

TECHNICAL MEMORANDUM

GLENN LUKOS ASSOCIATES

Regulatory Services



PROJECT NUMBER: 0849-85LAMP

TO: Nicole Morse

FROM: Tony Bomkamp

DATE: October 16, 2023

SUBJECT: Jurisdictional Determination for Project Site at 4665 Lampson Avenue, Los Alamitos, Orange County

On September 26, 2023, I conducted a jurisdictional determination at the above-referenced site which covers approximately 12.37 acres in the City of Los Alamitos [Exhibits 1: Regional Map and 2: Vicinity Map from USGS 7.5 Topographic Map Los Alamitos, California]. Specifically, I reviewed a concrete drainage ditch and its environs that occupy the southern portion of the site as depicted on Exhibit 3 for areas potentially subject to the jurisdiction of (1) U.S. Army Corps of Engineers (Corps) jurisdiction pursuant to Section 404 of the Clean Water Act (CWA), (2) Regional Water Quality Control Board (Regional Board) jurisdiction pursuant to Section 401 of the CWA and Section 13260 of the California Water Code (CWC), and (3) California Department of Fish and Wildlife (CDFW) jurisdiction pursuant to Division 2, Chapter 6, Section 1600 of the Fish and Game Code.

I. METHODOLOGY

Prior to beginning the field review, a series of color aerial photographs, a topographic base map of the property, the previously cited USGS topographic map, and a soils map were examined to evaluate the ditch and adjacent areas with respect to any characteristics consistent with the presence of Corps, Regional Board, and CDFW jurisdiction. The concrete drainage ditch and adjacent areas were field checked during a site visit on September 26, 2023, for evidence of a drainage course and/or wetland vegetation, soils, and hydrology. Where applicable, reference was made to the 2008 Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States (OWHM Manual)¹ to identify the width of Corps jurisdiction, and suspected federal wetland habitats on the site were evaluated using the methodology set forth in the U.S. Army Corps of Engineers 1987 Wetland Delineation Manual² (Wetland Manual) and the 2008 Regional Supplement to the Corps of Engineers

¹ U.S. Army Corps of Engineers. 2008. A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States

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

MEMORANDUM

October 16, 2023

Page 2

Wetland Delineation Manual: Arid West Supplement (Arid West Supplement).³ Reference was also made to the 2019 State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State (State Board Wetland Definition and Procedures) to identify suspected State wetland habitats.⁴ While in the field, the potential indicators of jurisdiction were recorded on a color aerial photograph using visible landmarks.

II. JURISDICTIONAL DEFINITIONS

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” was most recently defined in the Federal Register on September 8, 2023, in the Corps’ regulations at 33 CFR Part 328.3(a)⁵ as:

- (1) Waters which are:
 - (i) 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;
 - (ii) The territorial seas; or
 - (iii) Interstate waters;
- (2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;
- (3) Tributaries of waters identified in paragraphs (a)(1) or (2) of this section: that are relatively permanent, standing or continuously flowing bodies of water
- (4) Wetlands adjacent to the following waters:
 - (i) Waters identified in paragraph (a)(1) of this section; or
 - (ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3)(i) of this section and with a continuous surface connection to those waters; or

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.

⁴ State Water Resources Control Board. 2019. State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State.

⁵ *Federal Register* / Vol. 88, No. 173 / Friday, September 8, 2023 / Rules and Regulations

MEMORANDUM

October 16, 2023

Page 3

- (5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section

that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.

Corps regulations at 33 CFR Part 328.3(b) exclude the following from being “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5) above:

- (1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act;
- (2) Prior converted cropland designated by the Secretary of Agriculture. The exclusion would cease upon a change of use, which means that the area is no longer available for the production of agricultural commodities. 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 EPA;
- (3) Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;
- (4) Artificially irrigated areas that would revert to dry land if the irrigation ceased;
- (5) Artificial lakes or 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;
- (6) 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;
- (7) Waterfilled 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; and
- (8) Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.

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(c)(4) 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,

MEMORANDUM

October 16, 2023

Page 4

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.

“Adjacent wetlands” are defined by 33 CFR 328.3(c)(2) as those wetlands having a continuous surface connection.

1. 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(c)(1) as “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.” In 1987 the Corps published the Wetland Manual to guide its field personnel in determining jurisdictional wetland boundaries. The methodology set forth in the Wetland 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 Wetland Manual and Arid West 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 hydrophytic in nature as published in the most current national wetland plant list;
- 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 Wetland 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 criterion with the exception for areas with “problematic hydrophytic vegetation”, which require a minimum of 14 days of ponding to be considered a wetland.

