



DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, U.S. ARMY CORPS OF ENGINEERS
1455 MARKET STREET, 16TH FLOOR
SAN FRANCISCO, CALIFORNIA 94103-1398

MAR 18 2016

Regulatory Division (1145b)

Subject: File Number 2003-282520S

Mr. William D. Marsh
Edgcomb Law Group, PC
One Post Street, Suite 2100
San Francisco, California 94104

Dear Mr. Marsh:

This correspondence is in reference to your submittal of the Notification of Administrative Appeal Options and Process and Request for Appeal, signed January 25, 2013, requesting an appeal of the approved jurisdictional determination of the extent of navigable waters of the United States (U.S.) and waters of the U.S for the Zeneca Freshwater Lagoons located on the Campus Bay property, in the City of Richmond, Contra Costa County, California (Lat: 37.910287° N, Long: -122.329635° W).

Your appeal was reviewed by the South Pacific Division, Administrative Appeal Review Officer, and remanded to the San Francisco District Engineer with specific instructions for reconsideration. This letter serves as notice of our reconsideration of the approved jurisdictional determination made in our letter dated November 27, 2012. Upon reconsideration, we have determined that the lagoons are currently above the mean high water mark and not jurisdictional pursuant to Section 10 of the Rivers and Harbors Act 1899 as diked baylands. However, Baxter Creek connects East Stege Marsh to San Pablo Bay and provides a hydrological connection between the lagoons and San Pablo Bay, a traditionally navigable water. Therefore, the lagoons are adjacent to San Pablo Bay and jurisdictional pursuant to Section 404 of the Clean water Act of 1972. Lastly, we have also determined that the lagoons are not exempt under the Waste Water treatment Exemption of 33 C.F.R section 328.3 (a)(8) due to the fact that the lagoons no longer serve their original purpose as waste treatment systems designed to meet the requirements of the Clean Water Act.

All proposed discharges of dredged or fill material occurring below the plane of ordinary high water in non-tidal waters of the U.S. or below the high tide line in tidal waters of the U.S. and within the lateral extent of wetlands adjacent to these waters, typically require Department of the Army authorization and the issuance of a permit under Section 404 of the Clean Water Act of 1972, as amended (33 U.S.C. § 1344 *et seq.*). Waters of the U.S. generally include: the territorial seas; all traditional navigable waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters subject to the ebb and flow of the tide; wetlands adjacent to traditional navigable waters; non-navigable tributaries of traditional navigable waters that are relatively permanent, where the tributaries typically flow

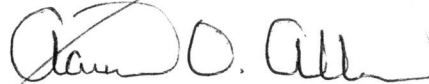
year-round or have continuous flow at least seasonally; and wetlands directly abutting such tributaries. Where a case-specific analysis determines the existence of a "significant nexus" effect with a traditional navigable water, waters of the U.S. may also include non-navigable tributaries that are not relatively permanent; wetlands adjacent to non-navigable tributaries that are not relatively permanent; wetlands adjacent to but not directly abutting a relatively permanent non-navigable tributary; and certain ephemeral streams in the arid West.

The enclosed delineation map entitled, "Zeneca Freshwater Lagoons," in one sheet and date certified January 22, 2016, accurately depicts the extent and location of 3.56 acres of wetlands, and 2.55 acres of other waters of the United States, within the boundary area of the site that are subject to U.S. Army Corps of Engineers' regulatory authority under Section 404 of the Clean Water Act. This approved jurisdictional determination is based on the current conditions of the site, as verified during a field investigation of September 13, 2012, a review of available digital photographic imagery, and a review of other data included in your submittal. This approved jurisdictional determination will expire in five years from the date of this letter, unless new information or a change in field conditions warrants a revision to the delineation map prior to the expiration date.

You may refer any questions on this matter to Janelle Leeson of my Regulatory staff by telephone at (415) 503-6773 or by e-mail at Janelle.D.Leeson@usace.army.mil. All correspondence should be addressed to the Regulatory Division, South Branch, referencing the file number at the head of this letter.

The San Francisco District is committed to improving service to our customers. My Regulatory staff seeks to achieve the goals of the Regulatory Program in an efficient and cooperative manner, while preserving and protecting our nation's aquatic resources. If you would like to provide comments on our Regulatory Program, please complete the Customer Service Survey Form available on our website:
<http://www.spn.usace.army.mil/Missions/Regulatory.aspx>.

