GLENN LUKOS ASSOCIATES

Regulatory Services

October 13, 2017
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Jerrica Harding
T&B Planning
17542 17th Street
Suite 100
Tustin, California 92780

SUBJECT: Jurisdictional Delineation of Fleming Ranch, City of Menifee, Riverside County, California.

Dear Ms. Harding:

This letter report summarizes our preliminary findings of U.S. Army Corps of Engineers (Corps), Regional Water Quality Control Board (RWQCB), and California Department of Fish and Wildlife (CDFW) jurisdiction for the above-referenced property.[1]

The Fleming Ranch Project (the Project) located in the City of Menifee, Riverside County [Exhibit 1 – Regional Map], comprises approximately 331 acres and contains one blue-line drainage (as depicted on the U.S. Geological Survey (USGS) topographic map Romoland, California [dated 1953 and photorevised in 1979]) [Exhibit 2 – Vicinity Map]. On July 26, 2017 and April 16. 2018, regulatory specialists with Glenn Lukos Associates, Inc. (GLA) examined the project site to determine the limits of (1) Corps jurisdiction pursuant to Section 404 of the Clean Water Act, and (2) RWQCB jurisdiction pursuant to Section 401 of the Clean Water Act and the State Porter-Cologne Act, and 3) CDFW jurisdiction pursuant to Division 2, Chapter 6, Section 1600 of the Fish and Game Code. Enclosed is a 200-scale map [Exhibit 3] that depicts the areas of Corps and CDFW jurisdiction. Photographs to document the topography, vegetative communities, and general widths of each of the waters are provided as Exhibit 4.

Corps/RWQCB jurisdiction at the site totals approximately 0.68 acre, none of which supports jurisdictional wetlands.

CDFW jurisdiction at the site totals approximately 0.68 acre, none of which supports riparian habitat.

[1] This report presents our best effort at estimating the subject jurisdictional boundaries using the most up-to-date regulations and written policy and guidance from the regulatory agencies. Only the regulatory agencies can make a final determination of jurisdictional boundaries. If a final jurisdictional determination is required, GLA can assist in getting written confirmation of jurisdictional boundaries from the agencies.

I. METHODOLOGY

Prior to beginning the field delineation a color aerial photograph, a topographic base map of the property, and the previously cited USGS topographic map were examined to determine the locations of potential areas of Corps, RWQCB, and CDFW jurisdiction. Suspected jurisdictional areas were field checked for the presence of definable channels and/or wetland vegetation, soils and hydrology. Suspected wetland habitats on the site were evaluated using the methodology set forth in the U.S. Army Corps of Engineers 1987 Wetland Delineation Manual[2] (Wetland Manual) and the 2006 Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Supplement (Arid West Supplement).[3]. While in the field the limits of CDFW jurisdiction were recorded onto a color aerial photograph using visible landmarks. Other data were recorded onto wetland data sheets.

Arbuckle Loam, 2 to 8 Percent Slopes (AkC) and Arbuckle Loam, 8 to 15 Percent Slopes (AkD)

Soils of the Arbuckle series are well drained and have slopes of 2 to 25 percent. They occur on alluvial fans and developed in alluvium from metasedimentary rocks. Vegetation typically associated with the Arbuckle soils includes annual grasses, forbs, and chamise. In a typical profile, the surface layer is brown (10YR 5/3 when dry, 10YR 4/2 when moist) gravelly loam and pale-brown (10YR 6/3 when dry, 10YR 4/3 when moist) gravelly very fine sandy loam about 12 inches thick. The subsoil is brown (10YR 5/3 when dry, 10YR 4/3 when moist) gravelly loam and gravelly clay loam, and it extends to a depth of about 45 inches. The substratum is yellowish-brown (10YR 5/4 when dry, 10YR 4/3 when moist) very gravelly sandy loam. The Arbuckle soils are used for dryland grain and for irrigated citrus, alfalfa, melons, and grain.

Buchenau Silt Loam, 2 to 8 Percent Slopes, Eroded (BkC2)

The Buchenau series consists of moderately well drained soils on alluvial fans. Slopes range from 0 to 8 percent. These soils developed in mixed alluvium and are underlain by a platy, calcareous hardpan. Vegetation typically associated with the Buchenau soils includes annual grasses, saltgrass, and forbs. In a typical profile, the surface layer is brown (10YR 5/3 when dry, 10YR 3/3 when moist) loam about 10 inches thick. The subsoil is yellowish-brown(10YR 5/4

[2] Environmental Laboratory. 1987. Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1, U.S. Army Engineer Waterways Experimental Station, Vicksburg, Mississippi.

[3] U.S. Army Corps of Engineers. 2008. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0), ed. J. S. Wakeley, R. W. Lichvar, and C. V. Noble. ERDC/EL TR-08-28. Vicksburg, MS: U.S. Army Engineer Research and Development Center.

when dry, 10YR 4/4 when moist), brown (10YR 5/3 when dry, 10YR 4/3 when moist), and pale-brown (10YR 6/3 when dry, 10YR 4/3 when moist) clay loam and loam about 29 inches thick. The substratum is light brownish-gray (10YR 6/2 when dry, 10YR 4/2 when moist) loam, which overlies a cemented, platy hardpan at a depth of about 52 inches. The Buchenau soils are used for irrigated truck crops, alfalfa, permanent pasture, and grain. They are also used for dryland pasture and range and for nonfarm purposes.

Cajalco Fine Sandy Loam, 8 to 15 Percent Slopes, Eroded (CaC2), Cajalco Fine Sandy Loam, 8 to 15 Percent Slopes, Eroded (CaD2), and Cajalco Rocky Fine Sandy Loam, 5 to 15 Percent Slopes, Eroded (CbD2)

The Cajalco series consists of well-drained soils developed in decomposing gabbro and other basic igneous rocks. Rock outcrops occur in some areas. These soils are on uplands and have slopes of 2 to 50 percent. Vegetation typically associated with the Cajalco soils include annual grasses, forbs, and chamise. In a typical profile, the surface layer is yellowish-brown (10YR 5/4 when dry, 10YR 3/4 when moist) fine sandy loam about 10 inches thick. The subsoil is brown (7.5YR 5/4 when dry, 5YR 3/4 when moist) fine sandy loam and loam. It grades to light yellowish-brown (10YR 6/4 when dry, 10YR 4/4 when moist) loam at a depth of about 18 inches. At a depth of about 22 inches is weathered gabbro. The Cajalco soils are used for dryland pasture, grain, and range, for irrigated citrus, and for nonfarm purposes.

