination (JD) to the Appellant. The Appellant submitted a Request for Appeal regarding the approved JD to the South Pacific Division Commander on 10 July 2006.

**Appeal Decision Evaluation, Findings and Instructions to the San Francisco District Engineer (DE):**

**Reason 1: The Corps improperly characterized the DMCAs as having been constructed in jurisdictional areas despite prior determinations that the DMCAs are non-jurisdictional upland features.**

**Reason 2: The Corps incorrectly identified the DMCAs as jurisdictional based solely on wetland parameters despite the absence of requisite normal circumstances.**

**Finding: These reasons for appeal have merit.**

**Action: The District's administrative record does not adequately address the issues raised by the Appellant in the RFA. The District shall prepare and include in the administrative record a decision document that supports its final JD.**

**Discussion:** The District's administrative record does not contain any documentation to support its determination that the existing DMCAs located on the Port Sonoma Marina site are subject to the Corps jurisdiction under Section 10 of the Rivers and Harbors Act or Section 404 of the Clean Water Act. There is no explanation why the District decided to exert jurisdiction over the DMCAs now after stating for the past 30 years that the sites were not subject to Corps jurisdiction. The District did not complete any field data sheets to verify that the DMCAs met the three mandatory criteria that must be present in order to be identified as wetlands in accordance with the Corps 1987 wetland delineation manual. In addition to not having any documentation explaining why the DMCAs are now jurisdictional, the District failed to document why the "normal circumstances" at the DMCAs sites has changed.

The Appellant provided documentation (District permits authorizing the Port Sonoma project) that the District has up until 9 May 2006, identified the DMCAs as non-jurisdictional. In January 1984, the District issued a permit to the Port Sonoma Marina

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<sup>1</sup> The Appellant's consultant noted in the revised delineation report that they did not agree with the District's determination that the DMCAs were jurisdictional. However, in cases where a consultant or the appellant completed the JD, the District must concur with the findings, in writing, before the JD is considered an approved JD. To get Corps concurrence, the Appellant submitted a delineation report with the required District changes.

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authorizing the permittee to perform maintenance dredging at the marina site “with disposal of the material on property located to the east and south of the marina and **outside Corps of Engineers jurisdiction.**”(emphasis added) The District, as recently as October 2002, authorized Port Sonoma Marina to “dredge approximately 60,000 cubic yards of sediment from the marina basins to return them to -6 feet MLLW with 1 foot of overdredge allowance and **dispose in upland ponds number 1,2,3 and 4 at Port Sonoma Marina, Solano County, California.**” (emphasis added) The proposed work was authorized under Nationwide Permits 16 and 35. Nationwide Permit 16 authorizes return water from upland contained disposal areas.

The District needs to provide documentation supporting its findings that the DCMAAs are not upland (non-jurisdictional) as previously stated in District permit documents for the Port Sonoma project.

**Conclusion: For the reasons stated above, I conclude that this request for appeal has merit. The approved JD is remanded to the District to include sufficient documentation to support its approved JD and to reconsider if the approved JD decision as appropriate.**

original signed by

John R. McMahon  
Colonel, US Army  
Commanding