Sincerely,

A handwritten signature in dark ink, appearing to read "Aaron O. Allen", written over a horizontal line.

Aaron O. Allen, Ph.D.
Acting Chief, Regulatory Division

Enclosures

Copies Furnished (w/ delineation map only):

Cherokee Investment Partners, Littleton, CO

ARCADIS U.S., Inc., Walnut Creek, CA (Attn.: Alex Francisco)

CA RWQCB, Oakland, CA

Copy Furnished (w/o enclosures):

U.S. EPA, San Francisco, CA

CF:

CESPN-R Rdg File

CESPN-R-N (LEESON)

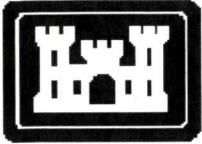
LEESON
CESPN-R-S
415-503-6786
14 March 2016


14 March 16

GALACATOS
CESPN-R-S 15 March 2016

GOODENOUGH, f.w.
for 15 March 2016
CESPN-OC

ALLEN
CESPN-R 18 March 2016



U.S. Army Corps of Engineers, San Francisco District

MEMORANDUM FOR RECORD

FILE NUMBER: 2003-282520S

PROJECT: Zeneca Lagoons JD Appeal

DATE: January 6, 2016

SUBJECT: Consideration of December 19, 2013, remand of JD appeal.

In the December 19, 2013 remand for the Zeneca Lagoons jurisdictional determination, the Review Officer indicated four analyses and documentations required of the District. The following is description of each and the response of the District.

"The District must clearly document the analysis which leads to the conclusion as to whether the two freshwater lagoons are diked baylands and clarify whether these waters should properly be determined to be jurisdictional under Section 10 of the Rivers and Harbors Act as diked baylands, as described in District policy and public notices or conclusions that lead to a determination that the two freshwater lagoons on the Property would be jurisdictional under Section 404 of the Clean Water Act, as a result of being diked baylands."

Response: To address the above concern regarding diked baylands, the District compared a December 15, 1900 Geological Survey map with a 1959 revised in 1980 U.S. Geological Survey map. The December 15, 1900 map identifies the area west of the Southern Pacific Railroad where the lagoons are currently located as open water, below the mean high water mark, clearly within the historic bay margin (see attachment 1). Whereas, the 1980 map shows the same area west of the Southern Pacific Railroad as developed land (see attachment 2). Results from this comparison indicated that the area where the lagoons are currently located was once within waters of San Francisco Bay. To determine if the lagoons are currently below the mean high water elevation, the District referred to the National Oceanic and Atmospheric Administration tide datum for Richmond Inner Harbor for the current mean high water elevation (5.41 North American Vertical Datum of 1988 (NADV88). Elevations within the lagoons ranged from 11.5 NADV88 to 19.5 NADV88 (Upper Lagoon) and 7 NADV88 to 11 NADV88 (Lower Lagoon). Based on the definition of a diked bayland as outlined in the District's January 1972 Public Notice, the District has determined that the lagoons are currently above the mean high water mark and not jurisdictional pursuant to Section 10 of the Rivers and Harbors Act 1899 as diked baylands nor jurisdictional under Section 404 of the Clean Water Act, as a result of being diked baylands.

"The District must provide its basis for determining whether the two freshwater lagoons are adjacent to San Pablo Bay, or whether the two freshwater marshes should more properly be characterized and analyzed differently, in compliance with the Revised Rapanos Guidance, as a result of being connected to San Pablo Bay through an outfall pipe into the East Stege Marsh, and from East Stege Marsh to San Pablo Bay."

Response: The Upper Lagoon is hydraulically connected to the Lower Lagoon by a culvert (approximately 15 feet in length) spanning beneath an access road. The Lower Lagoon discharges directly into East Sedge Marsh by a culvert (approximately 150 feet in length) spanning under a raised access road. In high flow events, the Upper Lagoon discharges directly into East Stege Marsh by a culvert (approximately 50 feet in length) spanning under a raised access road. East Stege Marsh is a tidally influenced marsh situated in between the lagoons and San Pablo Bay, receiving tidal influenced flow from Baxter Creek. The lagoons are approximately 450 feet from Baxter Creek and San Pablo Bay. Therefore, the lagoons are hydrologically connected and adjacent wetlands to the San Pablo Bay, a traditionally navigable water and jurisdictional pursuant to Section 404 of the Clean water Act of 1972 (see attachment 3).