Cieneba Sandy Loam, 5 to 8 Percent Slopes (ChC) and Cieneba Rocky Sandy Loam, 15 to 20 Percent Slopes, Eroded (CkF2)

The Cieneba series consists of somewhat excessively drained soils on uplands. These soils formed in course-grained igneous rock. Slopes range from 5 to 50 percent. These soils formed in coarse-grained igneous rock. Vegetation typically associated with the Cieneba soils includes annual grasses, chamise, and flat-top buckwheat. In a typical profile, the surface layer is brown (10YR 5/3 when dry, 10YR 3/3 when moist) sandy loam about 14 inches thick. Underlying this is light yellowish-brown (10YR 6/4 when dry, 10YR 5/4 when moist) gravelly coarse sand. At a depth of about 22 inches is slightly acid, weathered granodiorite. The Cieneba soils are used for dryland grain, pasture, and range, for irrigated citrus, and for homesites.

Exeter Sandy Loam, Channeled, 2 to 8 Percent Slopes, Eroded (EnC2)

Soils of the Exeter series have slopes of 0 to 8 percent and they lie in basins and on alluvial fans. These well-drained soils developed in alluvium from moderately coarse granitic materials. Vegetation typically associated with the Exeter soils includes annual grasses and forbs. In a typical, the surface layer is brown (10YR 5/3 when dry, 10Yr 3/3 when moist) sandy loam about

16 inches thick. The subsoil is brown (10YR 4/3 when dry, 10YR 3/3 when moist) heavy loam. At a depth of about 37 inches is an indurated silica hardpan. The cementation of the hardpan decreases with depth. The Exeter soils are used for dryland grain and pasture, for irrigated alfalfa, potatoes, and truck crops, and for homesites.

Fallbrook Fine Sandy Loam, 2 to 8 Percent Slopes, Eroded (FfC2)

The Fallbrook series consists of well-drained soils that lie on uplands and have slopes of 2 to 50 percent. These soils developed on granodiorite and tonalite. Vegetation typically associated with the Fallbrook soils includes annual grasses, oaks, flat-top buckwheat, and chaparral. In a typical profile, the surface layer is brown (10YR 5/3 when dry, 10YR 3/3 when moist) sandy loam about 14 inches thick. The subsoil is reddish-brown (5YR 4/4 when dry, 5YR 3/4 when moist) sandy clay loam. At a depth of about 24 inches is weathered tonalite. The Fallbrook soils are used for dryland pasture and grain, for irrigated citrus, alfalfa, and grain, and for homesites.

Garretson Gravelly Very Fine Sandy Loam, 2 to 8 Percent Slopes (GdC)

The Garretson series consists of well-drained soils on alluvial fans. Slopes range from 0 to 15 percent. These soils developed in alluvium made up chiefly of metasedimentary materials. Vegetation typically associated with the Garretson soils includes annual grasses, forbs, chamise, and sumac. In a typical profile, the surface layer is brown (10YR 5/3 when dry, (10YR 3/3 when moist) and yellowish-brown (10YR 5/4 when dry, 10YR ¾ when moist), gravelly very fine sandy loam and gravelly loam about 29 inches thick. The underlying material is yellowish-brown (10YR 5/4 when dry, 10YR ¾ when moist), brown (10YR 5/3 when dry, 10YR 4/3 when moist), and grayish-brown (10YR 5/2 when dry, 10YR 4/2 when moist) gravelly loam and loam, and it extends to a depth of more than 60 inches. The Garretson soils are used for dryland grain and pasture, for irrigated citrus, truck crops, alfalfa, and grain, and for homesites.

Honcut Sandy Loam, 2 to 8 Percent Slopes (HnC) and Honcut Loam, 2 to 8 Percent Slopes Eroded (HuC2)

In the Honcut series are well-drained soils on alluvial fans. These soils developed in alluvium from dominantly basic igneous rocks. Slopes range from 2 to 25 percent. Vegetation typically associated with the Honcut soils includes annual grasses, forbs, and chamise. Also, there are a few scattered oak trees. In a typical profile, the surface layer is dark-brown (10YR 3/3 when dry, 10YR 2/2 when moist) sandy loam about 22 inches thick. The underlying material is brown (7.5YR 4/4 when dry, 7.5YR 3/2 when moist) fine sandy loam or sandy loam and extends to a depth greater than 60 inches. The Honcut soils are used for dryland pasture and grain and for irrigated citrus and truck crops.

Las Posas Loam, 2 to 8 Percent Slopes (LaC) and Las Posas Loam, 5 to 8 Percent Slopes, Eroded (LaC2)

Soils of the Las Posas series are on uplands. Slopes range from 2 to 50 percent. These well-drained soils developed on gabbro and other intrusive basic igneous rocks. Vegetation typically associated with the Las Posas soils includes annual grasses, forbs, chamise, flat-top buckwheat, and black sage. Typically, the surface layer is reddish-brown (5YR 4/4 when dry, 5YR 3/4 when moist) loam and clay loam about 12 inches thick. The subsoil is dark-red (2.5YR 3/6 when dry, 2.5YR 3/6 when moist) clay and red (2.5YR 4/6 when dry, 2.5YR 3/6 when moist) heavy clay loam. At a depth of about 32 inches is yellowish-red (5YR 5/6 when dry, 5YR 4/6 when moist) weathered gabbro. The Las Posas soils are used for dryland pasture and grain and for irrigated citrus and truck crops.

Lodo Rocky Loam, 25 to 50 Percent Slopes, Eroded (LpF2)

The Lodo series consists of somewhat excessively drained upland soils on slopes of 8 to 50 percent. These soils developed on metamorphosed fine-grained sandstone. Vegetation typically associated with the Lodo soils includes annual grasses, forbs, and chaparral. In a typical profile, the surface layer is brown (10YR 5/3 when dry, 10YR 3/3 when moist) gravelly loam about 8 inches thick. Underlying this is brown (7.5YR 5/4 when dry, 10YR 3/4 when moist) shattered and weathered fine-grained metamorphosed sandstone. Depth to the sandstone varies from 8 to 15 inches. The Lodo soils are used for range and dryland pasture.