MEMORANDUM

October 16, 2023

Page 5

B. Regional Water Quality Control Board

The State Water Resource Control Board and each of its nine Regional Boards regulate the discharge of waste (dredged or fill material) into waters of the United States⁶ and waters of the State. Waters of the United States are defined as “any surface water or groundwater, including saline waters, within the boundaries of the state” (California Water Code 13050[e]). Thus, the Regional Board has broad latitude in regulating features such as ephemeral drainages, which would not be regulated by the Corps under Section 404 of the CWA.

Section 401 of the CWA requires certification for any federal permit or license authorizing impacts to waters of the U.S. (i.e., waters that are within federal jurisdiction), such as Section 404 of the CWA and Section 10 of the Safe Rivers and Harbors Act, to ensure that the impacts do not violate state water quality standards. As noted, this site contains no waters of the U.S. and there is no need to obtain a Section 401 Water Quality Certification. When a project could impact waters outside of federal jurisdiction, the Regional Board has the authority under the Porter-Cologne Water Quality Control Act to issue Waste Discharge Requirements (WDRs) to ensure that impacts do not violate state water quality standards. Clean Water Act Section 401 Water Quality Certifications, WDRs, and waivers of WDRs are also referred to as orders or permits.

1. State Wetland Definition

The State Board Wetland Definition and Procedures define an area as wetland as follows: *An area is wetland if, under normal circumstances, (1) the area has continuous or recurrent saturation of the upper substrate caused by groundwater, or shallow surface water, or both; (2) the duration of such saturation is sufficient to cause anaerobic conditions in the upper substrate; and (3) the area’s vegetation is dominated by hydrophytes or the area lacks vegetation.*

GLA has determined that the site contains no wetlands as defined by the State or under any other regulatory program, and that the site contains no other “waters of the State” as defined by the State. For purposes of completeness, the following definition for wetlands defined by the State is set forth below:

⁶ Therefore, wetlands that meet the current definition, or any historic definition, of waters of the U.S. are waters of the state. In 2000, the State Water Resources Control Board determined that all waters of the U.S. are also waters of the state by regulation, prior to any regulatory or judicial limitations on the federal definition of waters of the U.S. (California Code of Regulations title 23, section 3831(w)). This regulation has remained in effect despite subsequent changes to the federal definition. Therefore, waters of the state includes features that have been determined by the U.S. Environmental Protection Agency (U.S. EPA) or the U.S. Army Corps of Engineers (Corps) to be “waters of the U.S.” in an approved jurisdictional determination; “waters of the U.S.” identified in an aquatic resource report verified by the Corps upon which a permitting decision was based; and features that are consistent with any current or historic final judicial interpretation of “waters of the U.S.” or any current or historic federal regulation defining “waters of the U.S.” under the federal Clean Water Act.

MEMORANDUM

October 16, 2023

Page 6

1. *Natural wetlands;*
2. *Wetlands created by modification of a surface water of the state;⁷ and*
3. *Artificial wetlands⁸ that meet any of the following criteria:*
 - a. *Approved by an agency as compensatory mitigation for impacts to other waters of the state, except where the approving agency explicitly identifies the mitigation as being of limited duration;*
 - b. *Specifically identified in a water quality control plan as a wetland or other water of the state;*
 - c. *Resulted from historic human activity, is not subject to ongoing operation and maintenance, and has become a relatively permanent part of the natural landscape; or*
 - d. *Greater than or equal to one acre in size, unless the artificial wetland was constructed, and is currently used and maintained, primarily for one or more of the following purposes (i.e., the following artificial wetlands are not waters of the state unless they also satisfy the criteria set forth in 2, 3a, or 3b):*
 - i. *Industrial or municipal wastewater treatment or disposal,*
 - ii. *Settling of sediment,*
 - iii. *Detention, retention, infiltration, or treatment of stormwater runoff and other pollutants or runoff subject to regulation under a municipal, construction, or industrial stormwater permitting program,*
 - iv. *Treatment of surface waters,*
 - v. *Agricultural crop irrigation or stock watering,*
 - vi. *Fire suppression,*
 - vii. *Industrial processing or cooling,*
 - viii. *Active surface mining – even if the site is managed for interim wetlands functions and values,*
 - ix. *Log storage,*
 - x. *Treatment, storage, or distribution of recycled water, or*
 - xi. *Maximizing groundwater recharge (this does not include wetlands that have incidental groundwater recharge benefits); or*

⁷ “Created by modification of a surface water of the state” means that the wetland that is being evaluated was created by modifying an area that was a surface water of the state at the time of such modification. It does not include a wetland that is created in a location where a water of the state had existed historically, but had already been completely eliminated at some time prior to the creation of the wetland. The wetland being evaluated does not become a water of the state due solely to a diversion of water from a different water of the state.

