

Congress of the United States
Washington, DC 20515

March 22, 2019

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20004

Dear Administrator Wheeler:

We are concerned about the Environmental Protection Agency's March 1, 2019 determination that the Redwood City Salt Plant site is non-jurisdictional under the *Clean Water Act*. We write to request further information, detailed below, as to how this final determination was made by your agency, especially in light of the Environmental Protection Agency (EPA) Region 9's 2016 findings.

As you know, EPA Region 9 drafted a jurisdictional determination in November 2016 finding that 1,270 acres of the 1,300 Redwood City Salt Plant Site are "waters of the United States" and therefore subject to federal permitting requirements under the *Clean Water Act*. After considering both EPA Region 9's November 2016 draft determination and EPA's March 2019 final decision document, we have serious concerns regarding the discrepancies between the two determinations.

Based on relevant case law, prior agency practices, and a land survey, EPA Region 9 determined that the salt ponds in the Redwood City Salt Plant site are "waters of the United States" as defined by the *Clean Water Act* because: 1) the site was part of the navigable waters of the San Francisco Bay and were not converted to "fast land"; 2) the salt ponds are navigable in their current state and could be used in interstate or foreign commerce with reasonable improvements; 3) the salt ponds are impoundments of waters of the United States; and 4) there is a significant nexus between the salt ponds and navigable waters of the San Francisco Bay.

Reaching the opposite conclusion, EPA Headquarters issued the final determination in March 2019, stating that the site is non-jurisdictional because the

Redwood City Salt Plant was converted to “fast land” prior to the passage of the *Clean Water Act*.

However, the explanation underlying this finding contradicts the extensive research and land surveying done by Region 9:

- In the March 2019 jurisdiction determination, EPA Headquarters states that this parcel is not jurisdictional because it is separated from the surrounding aquatic system by levees. Yet, case law cited in the Region 9 draft determination concluded that man-made diversions of water do not preclude the waters behind the diversion from jurisdiction unless they are filled.

Please explain the reasoning for not applying the legal decisions cited by Region 9, and in this instance how the levees on this site would not qualify as man-made diversions.

- The final determination states that the parcel in question has been filled in. However, Region 9 concluded that only 95 acres of the 1,300-acre property have been filled and converted to “fast lands,” while the rest of the site could be restored to bay marshlands.

What was the basis for EPA Headquarters characterization of this property as “fast lands,” and what information or methodology was used to justify this finding?

- The final jurisdictional determination finds that the water at the Redwood City Salt Plant is a byproduct of the industrial activity at the site and, therefore, not subject to *Clean Water Act* jurisdiction. However, in 1990, the Ninth Circuit Court of Appeals held that salt production pits are within the *Clean Water Act*'s regulatory definition of “other waters” and could not be excluded “even if they are in fact dry most of the year.”¹ Additionally, Region 9's draft determination states that the salt ponds enclosed by levees are regularly inundated with water from the San Francisco Bay and precipitation, and therefore not solely comprised of industrial products.

Please explain the basis for the difference in Headquarters findings from that of Region 9.

¹ *Leslie Salt Co. v. United States*, 896 F. 2d 354, 360 (9th Cir. 1990)

- In reviewing the March 2019 final determination, it is clear that portions of the document are directly copied from the 2016 Region 9 draft, such as the historical background section. On the other hand, the final determination does not include any of the extensive legal and factual analysis from the 2016 document.

Please explain why these pertinent sections are missing from the final evaluation and whether EPA headquarters considered this important information.

In addition to answers to the above questions, we also ask that you provide any and all communications or information, including but not limited to emails, letters, calendar appointments, and studies related to this final decision.

We appreciate your attention to this important matter and your prompt consideration of our requests.

Sincerely,


Jackie Speier
Member of Congress


Dianne Feinstein
United States Senator