Madera Fine Sandy Loam, 0 to 2 Percent Slopes (MaA) and Madera Fine Sandy Loam, 2 to 5 Percent Slopes (MaB2)

The Madera series are moderately well drained soils on dissected terraces and old alluvial fans. Slopes are 0 to 15 percent. These soils developed in alluvium consisting mainly of granitic materials. Vegetation typically associated with the Madera soils includes annual grasses, forbs, and chamise. In a typical profile, the surface layer is pale-brown (10YR 6/3 when dry, 10YR 3/3 when moist) and brown (10YR 5/3 when dry, 10YR 3/3 when moist) fine sandy loam about 19 inches thick. The subsoil is yellowish-brown (10YR 5/4 when dry, 10YR 3/4 when moist) clay. At a depth of about 26 inches is a yellowish-brown (10YR 5/4 when dry, 10YR 4/4 when moist) indurated hardpan. The Madera soils are used for dryland pasture and grain and for irrigated alfalfa, grain, and sugar beets. They are also used for homesites and othe nonfarm purposes.

Placentia Fine Sandy Loam, 0 to 5 Percent Slopes (PlB)

The Placentia series consists of moderately well drained soils on alluvial fans and terraces. These soils developed in alluvium consisting mainly of granitic materials. Slopes range from 0 to 25 percent. These soils developed in alluvium consisting mainly of granitic materials. Vegetation typically associated with the Placentia soils includes annual grasses, forbs, and chamise. In a typical profile, the surface layer is brown (10YR 5/3 when dry, 10YR 3/3 when moist) and pale-brown (10YR 6/3 when dry, 10YR 4/3 when moist) fine sandy loam and loam about 18 inches thick. The upper subsoil is brown (7.5YR 4/4 when dry, 7.5YR 3/2 when moist) heavy clay loam about 21 inches thick. The lower subsoil is brown (10YR 5/3 when dry, 5YR 3/2 when moist) sandy clay loam about 18 inches thick. The substratum is stratified sandy, gravelly, or cobbly alluvium of granitic origin. The Placentia soils are used for dryland pasture and grain, for irrigated permanent pasture, and for nonfarm purposes.

Porterville Clay, 0 to 8 Percent Slopes (PoC), Porterville Cobbly Clay, 2 to 15 Percent Slopes (PrD), and Porterville Clay, Moderately Deep, 2 to 8 Percent Slopes (PsC)

In the Porterville series are well-drained soils on alluvial fans. Slopes range from 0 to 15 percent. These soils developed in alluvium consisting mainly of very fine basic igneous materials. Vegetation typically associated with the Porterville soils includes annual grasses, forbs, salvia, and buckwheat. In a typical profile, the surface layer is brown (7.5YR 4/2 when dry, 7.5YR 3/2 when moist) cobbly clay and clay about 15 inches thick. The next layer is reddish-brown 5YR 5/4 when dry, 5YR 3/4 when moist) clay about 10 inches thick. Underlying this, to a depth of several feet, is brown (7.5YR 5/4 when dry, 5YR 4/6 when moist) and yellowish-red (5YR 5/6 when dry, 5YR 4/6 when moist) clay. The Porterville soils are used for dryland grain, pasture, and range and for irrigated citrus, alfalfa, and truck crops. Small areas are used for homesites and other nonfarm purposes.

Ramona Sandy Loam, 2 to 5 Percent Slopes, Eroded (RaB2)

The Ramona series consists of well-drained soils on alluvial fans and terraces. Slopes range from 0 to 25 percent. These soils developed in alluvium consisting mainly of granitic materials. Vegetation typically associated with the Ramona soils includes annual grasses, forbs, chamise, salvia, and flat-top buckwheat. In a typical profile, the surface layer is brown (10YR 5/3 when dry, 10YR 3/3 when moist) sandy loam and fine sandy loam about 23 inches thick. The subsoil extends to a depth of about 68 inches. This layer is brown (7.5YR 5/4 when dry, 5YR ¾ when moist) loam and reddish-brown (5YR 4/4 when dry, 5YR ¾ when moist) and yellowish-red (5YR 5/6 when dry, 5YR 4/6 when moist) sandy clay loam. The substratum is strong-brown (7.5YR 5/6 when dry, 7.5YR 4/4 when moist) fine sandy loam. The Ramona soils are used for

dryland grain and pasture and for irrigated peaches, apricots, citrus, alfalfa, truck crops, and grain. They are also used as sites for homes and schools and for other nonfarm purposes.

Vista Coarse Sandy Loam, 2 to 8 Percent Slopes (VsC) and Vista Rocky Coarse Sandy Loam, 2 to 35 Percent Slopes, Eroded (VtF2)

In the Vista series are well-drained soils of the uplands. Slopes range from 2 to 35 percent. These soils developed on weathered granite and granodiorite. Vegetation typically associated with the Vista soils includes annual grasses, forbs, and chaparral. In a few areas the plant cover consists of grasses and oaks. Typically, the surface layer is brown (10YR 5/3 when dry, 10YR 2/2 when moist) and grayish-brown (10YR 5/2 when dry, 10YR 3/2 when moist) coarse sandy loam about 15 inches thick. The subsoil is brown (10YR 5/3 when dry, 10YR 4/2 when moist) gravelly coarse sandy loam about 9 inches thick. Below this is weathered granodiorite containing yellow, white, and black feldspar. The Vista soils are used for dryland pasture and grain and, if irrigated, for citrus, truck crops, and grain. They are used for homesites.

Wyman Loam, 2 to 8 Percent Slopes, Eroded (WyC2)

Soils of the Wyman series are well drained and lie on alluvial fans. Slopes range from 2 to 15 percent. These soils developed in alluvium from predominantly basic igneous materials. Vegetation typically associated with the Wyman soils includes annual grasses, forbs, chamise, and black sage. Typically, the surface layer is brown (7.5YR 5/4 when dry, 7.5YR 3/2 when moist) loam about 10 inches thick. The subsoil is reddish-brown (5YR 4/4 when dry, 5YR 3/3 when moist) loam and clay loam about 40 inches thick. The substratum is yellowish-red (5YR 5/6 when dry, 5YR ¾ when moist) coarse sandy loam. The Wyman soils are used for dryland pasture and grain and, if irrigated, for citrus, alfalfa, and truck crops.

