

Appendix G-8
Approved Jurisdictional Determination



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, SAN FRANCISCO DISTRICT
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CA 94102

CESPN-RGN

07 JUN 2024

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the "Revised Definition of 'Waters of the United States'"; (88 FR 3004 (January 18, 2023) as amended by the "Revised Definition of 'Waters of the United States'; Conforming" (8 September 2023) ,¹ SPN-2022-00162²

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.³ AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.⁴

On January 18, 2023, the Environmental Protection Agency (EPA) and the Department of the Army ("the agencies") published the "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule"). On September 8, 2023, the agencies published the "Revised Definition of 'Waters of the United States'; Conforming", which amended the 2023 Rule to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S., 143 S. Ct. 1322 (2023) ("*Sackett*").

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ the 2023 Rule as amended,

¹ While the Revised Definition of "Waters of the United States"; Conforming had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

² When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, the territorial seas, or interstate water that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).
 - i. ID-01, jurisdictional, Section 404
 - ii. RD-01, non-jurisdictional
 - iii. RD-02, non-jurisdictional
 - iv. SW-01, jurisdictional, Section 404
 - v. SW-02, non-jurisdictional
 - vi. SW-03, non-jurisdictional
 - vii. SW-04, non-jurisdictional
 - viii. SW-05, jurisdictional, Section 404
 - ix. SW-06, jurisdictional, Section 404
 - x. SW-07, jurisdictional, Section 404
 - xi. SW-08, jurisdictional, Section 404
 - xii. SW-09, non-jurisdictional

2. REFERENCES.

- a. "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (January 18, 2023) ("2023 Rule")
- b. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (September 8, 2023)
- c. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)

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- d. San Francisco District List of Navigable Waterways (August 2, 1971)
3. REVIEW AREA. The approximately 67-acre review area is located at 222 East Shiloh Road in the City of Santa Rosa, Sonoma County, California (Lat: 38.5239°, Long: -122.7739°). The review area is bordered by Shiloh Road on the north, existing vineyards on the east, a portion of Pruitt Creek and scattered residences on the south, and Old Redwood Highway on the west. The review area is predominately occupied by vineyards bisected by an intermittent drainage, Pruitt Creek, and a single-family residence exists near the eastern property boundary. No previous jurisdictional determinations have been completed within the review area.
 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The Russian River is the nearest downstream TNW. The Russian River is listed as a navigable water on the August 2, 1971, List of Navigable Waters for the San Francisco District. In addition, it is known to be tidal in its lower reaches prior to discharging into the Pacific Ocean, and is currently and historically used for commerce.⁶
 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. SW-01 has a continuous surface connection through an upland swale for five feet, before draining into the roadside ditch along Old Redwood Highway. The drainage ditch flows south for approximately 125 feet where it drains into Pruitt Creek. Pruitt Creek flows approximately 1.6 miles northwest where it converges with Pool Creek. Pool Creek flows approximately two miles west where it converges with Windsor Creek. Windsor Creek flows approximately 2.33 miles south where it converges with the Laguna de Santa Rosa. The Laguna de Santa Rosa flows 2.9 miles to the west where it converges with the Russian River.

SW-05, -06, -07, and -08 are fully located within the ordinary high water mark of Pruitt Creek. As stated above, Pruitt Creek flows approximately 1.6 miles northwest where it converges with Pool Creek. Pool Creek flows approximately two miles west where it converges with Windsor Creek. Windsor Creek flows approximately 2.33 miles south where it converges with the Laguna de Santa Rosa. The Laguna de Santa Rosa flows 2.9 miles to the west where it converges with the Russian River.

⁶ This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

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6. SECTION 10 JURISDICTIONAL WATERS⁷: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁸ N/A

7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the 2023 Rule as amended, consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the 2023 Rule as amended. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.
 - a. Traditional Navigable Waters (TNWs) (a)(1)(i): N/A
 - b. The Territorial Seas (a)(1)(ii): N/A
 - c. Interstate Waters (a)(1)(iii): N/A
 - d. Impoundments (a)(2): N/A
 - e. Tributaries (a)(3):

Pruitt Creek (0.648 acre): The Pruitt Creek tributary reach essentially includes the entire reach of the creek stretching from the hills to the east downstream to the confluence with Pool Creek, which is approximately 5.6 miles. Pruitt Creek has flowing or standing water continuously during certain times of the year (prior

⁷ 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.