"The Appellant refers to Baxter Creek and the District refers to Carlson Creek as the creek that connects East Stege Marsh to San Pablo Bay, the District should, in its final decision, clarify the correct name of the creek."

Response: After further review the District has determined that the Creek that connects East Stege Marsh to San Pablo Bay is called Baxter Creek.

"The District is directed to include in its final JD a discussion of why it did not apply the Waste Water Treatment exemption of 33 C.F.R. §328.3(a)(8)."

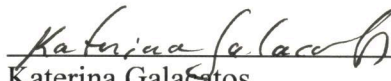
Response: The San Francisco District has determined that the lagoons are not exempt under the Waste Water treatment Exemption of 33 C.F.R section 328.3 (a)(8) due to the fact that the lagoons no longer serve their original purpose as waste treatment systems designed to meet the requirements of the Clean water Act.

PREPARED BY:


Janelle Leeson
Regulatory Project Manager

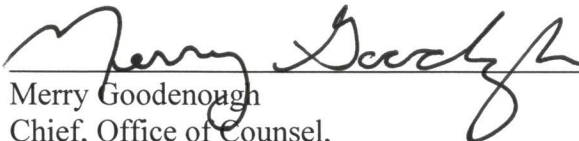
29 Feb 14
Date

REVIEWED AND APPROVED BY:


Katerina Galatzos
South Branch Chief,
Regulatory San Francisco District


10 March 2016
Date

REVIEWED AND APPROVED BY:


Merry Goodenough
Chief, Office of Counsel,
San Francisco District

3/18/16
Date

REVIEWED AND APPROVED BY:


Aaron O. Allen
Acting Chief, Regulatory Division
Regulatory San Francisco District

18 March 2016
Date



East Sedge Marsh
SPN File Number 2003-282520S
City of Richmond, Contra Costa County, California
Attachment 1