Yokohl Loam, 2 to 8 Percent Slopes (YbC)

The Yokohl series consists of well-drained soils on old alluvial fans and terraces. Slopes range from 2 to 25 percent. These soils developed in alluvium from predominantly basic igneous materials and are underlain by a hardpan. Vegetation typically associated with the Yokohl soils includes annual grasses, forbs, chamise, and salvia. Typically, the surface layer is reddish-brown (5YR 4/4 when dry, 5YR 3/4 when moist) loam about 10 inches thick. The subsoil is reddish-brown (2.5YR 4/4 when dry, 2.5YR 3/4 when moist) heavy clay about 16 inches thick. At a depth of about 26 inches is a hardpan of reddish-yellow (5YR 6/6 when dry, 5YR 6/4 when moist) coarse sand. The Yokohl soils are used for dryland grain and pasture and, if irrigated, for citrus.

None of these soil units are identified as hydric in the SCS's publication, Hydric Soils of the United States[4]. However the SCS's publication, Hydric Soils Lists for Western Riverside County lists Madera Fine Sandy Loam, 0 to 2 Percent Slopes (MaA), Madera Fine Sandy Loam, 0 to 5 Percent Slopes, Eroded (MaB2), Placentia Fine Sandy Loam, 0 to 5 Percent Slopes **(**PlB), and Yokohl Loam, 2 to 8 Percent Slopes (YbC) as a hydric soil if it supports the following:

- inclusion of an unnamed ponded depression;
- soils that are frequently ponded for long duration or very long duration during the growing season; and
- soils that are seasonally flooded or ponded.

It is important to note that under the Arid West Region Supplement, the presence of mapped hydric soils is no longer dispositive for the presence of hydric soils. Rather, the presence of hydric soils must now be confirmed in the field.

II. JURISDICTION

A. Army Corps of Engineers

Pursuant to Section 404 of the Clean Water Act, the Corps regulates the discharge of dredged and/or fill material into waters of the United States. The term "waters of the United States" is defined in Corps regulations at 33 CFR Part 328.3(a)[5] as:

> *(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;*
> *(2) All interstate waters including interstate wetlands;*

[4] United States Department of Agriculture, Soil Conservation Service. 1991. Hydric Soils of the United States, 3rd Edition, Miscellaneous Publication Number 1491. (In cooperation with the National Technical Committee for Hydric Soils.)

[5] On October 9, 2015, the U.S. 6th District Circuit Court of Appeals ordered a nationwide stay on the Corps and EPA's definition of waters of the United States under the Clean Water Rule ("Clean Water Rule: Definition of 'Waters of the United States"; Final Rule," 80 Federal Register 124 (29 June, 2015), pp. 37054-37127). As a result, the Corps' regulations that were in effect prior to the August 28, 2015 Clean Water Rule is again in effect until such a time as the Court order is satisfied, if this occurs. In addition, President Trump signed an Executive Order on February 28, 2017 that instructs the EPA and Corps to formally reconsider the Rule, which could lead to a re-write of the law or a complete repeal.

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shell fish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce...

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)-(6) of this section.

(8) Waters of the United States do not include prior converted cropland.[6] *Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with the EPA.*

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

In the absence of wetlands, the limits of Corps jurisdiction in non-tidal waters, such as intermittent streams, extend to the OHWM which is defined at 33 CFR 328.3(e) as:

...that line on the shore established by the fluctuation of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

[6] The term "prior converted cropland" is defined in the Corps' Regulatory Guidance Letter 90-7 (dated September 26, 1990) as "wetlands which were both manipulated (drained or otherwise physically altered to remove excess water from the land) and cropped before 23 December 1985, to the extent that they no longer exhibit important wetland values. Specifically, prior converted cropland is inundated for no more than 14 consecutive days during the growing season…." [Emphasis added.]

1. Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, et al.

Pursuant to Article I, Section 8 of the U.S. Constitution, federal regulatory authority extends only to activities that affect interstate commerce. In the early 1980s the Corps interpreted the interstate commerce requirement in a manner that restricted Corps jurisdiction on isolated (intrastate) waters. On September 12, 1985, the U.S. Environmental Protection Agency (EPA) asserted that Corps jurisdiction extended to isolated waters that are used or could be used by migratory birds or endangered species, and the definition of "waters of the United States" in Corps regulations was modified as quoted above from 33 CFR 328.3(a).

On January 9, 2001, the Supreme Court of the United States issued a ruling on *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, et al.* (SWANCC). In this case the Court was asked whether use of an isolated, intrastate pond by migratory birds is a sufficient interstate commerce connection to bring the pond into federal jurisdiction of Section 404 of the Clean Water Act.

The written opinion notes that the court's previous support of the Corps' expansion of jurisdiction beyond navigable waters (*United States v. Riverside Bayview Homes, Inc.*) was for a wetland that abutted a navigable water and that the court did not express any opinion on the question of the authority of the Corps to regulate wetlands that are not adjacent to bodies of open water. The current opinion goes on to state:

> *In order to rule for the respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. We conclude that the text of the statute will not allow this.*

Therefore, we believe that the court's opinion goes beyond the migratory bird issue and says that no isolated, intrastate water is subject to the provisions of Section 404(a) of the Clean Water Act (regardless of any interstate commerce connection). However, the Corps and EPA have issued a joint memorandum which states that they are interpreting the ruling to address only the migratory bird issue and leaving the other interstate commerce clause nexuses intact.

2. Rapanos v. United States and Carabell v. United States

On June 5, 2007, the EPA and Corps issued joint guidance that addresses the scope of jurisdiction pursuant to the Clean Water Act in light of the Supreme Court's decision in the

consolidated cases ***Rapanos v. United States*** and ***Carabell v. United States*** ("Rapanos"). The chart below was provided in the joint EPA/Corps guidance.