⁸ This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

personal observations) with an observable and obvious ordinary high water mark. The creek is considered “intermittent” on the National Hydrography Dataset (NHD), and California Aquatic Resources Inventory (CARI) which includes data from the NHD and National Wetlands Inventory (NWI). Based on the above, it meets the relatively permanent standard and is considered a relatively permanent tributary of the Russian River, an (a)(1) water.

f. Adjacent Wetlands (a)(4):

SW-01 (73.4 square feet): This feature is a small seasonal wetland. As stated above in Section 5, SW-01 has a continuous surface connection to Pruitt Creek through an upland swale for five feet, before draining into the roadside ditch along Old Redwood Highway. The drainage ditch flows south for approximately 125 feet where it drains into Pruitt Creek, an (a)(3) tributary. The upland swale is a discrete low spot with no ordinary high water mark and that does not meet the wetland criteria, but did appear to allow for a direct hydrologic/physical connection during certain times of the year.

SW-05 (552 square feet), -06 (119 square feet), -07 (149 square feet), and -08 (646 square feet): These are separate but small riverine wetlands that are located within the ordinary high water mark of Pruitt Creek and are therefore considered to have a continuous surface connection to Pruitt Creek, an (a)(3) tributary.

g. Additional Waters (a)(5): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified in the 2023 Rule as amended as not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5). Include the type of excluded aquatic resource or feature, the size of the aquatic resource or feature within the review area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).⁹

SW-09 (0.0408 acre): This wetland is an artificially irrigated area that would revert to dry land if the irrigation ceased, thus is considered a (b)(4) exclusion. The wetland developed through artificial water sources, including irrigation water from the vineyard and sprinkler runoff from a culvert beneath an access road.

⁹ 88 FR 3004 (January 18, 2023)

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- b. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the 2023 Rule as amended (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

RD-01 (0.0713 acre) and RD-02 (0.0339 acre): These features constitute the roadside ditch along Old Redwood Highway on the west side of the review area. This linear feature runs immediately next to Old Redwood Highway and spans from Shiloh Road, the northern boundary of the review area, to Pruitt Creek, the southwestern corner of the review area. It is two to three feet wide at the ordinary high water mark, but is not shown on the NHD or CARI maps as a tributary. There is also no evidence from historic imagery going back as far as 1952 or historic aquatic resource data that the feature was ever a re-routed natural tributary. Based on the above information and knowledge of the area, the onset of flow would coincide with distinct rainfall events and be driven primarily by storm runoff. Flow is likely to only persist from a few hours to days at a time.

SW-02 (165 square feet), -03 (193 square feet), -04 (404 square feet): These three seasonal wetland features are located on the western boundary of the site with no observed outlets. None of these features have a continuous surface connection to an (a)(1) to (a)(3) water.

9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
 - a. *Aquatic Resources Delineation Report, Shiloh Resort and Casino Property, Larkfield-Wikiup, Sonoma County, California, April 2022*
 - b. *Jurisdictional Determination and Technical Memorandum, Shiloh Resort and Casino Project (SPN-2022-00162), Windsor/Sonoma County, California, March 22, 2024*
 - c. Site Visit, October 27, 2023
 - d. Regulatory Viewer, various
 - e. Google Earth Imagery, various
 - f. EcoAtlas, March 2, 2023