U.S. Army
Corps of Engineers
San Francisco District
Regulatory Division



Project Area

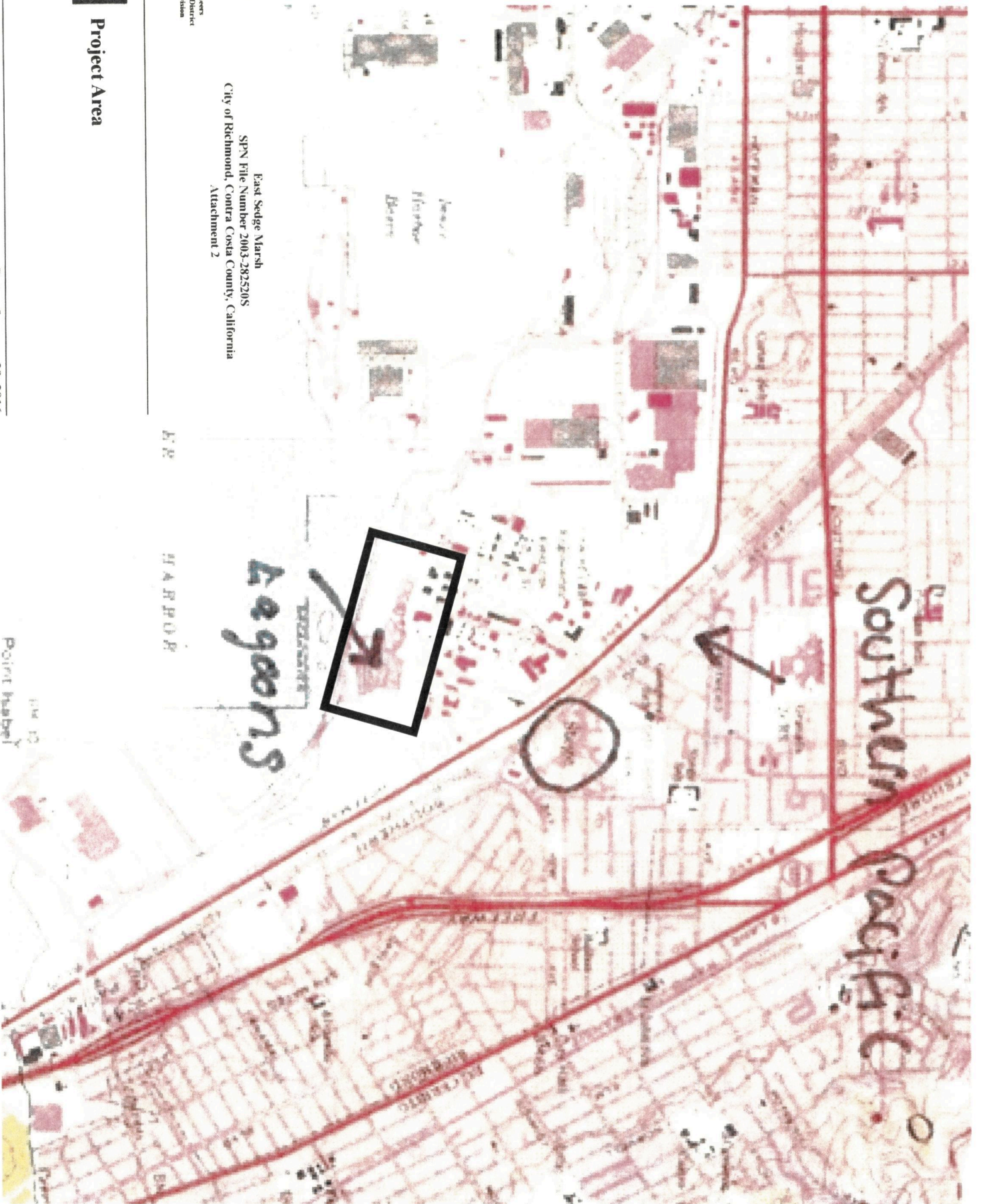


U.S. Army
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Regulatory Division

East Sedge Marsh
SPN File Number 2003-282520S
City of Richmond, Contra Costa County, California
Attachment 2



Project Area




Attachment 3 - Zeneca Lagoons (2003-282520)



Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community

VEGETATED WETLANDS (ACRES)		OPEN WATER (ACRES)	
UPPER LAGOON	1.39	UPPER LAGOON	0.52
LOWER LAGOON	2.12	LOWER LAGOON	1.98
DRAINAGE DITCH	0.05	PONDED AREA	0.05
TOTAL VEGETATED WETLANDS	3.56	TOTAL OPEN WATER AREA	2.55



U.S. Army
Corps of Engineers
San Francisco District
Regulatory Division

Approved Jurisdictional Determination
SPN File Number 2003-282520S
Zeneba Freshwater Lagoons
City of Richmond, Contra Costa County, California
(37.910287° N, -122.379635° W)

Project Boundary

Wetlands and other waters are accurate as mapped.
Wetlands and other waters are jurisdictional pursuant to Section 404 of the Clean Water Act of 1972.

Sheet 1 of 1

Date: January 22, 2016



LEGEND

HA-2 WETLAND INVESTIGATION BOUNDARY

UPPER AND LOWER LAGOONS

WATERS/WETLANDS BOUNDARY

DRAINAGE DITCH

DRAINAGE DITCH (ESTIMATED)

SOIL SAMPLE POINT

LOWER LAGOON -

OPEN WATER

UPPER LAGOON -
OPEN WATER

PONDED AREA

NOTES:

1. Wetland delineation boundaries presented on this figure represent the best professional judgment of ARCADIS and are conditional, pending a final determination by the U.S. Army Corps of Engineers, San Francisco District (USACE) and the State Water Resources Quality Control Board (SWRQCB).
2. March 2012 assessment locations and waters/wetland boundaries were mapped using a Trimble® GeoXT™ handheld from the GeoExplorer® 3000 series with an estimated accuracy of 1 meter or less.
3. Acreage of Open Water and Vegetated Wetlands revised on December 3, 2014 to reflect accurate values. Previous values presented in version submitted on May 22, 2012 double counted Open Water areas in the Upper and Lower Lagoons as part of the Vegetated Wetlands.