For project sites that include waters other than Traditional Navigable Waters (TNWs) and/or their adjacent wetlands or Relatively Permanent Waters (RPMs) tributary to TNWs and/or their adjacent wetlands as set forth in the chart below, the Corps must apply the significant nexus standard.

For "isolated" waters or wetlands, the joint guidance also requires an evaluation by the Corps and EPA to determine whether other interstate commerce clause nexuses, not addressed in the SWANCC decision are associated with isolated features on project sites for which a jurisdictional determination is being sought from the Corps.

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters
- 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 (e.g., typically three months)
- Wetlands that directly abut such tributaries

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

The agencies generally will not assert jurisdiction over the following features:

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

The agencies will apply the significant nexus standard as follows:

- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters

- Significant nexus includes consideration of hydrologic and ecologic factors

3. Wetland Definition Pursuant to Section 404 of the Clean Water Act

The term "wetlands" (a subset of "waters of the United States") is defined at 33 CFR 328.3(b) as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support...a prevalence of vegetation typically adapted for life in saturated soil conditions." In 1987 the Corps published a manual to guide its field personnel in determining jurisdictional wetland boundaries. The methodology set forth in the 1987 Wetland Delineation Manual and the Arid West Supplement generally require that, in order to be considered a wetland, the vegetation, soils, and hydrology of an area exhibit at least minimal hydric characteristics. While the manual and Supplement provide great detail in methodology and allow for varying special conditions, a wetland should normally meet each of the following three criteria:

- more than 50 percent of the dominant plant species at the site must be typical of wetlands (i.e., rated as facultative or wetter in the Arid West 2016 Regional Wetland Plant List[78]);

- soils must exhibit physical and/or chemical characteristics indicative of permanent or periodic saturation (e.g., a gleyed color, or mottles with a matrix of low chroma indicating a relatively consistent fluctuation between aerobic and anaerobic conditions); and

- Whereas the 1987 Manual requires that hydrologic characteristics indicate that the ground is saturated to within 12 inches of the surface for at least five percent of the growing season during a normal rainfall year, the Arid West Supplement does not include a quantitative criteria with the exception for areas with "problematic hydrophytic vegetation", which require a minimum of 14 days of ponding to be considered a wetland.

[7] Lichvar, R.W., D.L. Banks, W.N. Kirchner, and N.C. Melvin. 2016. Arid West 2016 Regional Wetland Plant List. Phytoneuron 2016-30: 1-17. Published 28 April 2016.
[8] Note the Corps also publishes a National List of Plant Species that Occur in Wetlands (Lichvar, R.W., D.L. Banks, W.N. Kirchner, and N.C. Melvin. 2016. The National Wetland Plant List: 2016 wetland ratings. Phytoneuron 2016-30: 1-17. Published 28 April 2016.); however, the Regional Wetland Plant List should be used for wetland delineations within the Arid West Region.

B. Regional Water Quality Control Board

Section 401 of the Clean Water Act requires any applicant for a Section 404 permit to obtain certification from the State that the discharge (and the operation of the facility being constructed) will comply with the applicable effluent limitation and water quality standards. In California this 401 certification is obtained from the Regional Water Quality Control Board. The Corps, by law, cannot issue a Section 404 permit until a 401 certification is issued or waived.

Subsequent to the SWANCC decision, the Chief Counsel for the State Water Resources Control Board issued a memorandum that addressed the effects of the SWANCC decision on the Section 401 Water Quality Certification Program.[9] The memorandum states:

> *California's right and duty to evaluate certification requests under section 401 is pendant to (or dependent upon) a valid application for a section 404 permit from the Corps, or another application for a federal license or permit. Thus if the Corps determines that the water body in question is not subject to regulation under the COE's 404 program, for instance, no application for 401 certification will be required…*
>
> *The SWANCC decision does not affect the Porter Cologne authorities to regulate discharges to isolated, non-navigable waters of the states….*
>
> *Water Code section 13260 requires "any person discharging waste, or proposing to discharge waste, within any region that could affect the waters of the state to file a report of discharge (an application for waste discharge requirements)." (Water Code § 13260(a)(1) (emphasis added).) The term "waters of the state" is defined as "any surface water or groundwater, including saline waters, within the boundaries of the state." (Water Code § 13050(e).) The U.S. Supreme Court's ruling in SWANCC has no bearing on the Porter-Cologne definition. While all waters of the United States that are within the borders of California are also waters of the state, the converse is not true—waters of the United States is a subset of waters of the state. Thus, since Porter-Cologne was enacted California always had and retains authority to regulate discharges of waste into any waters of the state, regardless of whether the COE has concurrent jurisdiction under section 404. The fact that often Regional Boards opted to regulate discharges to, e.g., vernal pools, through the 401 program in lieu of or in addition to issuing waste discharge requirements (or waivers thereof) does not preclude the regions*

[9] Wilson, Craig M. January 25, 2001. Memorandum addressed to State Board Members and Regional Board Executive Officers.

> *from issuing WDRs (or waivers of WDRs) in the absence of a request for 401 certification….*

In this memorandum the SWRCB's Chief Counsel has made the clear assumption that fill material to be discharged into isolated waters of the United States is to be considered equivalent to "waste" and therefore subject to the authority of the Porter Cologne Water Quality Act.[10]

C. California Department of Fish and Wildlife

Pursuant to Division 2, Chapter 6, Sections 1600-1603 of the California Fish and Game Code, the CDFW regulates all diversions, obstructions, or changes to the natural flow or bed, channel, or bank of any river, stream, or lake, which supports fish or wildlife.

CDFW defines a stream (including creeks and rivers) as "a body of water that flows at least periodically or intermittently through a bed or channel having banks and supports fish or other aquatic life. This includes watercourses having surface or subsurface flow that supports or has supported riparian vegetation." CDFW's definition of "lake" includes "natural lakes or man-made reservoirs." CDFW also defines a stream as "a body of water that flows, or has flowed, over a given course during the historic hydrologic regime, and where the width of its course can reasonably be identified by physical or biological indicators."