⁸ Artificial wetlands are wetlands that result from human activity.

MEMORANDUM

October 16, 2023

Page 7

All artificial wetlands that are less than an acre in size and do not satisfy the criteria set forth in 2, 3.a, 3.b, or 3.c are not waters of the state. If an aquatic feature meets the wetland definition, the burden is on the applicant to demonstrate that the wetland is not a water of the state.

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 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 0.5, Chapter 1, section 89.5). 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.

III. RESULTS

A. Site Description

The feature evaluated consists of a shallow concrete drainage ditch, that is only about two inches deep, as depicted on Exhibit 4, Photographs 1, 2, 3, and 5, and as such is designed to convey only minor flow. The shallow concrete drainage ditch is approximately 36 inches wide and, as noted, only about two inches deep. The areas on both sides of the ditch consist of maintained turf/lawn as depicted on Exhibit 4, Photographs 1, 2, 3, and 5. At the southwest corner of the site there is a 24-inch culvert that discharges water from the adjacent off-site area (Exhibit 4, Photograph 4) and an eight-inch pipe that collects flows from areas north of the site discharges to the ditch. Because it is concrete, the feature supports no vegetation except for a few opportunistic plants growing in a thin layer of sediment at the point where the 24-inch pipe discharges. The discharge point also exhibits a layer of leaf litter from overhanging coast redwood (Exhibit 4, Photograph 4), which is growing as an ornamental tree. Exhibit 4, Photographs 5 and 6 show the terminal inlet as well as the outlet east of the road that is completely blocked by sediment.

MEMORANDUM

October 16, 2023

Page 8

B. Corps Jurisdiction

The feature is not a WOTUS based on two specific factors. First, the concrete feature it is not a wetland as it has no soils or vegetation⁹ and, by Corps' definition is not a wetland. Second, the area is excluded from Corps jurisdiction by rule under 328.3(b)(3) as "*Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water*". In addition to the concrete feature having no wetland characteristics it also does not carry relatively permanent flow.

C. Regional Water Quality Control Board

The concrete feature is not a wetland under the Regional Board's definition which states: *(1) the area has continuous or recurrent saturation of the upper substrate caused by groundwater, or shallow surface water, or both; (2) the duration of such saturation is sufficient to cause anaerobic conditions in the upper substrate; and (3) the area's vegetation is dominated by hydrophytes or the area lacks vegetation.* First the area lacks soil which is assumed in the term "saturation" since concrete cannot become saturated.