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g. Historic Aerials, various

h. CESPN-RGN Santa Rosa Plain Aerials, 2010

10. OTHER SUPPORTING INFORMATION. N/A

11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

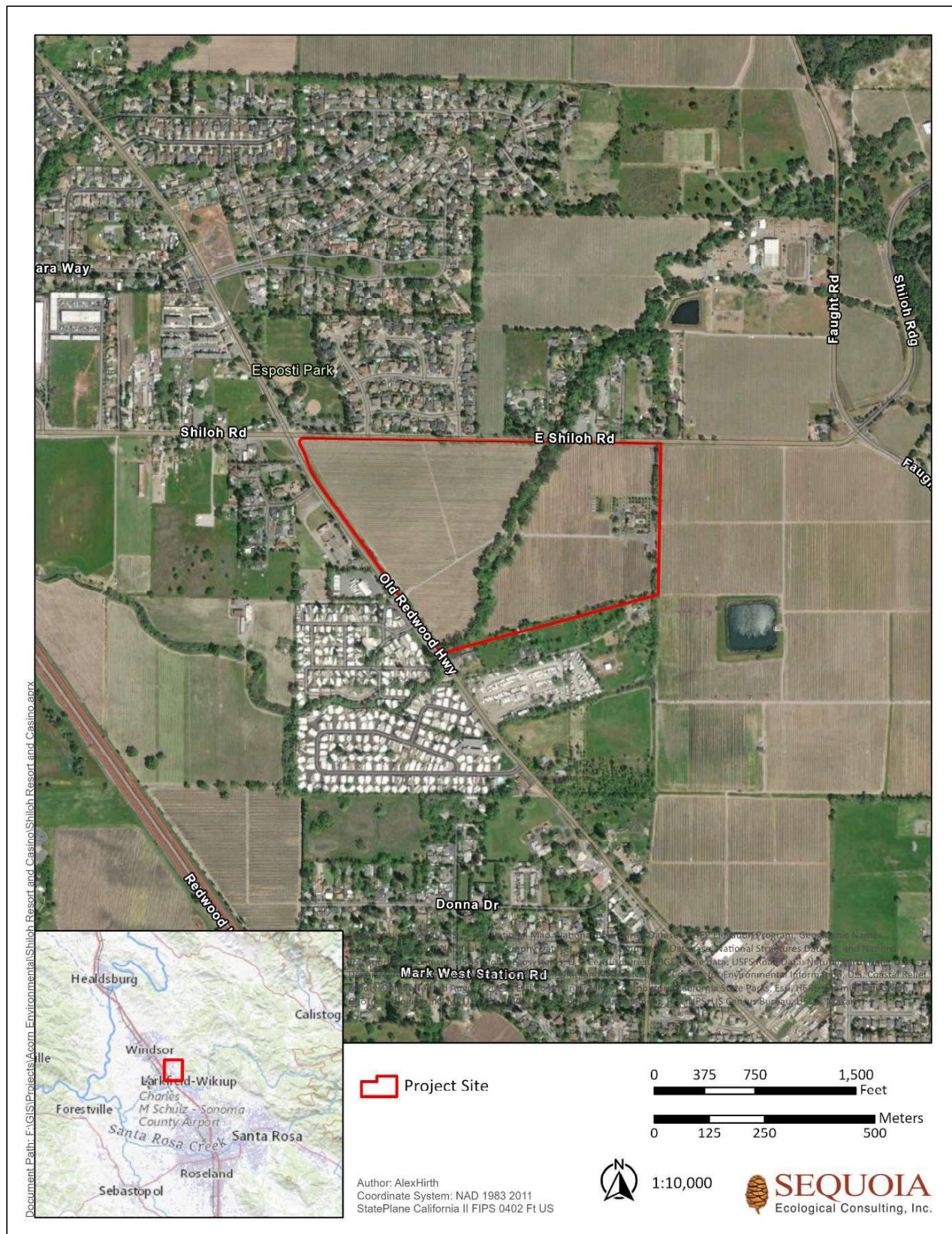


Figure 2. Location Map of the Shiloh Resort and Casino Project Site

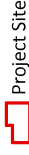


Approved Jurisdictional Determination, pursuant to Section 404 Clean Water Act

Sullivan Resort and Casino Property - 222 E. Shiloh Road
 Santa Rosa, Sonoma County
 (Lat: 38.4258°; Long: -122.7297°)
 Accurate as depicted on the map.

Section 404 Jurisdiction verified only within the designated Project Site.

