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Cargill ponds ruling may ease bay development

APPELLATE PANEL'S RULING IN CARGILL CASE COULD SIMPLIFY BUILDING PLANS

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At first glance, it looks like a mundane case: a long-running dispute between environmentalists and industry over a pile of salty mud on the shores of San Francisco Bay.

But a recent federal court decision rebuking the environmentalists has made the 10-foot-high pile near Fremont considerably more significant: The ruling could make it easier for waterfront property owners across California to develop their land because they would face fewer restrictions.

Issued by the 9th Circuit U.S. Court of Appeals in San Francisco on March 8, the decision could affect about 1,400 acres of bay-front land in Redwood City that Cargill Salt is seeking to develop into homes and other uses, along with 3,000 additional acres that Cargill owns in the Newark-Fremont area.

"This case substantially curtails federal authority to regulate certain water bodies," said Reed Hopper, an attorney with the Pacific Legal Foundation, a Sacramento firm that advocates for property rights. "I think it is a significant case for Clean Water Act authority."

Two environmental groups, San Francisco Baykeeper and the Citizens Committee to Complete the Refuge, based in Palo Alto, sued Cargill Salt in 1996. The groups argued that the company was violating the Clean Water Act by piling up waste mud and salt from its salt evaporation ponds on a 17-acre site adjacent to Mowry Slough near Newark.

The Clean Water Act bans the dumping of pollution or the developing of "navigable waters," which it calls "the waters of the United States," without a federal permit. One of America's landmark environmental laws, the act affects bays, rivers and streams. But after Congress passed the law in 1972, the Environmental Protection Agency and the Army Corps of Engineers widened its scope to include wetlands and tributaries - under the idea that pollution in those areas flows to the larger water bodies.

In the Cargill case, environmentalists argued that the area where Cargill stored waste should qualify as "waters of the United States." They won when a district court judge said that because the site is adjacent to San Francisco Bay, it should be given Clean Water Act protection just like a wetland or tributary. Cargill appealed.

By a 3-0 vote, a 9th Circuit panel overturned the ruling. Writing for the majority, Judge William Canby said there is no evidence that salty mud from the site - even when rainwater collected on it - had polluted the bay. He also ruled the lower court's interpretation of the law was overly broad and that simply being adjacent to the bay is not enough to qualify for Clean Water Act protections.

"The district court improperly expanded the regulatory definition of `waters of the United States,'" Canby wrote.

He also called any harm from the site "speculative or insubstantial," adding it "does not significantly affect the integrity of the slough."

Cargill officials sold 16,500 acres of their salt evaporation ponds to the federal and state government in 2003 for \$100 million. Government biologists are working to restore those areas to wetlands for birds and fish.

Cargill, however, retained 4,400 acres where it continues to harvest salt for roads, food and medical uses. In the government sale, an appraisal said Cargill's ponds were worth about \$20,000 an acre because they couldn't be filled and developed under the Clean Water Act. But if its remaining lands can be developed, they could be worth \$1 million an acre or more.

"One of the goals of this case was to get some clarity about this pond, with the hope it would have a ripple effect on other parcels and ponds," said Leo O'Brien, a Baykeeper board member.

Lori Johnson, a Cargill spokeswoman, said the court ruling applies to all of Cargill's remaining lands.

"Of course it was great to be vindicated after all these years," Johnson said. "It bolsters and reinforces our position that our operating properties - evaporation ponds, crystallizer beds, parking lots and our buildings - are not `waters of the U.S.' and subject to Clean Water Act jurisdiction."

Cargill has entered into a partnership with DMB Associates, a home builder, to try to develop 1,400 acres in Redwood City between Highway 101 and the bay that the company uses to crystalize salt. The Redwood City Council would need to change the zoning to allow significant construction. Environmentalists who oppose that development have now lost one potential legal tool.

But they tried to put the best face on the ruling.

Environmentalists still can argue that any Cargill lands that were historically part of the bay or have a hydrologic connection to it are wetlands and subject to the Clean Water Act, said Michael Lozeau, an Alameda attorney.

"This ruling is unfortunate, but it's not a disaster," said Lozeau, former executive director of Baykeeper. "It's certainly not the demise of the

bay shoreline. Every site is going to be looked at it on its own merits."

Ironically, the pollution issue is largely settled. Cargill changed its processes and stopped producing the mud. It got a storm water permit and now pumps any extra rainwater or bay water that occasionally sloshes over the levee back to other ponds for treatment. Those practices will continue, the company said.

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