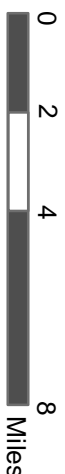
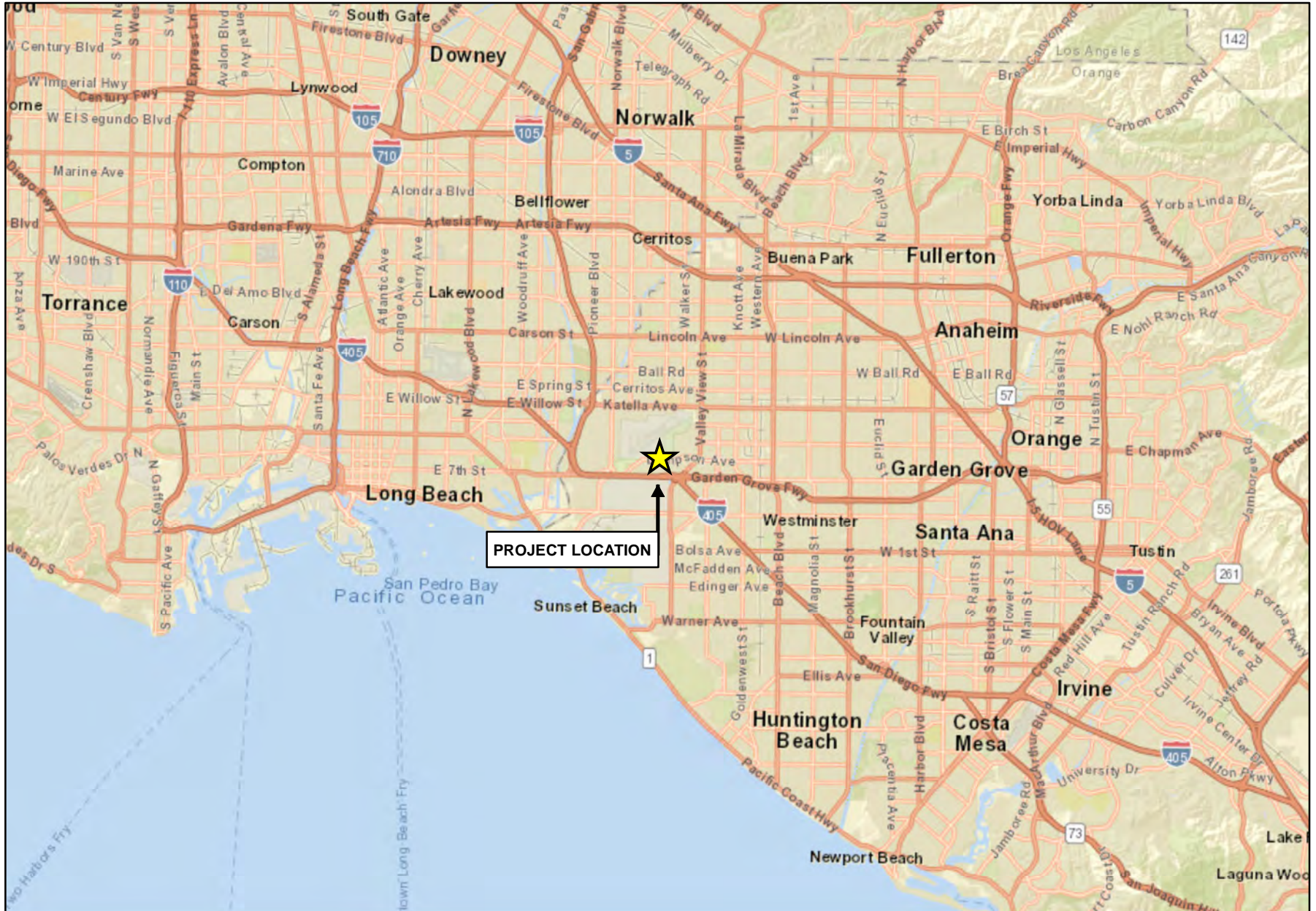
Under the "Procedures" the Regional Board also excludes areas excluded by the Corps such as artificial waters constructed and currently used and maintained primarily for the detention, retention, infiltration, or treatment of stormwater runoff subject to regulation under a municipal, construction, or industrial stormwater permitting program (Procedures, Section II.3.d.iii).

D. CDFW Jurisdiction

In addition to the feature lacking any and all wetland characteristics, the feature is not a "stream" in accordance with the definitions of a stream in the California Fish and Game Code as the drainage feature does not exhibit a bed, bank, or channel as the feature is an approximately two-inch-deep linearly shaped concrete slab that also support no vegetation as shown in the site photographs.

⁹ At the southwest corner where a thin layer of sediment has accumulated there were two individuals of tall umbrella sedge (*Cyperus eragrostis*, FACW) and one individual of Canada horseweed (*Lessingia canadensis*, FACW) were noted growing in the sediment and leaf litter from the overhanging coast redwood growing on the lawn area. Because of the underlying concrete and lack of soil this area is not considered to be wetland under any definition of wetlands.