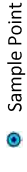
SEN-2022-00162 Date: June 7, 2024 2 sheets total



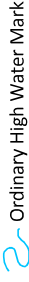
Project Site



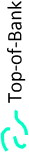
Culvert Opening



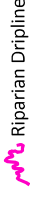
Sample Point



Ordinary High Water Mark



Top-of-Bank



Riparian Dripline

Table 1. Jurisdictional Features

Aquatic Feature Name	Area (sq. ft.)	Area (ac.)
ID-01	28,200	0.648
SW-01	73.4	0.00169
SW-05	552	0.0127
SW-06	119	0.00272
SW-07	149	0.00341
SW-08	646	0.0148

Table 2. Non-Jurisdictional Features

Aquatic Feature Name	Area (sq. ft.)	Area (ac.)
RD-01	3,110	0.0713
RD-02	1,470	0.0339
SW-02	165	0.00378
SW-03	193	0.00442
SW-04	404	0.00927
SW-09	1,780	0.0408

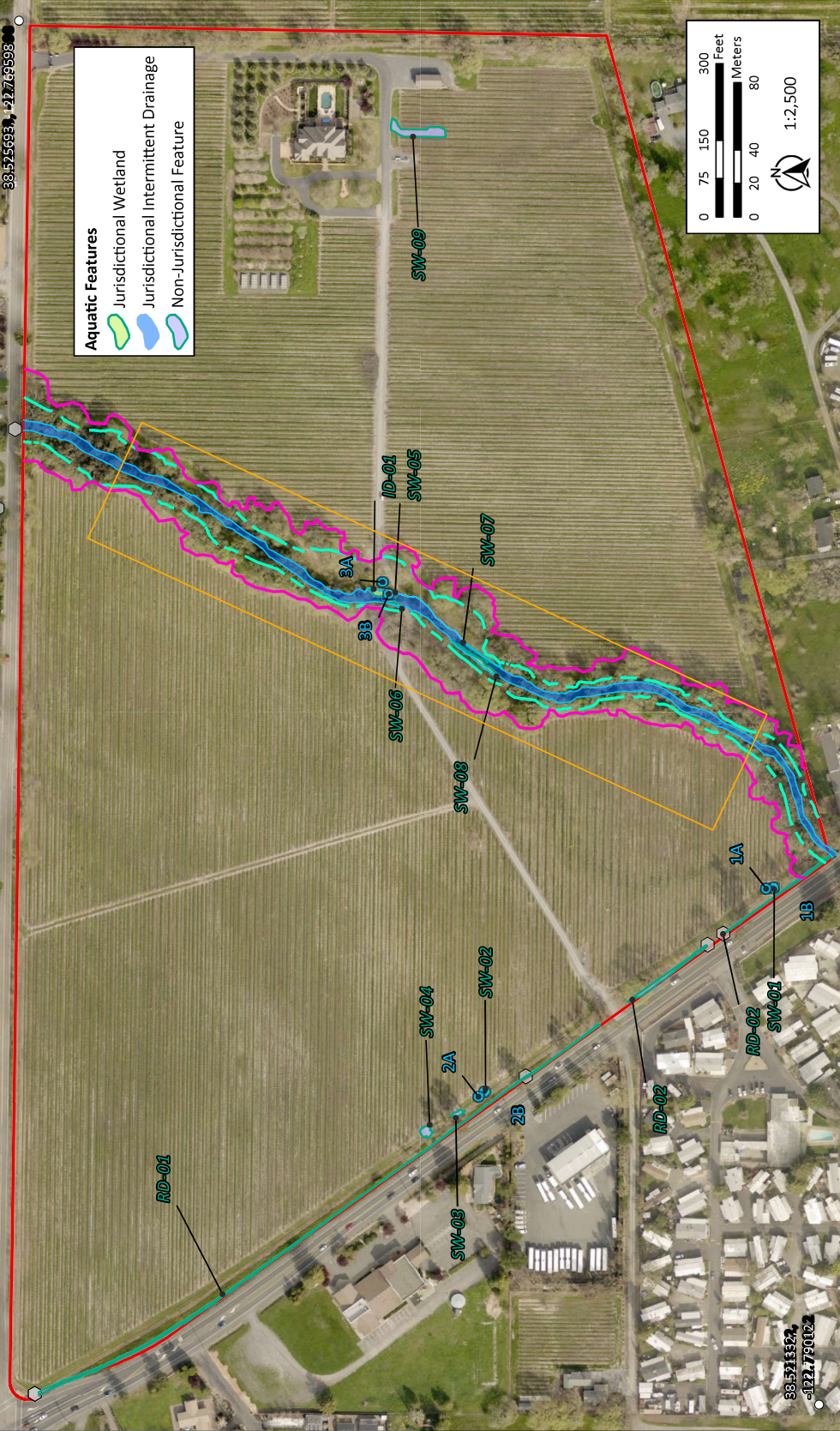
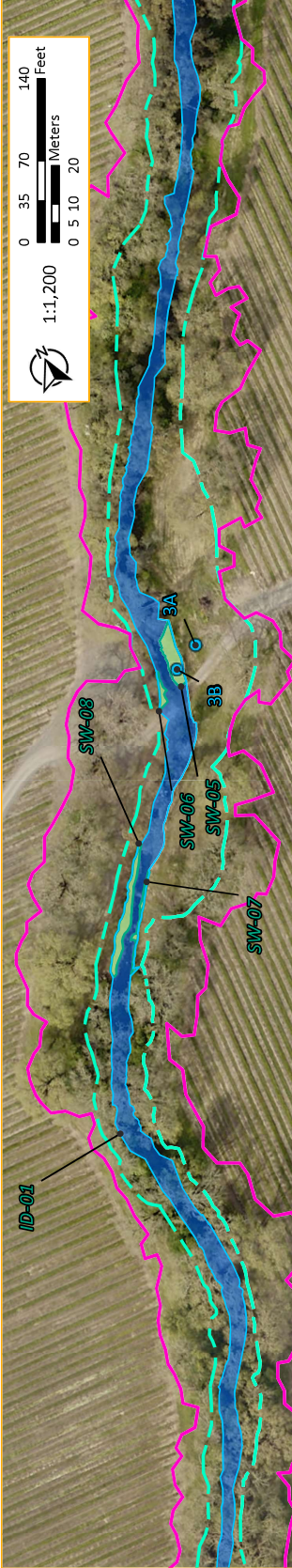
Author: Alex-Hirth