It is important to note that the Fish and Game Code defines fish and wildlife to include: all wild animals, birds, plants, fish, amphibians, invertebrates, reptiles, and related ecological communities including the habitat upon which they depend for continued viability (FGC Division 5, Chapter 1, section 45 and Division 2, Chapter 1 section 711.2(a) respectively). Furthermore, Division 2, Chapter 5, Article 6, Section 1600 et seq. of the California Fish and Game Code does not limit jurisdiction to areas defined by specific flow events, seasonal changes in water flow, or presence/absence of vegetation types or communities.

[10] On June 17, 2016, the SWRCB issued a draft "Procedures for Discharges of Dredged or Fill Materials to Waters of the State" which provides definitions for wetlands, procedures for jurisdictional delineations, and procedures for obtaining permits for impacts to waters of the State.

III. RESULTS

The Project site contains four drainage features (A, B, C, and D) that generally extend from east to west across the property. Due to the relatively flat topography and limited watershed, Drainages A, B, and C terminate within the site without a defined connection to offsite waters. Drainage D consists of a relatively short (1,156 linear feet) feature that has developed as the result of runoff from the terminus of Chambers Road to the east, and the extends west to another paved portion of Chambers Road. From this point the flows extend offsite, crossing Encanto Road and entering a roadside ditch that extends north between Encanto Road and I-215. In addition to these natural features, the site contains an artificially-created drainage ditch that originates at the southern site boundary from a storm drain at the northern terminus of Sherman Road, and which extends north for approximately 500 feet north into the property before flows diverge to the west where they assume the general direction of historic flows from the ephemeral portion of Drainage A. The artificial ditch is included in the discussion of Drainage A. The drainage ditch contains a drainage easement that was dedicated to the County of Riverside on June 29, 1988 (recorded instrument #180001).

The USGS Romoland quadrangle map show two historic blue-line streams that at one time converged just south of where the flows enter the property through the storm drain outlet. The existing drainage ditch is an apparent diversion of the historic flows, which are now greatly supplemented from storm runoff and nuisance flows from an adjacent residential development and other adjacent developments.

The drainage ditch was recently modified in response to a Notice of Violation (NOV) issued by the City of Menifee Code Enforcement Division (dated October 16, 2017). The NOV addressed two concerns with the drainage ditch, including the need for positive drainage and vector breeding harborage, both caused by the accumulation of dirt and vegetation within the ditch. In accordance with the NOV, the landowner was instructed to mow, trim, and remove all overgrown dead, diseased vegetation, while also removing materials as necessary to maintain positive flow away from the storm drain outlet in accordance with the approved Water Quality Management Plan (WQMP). The jurisdictional delineation includes the current condition of the drainage ditch.

A. Corps Jurisdiction

The Project site contains approximately 0.68 acre of waters of the United States (Corps jurisdiction), of which 0.11 consists of jurisdictional wetlands. The jurisdictional areas include four drainage features [Exhibit 3 – Jurisdictional Delineation map]. The drainage features do not have a direct visible connection to another water of the United States. However, the Corps takes the position that isolated drainage features exhibiting sheet flow connections to other

jurisdictional waters up to a 100-year event would be considered jurisdictional, although the sheet-flow connections themselves would not be jurisdictional. It is assumed that the drainage features would ultimately connect to the storm drain at Encanto Drive up to a 100-year event that would ultimately connect to the San Jacinto River (a water of the United States). As such the drainage features are considered jurisdictional.

Drainage A

Approximately 0.41 acre of Corps jurisdiction is associated with Drainage A, of which 0.11 supports jurisdictional wetlands. The drainage feature consists of a naturally ephemeral reach, as well as an artificially wet reach that supports the emergent wetland vegetation. The ephemeral portion originates in the southwest portion of the property, in part as runoff from Chambers Avenue. The drainage extends west for approximately 1,100 linear feet until the OHWM disappears in the agricultural field. The OWHM of this portion of Drainage A is approximately one-foot wide. The historic extent of this feature presumably carried ordinary flows further west where they would terminate in the west-central portion of the property. However, a constructed drainage ditch now conveys flows that enter the property from a storm drain at the northern terminus of Sherman Road, and which extend north to bisect the historic east-west ephemeral drainage channel. The drainage ditch extends for approximately 500 feet north into the property before flows diverge to the west where they assume the general direction of historic flows from the ephemeral portion of Drainage A. The USGS Romoland quadrangle map show two historic blue-line streams that at one time converged just south of where the flows enter the property through a storm drain outlet. The existing drainage ditch is an apparent diversion of the historic flows, which are now greatly supplemented from storm runoff and nuisance flows from an adjacent residential development and other adjacent developments. The drainage ditch is currently unvegetated.

The artificially-created ditch consists initially of a concrete portion that originates from the storm drain outlet at Sherman Road. The OHWM of the concrete portion ranges from 8 feet wide at the outlet to 13 feet wide. The concrete portion extends north for approximately 120 linear feet to where it transitions to an artificially-created earthen channel. The earthen channel extends north for approximately 500 linear feet and then curves to the northwest where it then follows the historic of flows associated with Drainage A. Approximately 350 linear feet of the earthen channel consists of earthen side slopes, but the bottom is lined with un-grouted riprap. The OHWM associated with this portion ranges from 13 to 17 feet wide. The remaining 150 linear feet of the artificially-created portion is entirely earthen and the OHWM ranges from 6 to 8 feet wide. From the point where the channel curves northwest, the drainage feature gradually narrows to the point where there is no longer a discernible OHWM.

Drainage B

Approximately 0.07 acre of Corps jurisdiction is associated with Drainage B, none of which consists of jurisdictional wetlands. As with Drainage C, this drainage is also an ephemeral feature. Feature B also traverses from the eastern boundary in a westward direction for approximately 3,100 linear feet until an OHWM is no longer visible near the central portion of the Property. Drainage B also exhibits a one-foot-wide OHWM. Vegetation associated with Drainage B is similar to that associated with Drainage C.