Source: ESRI World Street Map



4665 LAMPSON AVENUE PROJECT

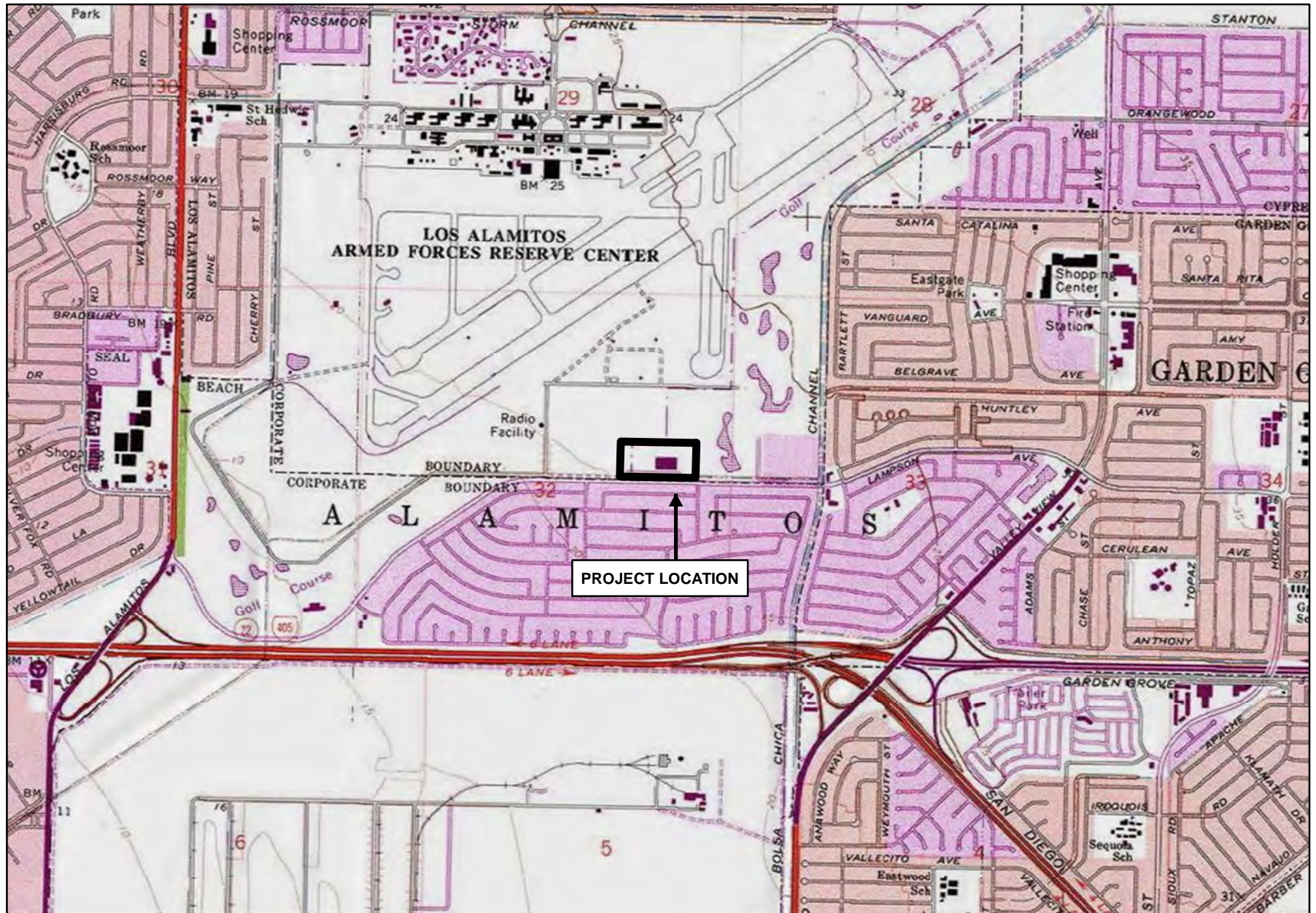
Regional Map

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Exhibit 1

Adapted from USGS Los Alamitos, CA quadrangle



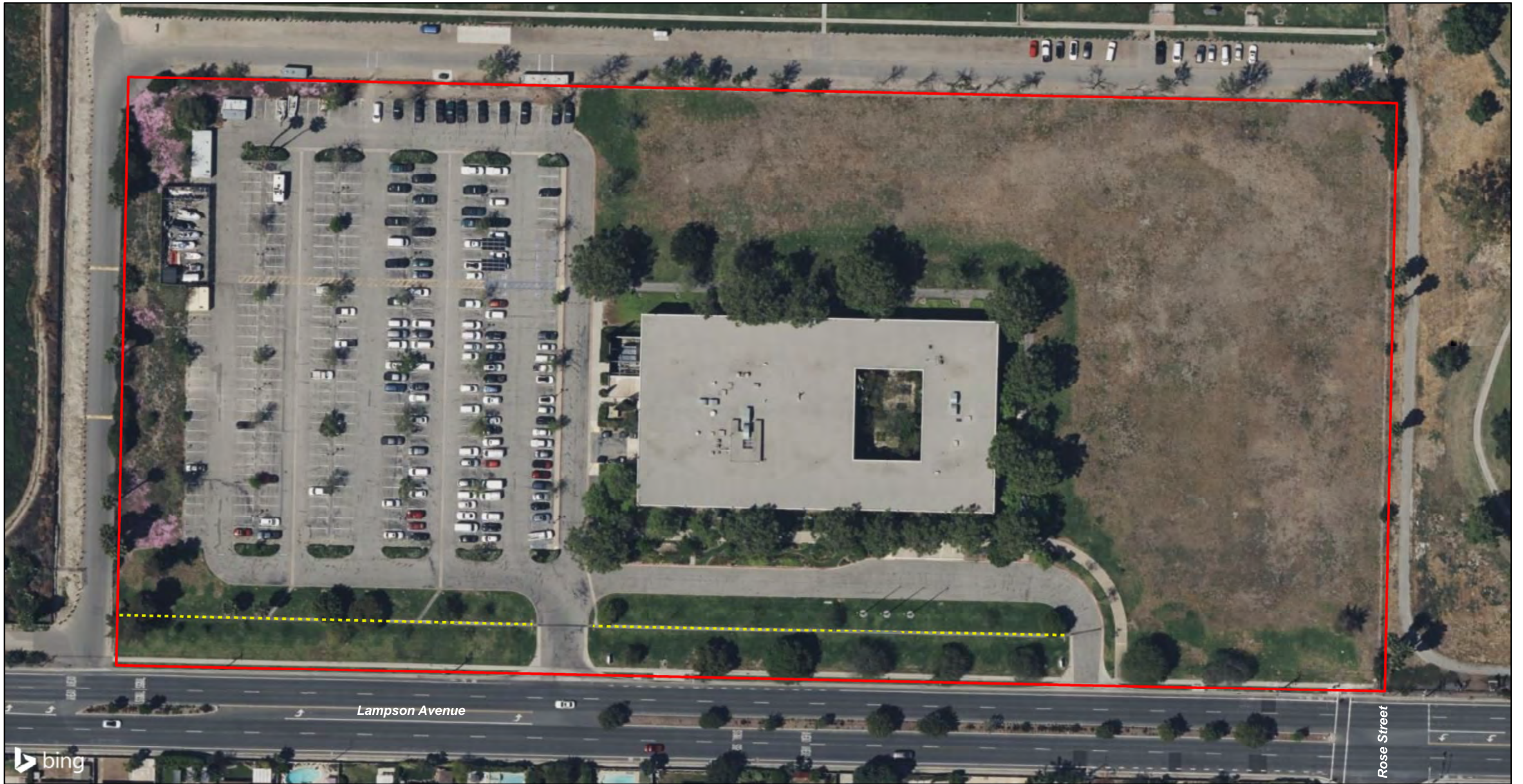
4665 LAMPSON AVENUE PROJECT

Vicinity Map

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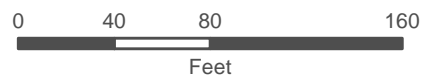


Exhibit 2



 Property Boundary

 Shallow Concrete V-Ditch



1 inch = 80 feet

Coordinate System: State Plane 6 NAD 83
Projection: Lambert Conformal Conic
Datum: NAD 1983 2011
Map Prepared by: B. Gale, GLA
Date Prepared: October 12, 2023

4665 LAMPSON AVENUE PROJECT

Jurisdictional Determination Map

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Exhibit 3



Photograph 1: View of shallow clean concrete ditch looking east immediately east of outfall shown in Photograph 4.



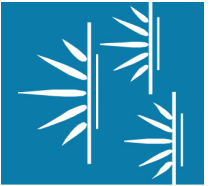
Photograph 2: View of shallow concrete ditch looking east immediately east of outfall shown in Photograph 4.



Photograph 3: View of shallow concrete ditch looking along substantial length from inlet that comprises terminus of shallow concrete ditch. Note turf on both sides of ditch.



Photograph 4: View concrete ditch at outfall showing shallow sediment accumulation and leaf litter from overhanging ornamental coast redwood.





Photograph 5: View of shallow concrete ditch looking east showing no sediment accumulation near the inlet structure at terminus of ditch.



Photograph 6: View of shallow clean concrete ditch looking east at inlet.



Photograph 7: View of outfall that is fully blocked with sediment east of road shown in Photographs 6 above and Photograph 8.



Photograph 8: View of turf at end of pipe which is currently completely plugged by sediment.