Date Exported: 12/12/2023

Coordinate System: NAD 1983 2011

StatePlane California II FIPS 0402 FT US

Service Layer Credits: Pictometry International, Maxar, USGS The National Map, Esri, DeLorme, GeoEye, IGN, AerGRID, AIRPHOTO, GeoEye, Geographic Names Information System, National Hydrography Dataset, National Land Cover Database, National Structures Dataset, and National Transportation Dataset; USGS Global Ecosystems; U.S. Census Bureau TIGER/Line data; USFS Road Data; Natural Earth Data; U.S. Department of State Humanitarian Information Unit; and NOAA National Centers for Environmental Information, U.S. Coastal Relief Model. Data refreshed April, 2023.



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DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, U.S. ARMY CORPS OF ENGINEERS
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102

June 10, 2024

Regulatory Division

Subject: Approved Jurisdictional Determination; File Number SPN-2022-00162

Ms. Ari Rogers
Sequoia Ecological Consulting, Inc
1342 Creekside Drive
Walnut Creek, California 94596
arogers@sequoiaeco.com

Dear Ms. Rogers:

This correspondence is in reference to your submittal of March 25, 2024, on behalf of the Koi Nation of Northern California, requesting an approved jurisdictional determination of the extent of navigable waters of the United States and waters of the United States occurring on an approximately 67-acre site located at 222 East Shiloh Road in the City of Santa Rosa, Sonoma County, California; Latitude 38.5239°, Longitude -122.7739°.

All proposed discharges of dredged or fill material occurring below the plane of ordinary high water in non-tidal waters of the United States; or below the high tide line in tidal waters of the United States; or 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 United States generally include: the territorial seas; waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide; interstate waters; tributaries of jurisdictional waters; lakes and ponds; impoundments of jurisdictional waters; and adjacent wetlands.