Drainage C

Approximately 0.12 acre of Corps jurisdiction is associated with Drainage C, none of which consists of jurisdictional wetlands. Drainage C is an ephemeral feature that only exhibits flows during and immediately after storm events, supporting a limited OHWM for varying distances. The drainage enters the property at the eastern boundary and extends westward for approximately 3,900 linear feet until an OHWM is no longer visible near the northern central portion of the Property. Drainage C exhibits a one-foot-wide OHWM. Vegetation adjacent to Feature C consists of Russian thistle (*Salsola tragus*), rattlesnake weed (*Chamaesyce albomarginata*), dove weed (*Eremocarpus setigerus*), vinegar weed (*Trichostema lanceolatum*), cultivated barley (*Hordeum vulgare*), field bindweed (*Convolvulus arvensis*), summer mustard (*Hirschfeldia incana*), and fascicled tarweed (*Hemizonia fasciculata*).

Drainage D

Approximately 0.08 acre of Corps jurisdiction is associated with Drainage D. Drainage D consists of an ephemeral feature that is three-feet wide and receives runoff from the western terminus of Chambers Avenue. The drainage only exhibits flows during and immediately after storm events, supporting a limited bed/bank for varying distances before the flows continue along another paved portion of Chambers Avenue before crossing Encanto Road offsite into a ditch that flows north along Encanto Road and I-215.

Table 1. Summary of Corps Jurisdiction

Drainage	Non-Wetland Waters	Wetlands	Total Jurisdiction
A	0.30	0.11	**0.41**
B	0.07	0	**0.07**
C	0.12	0	**0.12**
D	0.08	0	**0.08**
Total	**0.57**	**0.11**	**0.68**

B. Regional Water Quality Control Board Jurisdiction

Drainages A, B, C, and D are not intrastate/isolated waters outside Corps jurisdiction. As such, the drainage features are regulated under RWQCB jurisdiction pursuant to Section 401 of the Clean Water Act. The Project will impact approximately 0.68 acre of RWQCB jurisdiction associated with the drainage features, of which 0.11 acre supports jurisdictional wetlands. In addition, the Project will impact a seasonal pool (0.12 acre) that is not regulated by the Corps as a water of the U.S. due to its isolation from other waters. The pool supports one vernal pool indicator plant species (woolly marbles, ***Psilocarphus brevissimus***), and also supports non-listed fairy shrimp (versatile fairy shrimp, ***Branchinecta lindahli***) and western spadefoot (***Spea hammondii***). The RWQCB may regulated the seasonal pool since it provides beneficial uses for wildlife.

C. CDFW Jurisdiction

CDFW jurisdiction associated with the Project site totals approximately 0.68 acre of CDFW jurisdiction, of which 0.11 acre supports riparian vegetation. Areas of CDFW jurisdiction at the site are identical to areas of Corps jurisdiction discussed above and warrant no further discussion. Table 2 summarizes CDFW jurisdiction for the Project site.

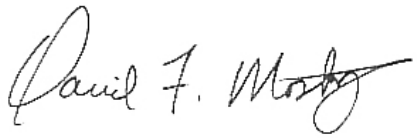
Table 2. Summary of CDFW Jurisdiction

Drainage	Unvegetated Streambed	Riparian Vegetation	Total Jurisdiction
A	0.30	0.11	**0.41**
B	0.07	0	**0.07**
C	0.12	0	**0.12**
D	0.08	0	**0.08**
Total	**0.57**	**0.11**	**0.68**

If you have any questions about this letter report, please contact me at (949) 340-2562, or at dmoskovitz@wetlandpermitting.com.

Sincerely,

GLENN LUKOS ASSOCIATES, INC.



David F. Moskovitz
Senior Biologist/Regulatory Specialist

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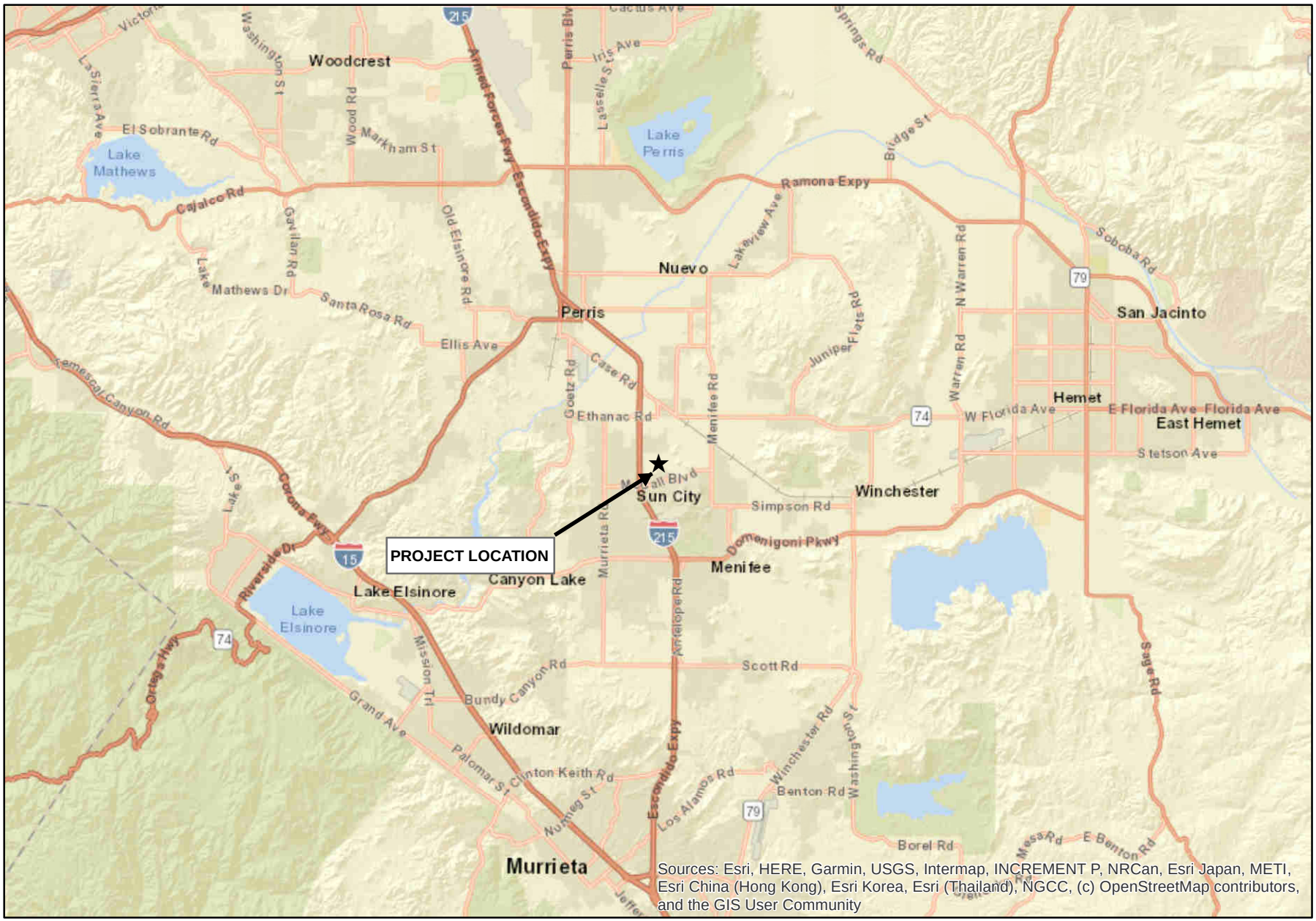
Source: ESRI World Street Map



