EPA - new letter 1-6-10

From: Bruce Wolfe
To: Andree Greenberg; Shin-Roei Lee
Date: Thursday, January 07, 2010 10:38 AM
Subject: Fwd: EPA Letter Re. Redwood City Plant Site
Attachments: Redwood City Plant Site_EPA Letter Jan 2010.pdf

Info - I wasn't aware the attached letter was coming out, but it does a good job of making EPA's interests and expectations clear as the application process for the Saltworks unfolds. Discussion of this letter and its implications will be a significant part of our 2/25 meeting, but we may hear more in advance of that. No need for us to chime in at this point.

And Shin-Roei, I still need to plug in with Travis and Alexis on the idea of having Save the Bay make a presentation at that meeting - will keep you posted.

Thanks!

>>> <Scianni.Melissa@epamail.epa.gov> 1/7/2010 9:50 AM >>>
Colonel Farrell:

Please find attached an electronic copy of EPA's January 5, 2010 letter concerning the Cargill Rewood City Plant Site and the proposed Saltworks Project. Hard copies were mailed on January 6.

Thank you,
Melissa

Melissa Scianni
Wetlands Office (WTR-8)
EPA Region 9
75 Hawthorne St
San Francisco, CA 94105
(415) 972-3821

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

Lt. Col. Laurence M. Farrell
District Engineer
San Francisco District
U.S. Army Corps of Engineers
1455 Market Street
San Francisco, CA 94103

Dear Colonel Farrell:

I am writing to discuss potential Clean Water Act Section 404 permitting actions concerning proposed development at the Redwood City Plant Site owned by Cargill, Inc. As part of the preapplication consultation process, Cargill and its development partner DMB Associates have met several times over the past 3 years with my staff and with staff in Corps Headquarters and the San Francisco District to discuss a planned multi-use development proposal known as the "Saltworks" project. We recently received the Corps Headquarters memo of October 2, 2009 concerning interpretation of "normal circumstances" at the Redwood City site and Cargill/DMB's request for a preliminary jurisdictional determination for the site dated November 12, 2009. As work on the proposed development is now gaining momentum, this letter discusses EPA's expectations concerning closer coordination between EPA and the Corps as the permitting process moves forward on the project, and important recent factors that warrant careful consideration in determining whether and how a development project at this site can be permitted under the Clean Water Act.

Corps-EPA Coordination During the Permitting Process

We have coordinated closely with San Francisco District Regulatory Division staff regarding the Redwood City site for several years. We share with your staff, the Bay Conservation and Development Commission, and California Regional Water Quality Control Board, a desire for the permitting agencies to work closely together throughout the permit process for the Redwood City site. The Corps Headquarters decision to unilaterally issue the "normal circumstances" memorandum without coordinating with EPA Headquarters or Region 9 was unfortunate and highly inappropriate given our request to Corps Headquarters staff to be consulted in advance before any regulatory or legal interpretations of Clean Water Act applicability to the Redwood City site were issued. As a co-regulatory partner in Clean Water Act implementation with the Corps, EPA needs to be fully consulted during the process of developing policy and legal interpretations of Clean Water Act Section 404. We have found through our generally excellent partnership with San Francisco District regulatory staff that permitting issues can be most efficiently addressed when we work together throughout the process. We expect that as the Corps evaluates the Cargill/DMB request for a preliminary jurisdictional determination and

subsequent permit application, we will have the opportunity to work closely with you at each step in the jurisdictional determination and Section 404 permitting process, before any project-related decisions are made.

Factors Influencing Evaluation of the Saltworks Development Proposal

EPA and the Corps have communicated repeatedly with Cargill and DMB concerning the permitting potential for the Redwood City site for over 10 years. Our prior communications reflected information available to the parties at that time. We have been made aware that interested parties have incorrectly interpreted EPA's letter of July 17, 2002 as representing EPA's current thinking about permitting at the Redwood City site. The 2002 letter was based solely on information available at that time, did not constitute an EPA determination as to whether and how a development project at the site should be permitted, and does not necessarily reflect current information related to the proposed project. For example, statements in the letter concerning site characteristics and the viability of site restoration outside the context of a development proposal were based on existing circumstances and information available at that time. Although the potential for restoration is not an appropriate consideration in determining a project's eligibility for a 404 permit, we note that presently there are a number of third parties interested in exploring potential acquisition and restoration of the site, which was not the case in 2002.

We will objectively evaluate any specific development proposal for the site based on the most current information and in light of important factors including recent developments concerning implementation of Clean Water Act Section 404,as well as emerging understanding of flood risks associated with rising sea level. I would like to briefly discuss several of these factors.

First, as EPA was not consulted in the preparation of the Corps' "normal circumstances" memorandum of October 2, 2009, I would like to clarify that EPA does not necessarily agree with its analysis or conclusions. As there may be other special aquatic sites present at areas of the project site proposed for fill, a permit application and associated project alternatives should be evaluated based on the criteria established at 40 CFR 230.10(a)(3) regarding presumption of no-fill alternatives for any proposed non-water dependent activity.

Second, we expect to work closely with your staff as we implement the recent joint Corps-EPA regulation concerning compensatory mitigation for projects authorized under Section 404. It will be important to focus on compensatory mitigation at the appropriate phase in project design and evaluation, after opportunities to avoid and minimize project impacts are fully explored and realized. Evaluation of mitigation needs and opportunities should fully consider the broad range of aquatic functions at the proposed project site as well as the recent successes in restoring aquatic functions to salt production facilities elsewhere in the San Francisco Bay area in light of the high priority State and Federal agencies have placed on restoring Bay area wetlands and the viability of a range of restoration approaches for former salt ponds.

Third, the Corps and EPA must rigorously apply the 404(b)(1) guidelines in evaluating a full range of reasonable alternatives; this evaluation will be the basis for the project's LEDPA determination for the project, consistent with recent case law and agency decisions and guidance, EPA expects to work closely with the Corps to carefully evaluate risks associated with flooding and sea level rise in applying the guidelines and other public policy considerations, including public interest review, coastal zone impacts, and floodplain protection, pursuant to 30 CFR 320.4(a, h, j, and k). Several State and Federal agencies have recently developed policies that emphasize the importance of minimizing development in areas subject to inundation due to sea level rise expected to occur as a result of climate change. For example, EPA's 2009 report on Coastal Wetland Protection discusses the risks associated with rising sea levels and the difficulties of adjusting existing development in areas subject to sea level rise. During the permitting process for the Redwood City site and other similar locations, EPA and the Corps should carefully consider sea level rise issues associated with developing areas of the Bay that are at or below current and projected sea level.

We look forward to working with your staff, the Redwood City site applicant, and other agencies at each step in the process to ensure proper application of Clean Water Act and other relevant regulatory authorities in light of these and other important factors. San Francisco Bay and its adjacent waters are critically important aquatic resources that warrant special attention and protection as we proceed. We look forward to working with your staff on the response to the request for a preliminary jurisdictional determination. Concurrently, we also expect that the local planning process will soon begin to yield substantial information needed to inform our joint evaluation of permitting options for the site.

I will look forward to discussing our cooperative efforts to address this important project in the near future. If you have any questions, please contact me at (415) 972-3572.

Sincerely,

Alexis Strauss 5 January 2010

Alexis Strauss, Director
Water Division

cc: Will Travis, San Francisco Bay Conservation and Development Commission
Bruce Wolfe, San Francisco Regional Water Quality Control Board
David C. Smith, DMB Associates, Inc.
Barbara Ransom, Cargill, Inc.