

Note to File # 29095N (ports.631) {JZ}

22Nov06

Port Sonoma JD Appeal Remand- Port Sonoma Dredge Disposal Ponds

27Sept06 Jim Gilmore, SWD Appeal Officer, issued an Administrative Appeal Decision regarding an appealed final JD for Port Sonoma (Berg Holdings). The District issued the approved JD on 9 May 06 based on material submitted by the applicant, 3 Corps site inspections and Corps review of former permits issued for dredging at Port Sonoma.

The summary finding was that the (JD) Appeal had merit for two reasons. Reason 1 stated, "the Corps had improperly characterized the DMCA's as having been constructed in jurisdictional areas despite prior determinations that the DMCA's are non-jurisdictional upland features". Reason 2 stated, "the Corps incorrectly identified the DMCA's as jurisdictional based solely on wetland parameters despite the absence of requisite normal circumstances". The Appeal Officer's conclusion and recommended action stated 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".

The District acknowledges the file had little documentation to support the final approved jd map issued on 9May06 and the finalized map revision of 15Aug06.

THERE IS NO DISAGREEMENT BETWEEN THE CORPS AND THE APPLICANT OVER THE EXTENT OF AREA WITHIN THE DMCA'S THAT MEET THE CRITERIA FOR WETLANDS. The extent of area meeting the criteria for waters/wetlands on the property did not seem to be a point of contention between the consultants and the Corps on the field inspections. The original determination of the extent of wetlands provided by the applicant (16Dec04) for areas in the DMCA's for A, H, N, O, P and Q remained unchanged in the final map. Small changes to the extent of wetlands from the original proposal for areas B, C, D, E, F, G and R were made in the field with the agreement of the consultants. The original submittal from the consultants identified these areas as having wetland features. According to their report the vegetation communities within the DMCA's were dominated by *Lolium perenne*, *Hordeum marinum*, *Cotula coronopifolia* and *Salicornia virginica* with *Lythrum hyssopifolia* and *Polypogon monspeliensis* (note the absence of any FacU or Upl species). While we were on the site some of the DMCA's were covered in water and dominated by *Ruppia maritima*, an aquatic species. The original submittal from the consultants identified the soil as 10YR3/2 with redox concentrations and stated the soil morphology was, "a combination common in seasonal wetlands and indicating the hydric character of the soil". The original submittal from the consultants characterized the wetland hydrology indicators throughout these features to include inundation, saturation, watermarks, drainage patterns, oxidized root channels, vegetation that satisfies the Fac -neutral test and algal mats. In general we concurred with their proposed extent of area with wetland characteristics and added a few areas with those features that were missed on the original proposal. The major reason the Corps did not include new data sheets was because there

was no disagreement in the field over the extent of areas meeting the criteria for wetlands and we relied on the material supplied by the applicant to determine the presence of wetlands.

Reason 1 for the Appeal cites the Corps improperly characterized the DMCA's as having been constructed in jurisdictional areas despite prior determinations that the DMCA's are non-jurisdictional upland features. The applicant's consultants have identified the DMCA's as wetland features. The consultants did recommend the Corps consider the DMCA's as non-jurisdictional wetlands not uplands.

There have been a number of permits issued over the years for dredging the Port facility beginning in the mid 70's. We reviewed the past permits for Port Sonoma and found that no jurisdictional delineations had been done for the DMCA's until the current application. We requested the applicant to provide any previous verified jurisdictional maps that included the DMCA's. The permits allow for disposal in upland areas but there are no site specific determinations or information regarding the condition of the disposal areas. The original permit left no record of decision regarding the condition of the disposal areas other than to refer to them as upland disposal. (In the days prior to the Wetland Delineation Manual there was no way to assess such sites. Upland disposal may very well have been the term assigned to disposal that did not occur in navigable waters). The original dredging permit used the term upland to describe the disposal areas and the term was carried over in subsequent dredging permits without documentation. We assessed the disposal areas for this application rather than repeat the undocumented condition from past permits.

We agree with the applicant that the areas had been referred to in past permits as uplands but we believe they were never properly assessed. We take the opportunity of the present permit application to correct that condition. The assertion that the DMCA's are wetland is based on their current condition. We recognize that the DMCA's current configuration is the result of past disposal episodes and does not reflect the original topographic condition.

Reason 2 of the Appeal states the Corps incorrectly identified the DCMA's as jurisdictional based solely on wetland parameters despite the absence of requisite normal circumstances. Reason 1 stated the DMCA's are upland features. Reason 2 stated the DMCA's met wetland parameters. ? . The Corps, in agreement with the consultants for the applicant, conclude that most of the surface area of the DMCA's currently meet the criteria for wetlands. {{ Background Information: The area where the DMCA's are located was originally tidal baylands. In the early 1900's the area was put behind a levee and converted to ag use. The area was ditched and pumped to remove surface and ground water to promote the growth of ag grasses. In the 1970's when the marina and DMCA's were constructed the site was still pumped and used for ag grasses. Reclaimed ag fields in the immediate area are a mosaic of seasonal wetlands and uplands. Relative depressions due to subsidence or lack of connection to a pumped ditch are typically seasonal wetland. Historically, the area was tidal wetland. At the inception of the CWA the site was an ag field that was probably a mosaic of seasonal wetland and pumped upland. No analysis of the site condition prior to the construction of the marina has been presented to date.}} The recent use history of the DMCA's provided by the applicant was

unclear. Based on statements from the applicant, the last episode of disposal or maintenance on the DMCA's was from 5 to 3 years ago. The Corps has determined that at the time of the current request to delineate the entire property (the first time the site has been delineated) the DMCA's currently support wetland conditions without artificial hydrologic input. Based on current site conditions, the Corps in agreement with the applicant's consultant has determined the current hydrologic situation (direct ppt) is sufficient to promote the development of hydric soil and select for hydrophytic vegetation. The DMCA's no longer have their original topographic configuration and are currently the result of episodes of dredge deposition and sediment removal. The lack of recent use or maintenance has allowed the site to revert to exhibiting wetland characteristics without artificial hydrologic maintenance. The Corps considers the normal circumstance of the site to be wetland with direct ppt as the hydrologic source and the topography secondarily derived from the lack of use or maintenance in the dredge disposal cells.

Self-sustaining wetland conditions have developed within the DMCA's. The DMCA's were referred to as uplands in former dredging permits but were never delineated. Existing regulations and guidance do not specifically exempt the current condition of the DMCA's. Sec 323.4 Discharges not Requiring Permits has no provisions for wetlands being used for dredge disposal areas. Sec 325.1 Applications for Permits [e] requires additional information including environmental data (i.e. wetland delineation not unsubstantiated summary opinions from the IfAPD). Section 328.3 Definitions in the preamble to the 86 regulations states the Corps reserves the right on a case by case basis to determine that artificial waters created by diking land to retain water in a settling basin is a W/US. SPN has had a policy of aggressively regulating wetlands within the limits of the historic bay margins. If the Corps chooses to regulate the DMCA's, we would permit the applicant to continue to use them as they have in the past with the condition of returning them to the relative extent and location of wetlands that exist at the time of the wetland delineation. Activities that would fill the DMCA's and change them from wetlands to uplands would require compensatory mitigation to replace the extent of wetland within the footprint of the former bay margin.

RECOMMENDATION: Pending review by OC for concurrence with existing court decisions, SPN should regulate all non-exempt wetlands within historic bay margins.