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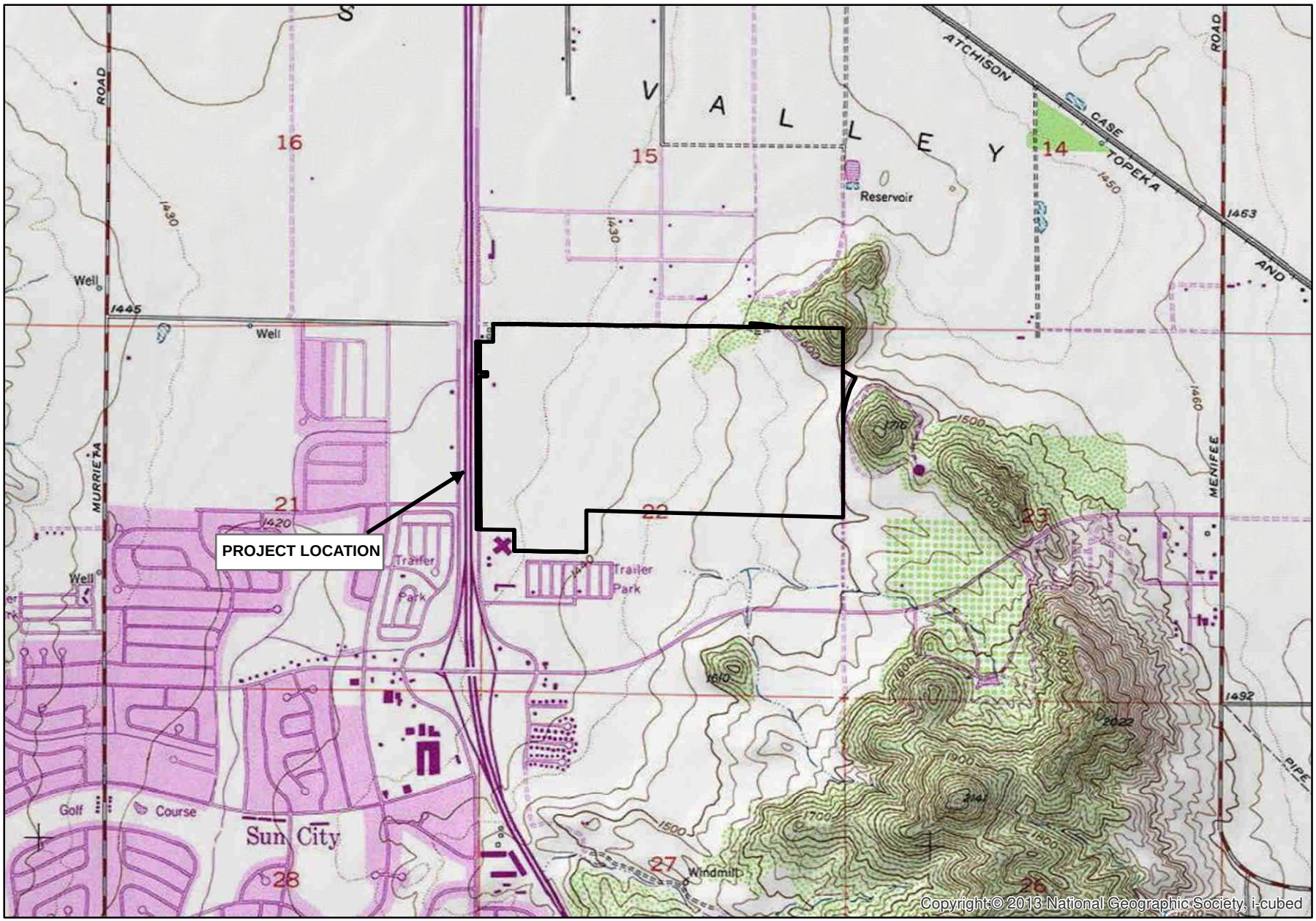
0 2 4 8 Miles

LEGADO PROJECT

Regional Map

GLENN LUKOS ASSOCIATES

Exhibit 1



Adapted from USGS Romoland, CA quadrangle

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0 1,000 2,000 4,000 Feet

LEGADO PROJECT

Vicinity Map

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Exhibit 2

Project Boundary

Offsite Impact Areas

Corps Non-Wetland Waters/CDFW Unvegetated Streambed

Corps Wetland/CDFW Riparian

6 Width of Jurisdiction in Feet

N

0 225 450 900

Feet

1 inch = 450 feet

LEGADO PROJECT

Jurisdictional Delineation Map

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Exhibit 3

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Photograph 1: View of the drainage ditch (Drainage A) looking south towards the storm drain outlet.

Photograph 2: View of the drainage ditch looking north where the ditch transitions from a concrete-lined ditch to an earthen ditch with un-grouted rock.

Photograph 3: View of the drainage ditch looking south, depicting where the ditch transitions from a deeper earthen channel (with rock lining) to a shallower earthen channel.

Photograph 4: View looking west towards the general dissipation area of Drainage A, but where flow indicators are absent due in part to disking.

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Exhibit 4

LEGADO

Site Photographs