The enclosed delineation map titled "Approved Jurisdictional Determination, pursuant to Section 404 Clean Water Act, Shiloh Resort and Casino Property - 222 E. Shiloh Road, Santa Rosa, Sonoma County," in two sheets date certified June 7, 2024, accurately depicts the extent and location of wetlands, and other waters of the United States within the project site that are subject to U.S. Army Corps of Engineers' regulatory authority under Section 404 of the Clean Water Act. As detailed in the enclosed memorandum for record, this approved jurisdictional determination is based on the current conditions of the site, as verified during a field investigation of October 27, 2023, a review of available digital photographic imagery, and a review of other data included in your submittal and is in accordance with 40 C.F.R. § 120.2. This approved jurisdictional determination will expire in three 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.

The enclosed delineation map further depicts the extent and location of wetlands and other waters within the project site that are **not** subject to U.S. Army Corps of Engineers' regulatory authority under Section 404 of the Clean Water Act. Waters of the United States do not generally include: waste treatment systems; prior converted cropland; ditches excavated wholly in and draining only dry land; artificially irrigated areas that would revert to dry land the irrigation ceased; artificial lakes and ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons; water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States; swales and erosional features characterized by low volume, infrequent, or short duration flow (33 C.F.R. § 328.3).

The delineation included herein has been conducted to identify the location and extent of the aquatic resources for purposes of the Clean Water Act for the particular site identified in this request. This delineation may not be valid for the Wetland Conservation Provisions of the Food Security Act of 1985, as amended. If you or your tenant are USDA program participants, or anticipate participation in USDA programs, you should discuss the applicability of an NRCS Certified Wetland Determination with the local USDA service center, prior to starting work.

The exclusion of an aquatic resource within the project site from the definition of a jurisdictional water of the United States does not obviate any requirement to obtain other Federal, State, or local approvals necessitated by law. Any impacts to federally-listed threatened or endangered species and/or designated critical habitat may be subject to regulation by the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service under Section 10 of the Endangered Species Act of 1973, as amended (16 U.S.C. § 1531 *et seq.*). If "waters of the state" are potentially present, the site may be subject to regulation by the California Regional Water Quality Control Board, North Coast Region, under the Porter-Cologne Water Quality Control Act, as amended (California Water Code § 1300 *et seq.*). You are, therefore, urged to contact these agencies directly to determine the need for other authorizations or permits.

You are advised that the approved jurisdictional determination may be appealed through the U.S. Army Corps of Engineers' *Administrative Appeal Process*, as described in 33 C.F.R. pt. 331 and outlined in the enclosed flowchart and *Notification of Administrative Appeal Options, Process, and Request for Appeal* (NAO-RFA) Form. If you do not intend to accept the approved jurisdictional determination, you may elect to provide new information to this office for reconsideration of this decision. If you do not

provide new information to this office, you may elect to submit a completed NAO-RFA Form to the Division Engineer to initiate the appeal process; the completed NAO-RFA Form must be submitted directly to the Appeal Review Officer at the address specified on the NAO-RFA Form. You will relinquish all rights to a review or an appeal unless this office or the Division Engineer receives new information or a completed NAO-RFA Form within 60 days of the date on the NAO-RFA Form. If you intend to accept the approved jurisdictional determination, you do not need to take any further action associated with the Administrative Appeal Process.

You may refer any questions on this matter to Bryan Matsumoto of the Regulatory staff by telephone at (415) 503-6786 or by e-mail at Bryan.T.Matsumoto@usace.army.mil. All correspondence should be addressed to the Regulatory Division, North, referencing the file number at the head of this letter.

The San Francisco District is committed to improving service to our customers. The 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: <https://www.spn.usace.army.mil/Missions/Regulatory/>.

Sincerely,



William M. Connor
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William Connor
North Branch Chief
Regulatory Division

Enclosures

cc:

CA RWQCB, Kaete King, kaete.king@waterboards.ca.gov
U.S. EPA, Russell Huddleston, huddleston.russell@epa.gov