

CALIFORNIA COASTAL COMMISSION

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Date Filed: March 11, 2004
 49th Day: April 29, 2004
 180th Day: September 7, 2004
 Staff: Carrie A. Bluth
 Staff Report: April 1, 2005
 Hearing Date: April 15, 2005
 Commission Action:

STAFF REPORT: REGULAR CALENDAR

APPLICATION NO.: 1-04-018

APPLICANT: Windy Acres / Domingo Santos

PROJECT LOCATION: Moxon Road, 300-feet north of Vassaide Road, Arcata, Humboldt County (APN 506-151-001)

PROJECT DESCRIPTION: Removal of unpermitted fill from a seasonal grazed wetland.

GENERAL PLAN DESIGNATION: Coastal Agriculture Exclusive / Coastal Public Facility - Parks

ZONING DESIGNATION: Coastal Agriculture Exclusive / Coastal Public Facility - Parks

LOCAL APPROVALS REQUIRED: Grading/Land Development Permit; Wetland and Creek Protection Approval

OTHER APPROVALS REQUIRED: U.S. Army Corp of Engineers may be required

SUBSTANTIVE FILE DOCUMENTS: Humboldt County LCP

SUMMARY OF STAFF RECOMMENDATION:

Staff recommends approval with special conditions of coastal development permit application number 1-04-018 to remove approximately 270-300 cubic yards of unpermitted fill from a seasonal grazed wetland. The fill was placed in the wetland without the benefit of a coastal development permit. The applicant is seeking a permit to remove the fill and to place it on another site, specifically on the extensive earthen dikes of Reclamation District No. 768 for purposes of dike repair.

The immediate project site is a seasonal grazed wetland on the applicant's property, which is located near Moxon Road, 300-feet north of Vassaide Road, in the City of Arcata. The property is located in an area known as the Arcata Bottoms, a low-lying agricultural area that was, historically, subject to tidal inundation via channels extending from Arcata Bay. The area no longer receives tidal flow, however the water table is very high and nearby water features such as Liscom Slough and scattered depressions still exist as seasonal freshwater wetlands. Virtually all of the adjoining pastureland consists of seasonal grazed wetlands. The historic and present use of the subject site is dairy and other agricultural use; the subject wetland was grazed prior to being filled.

Section 30233 of the Coastal Act limits development activities such as diking, dredging and filling in wetlands and other coastal waters. Such activities are allowable only when undertaken for certain specified purposes, one of which includes restoration. The purpose of the proposed development is to remove the unpermitted fill, and in so doing, the project as conditioned, should restore the site to its pre-development condition.

Special conditions concerning the timing of fill removal, proper disposal of fill, site reclamation standards, obtaining any necessary local government, and Army Corp of Engineers approvals, and permit issuance and expiration are recommended. Special Condition Nos. 2 and 3 together require that the fill be removed prior to the onset of the rainy season, and that the disturbed area be re-seeded with native or naturalized vegetation in order to enhance site restoration. Special Condition No. 4 requires the applicant to submit and adhere to an approved fill disposal plan, which identifies either an approved disposal facility to receive the fill, or a site which has been approved by the Coastal Commission under a separate coastal development permit. Special Conditions 5 and 6 require the applicant to provide a copy of any approvals required by the City of Arcata and/or the U.S. Army Corps of Engineers to the Executive Director, or submit evidence that no permits are required. Any changes to the project required by either local government or the Army Corps of Engineers must be reported to the Executive Director and such changes shall not be incorporated into the project until any required coastal development permit amendment is obtained.

As conditioned, staff believes that the project is fully consistent with the Chapter 3 policies of the Coastal Act.

STAFF NOTES:

1. Standard of Review

The proposed project is located within the Coastal Commission's area of original or retained jurisdiction. The standard of review is the applicable Chapter 3 policies of the Coastal Act.

2. Commission Action Necessary

The Commission must act on the application at the April 15, 2005 meeting to meet the requirements of the Permit Streamlining Act.

I. MOTION, STAFF RECOMMENDATION AND RESOLUTION:

The staff recommends that the Commission adopt the following resolution:

Motion:

I move that the Commission approve Coastal Development Permit No. 1-04-018 pursuant to the staff recommendation.

Staff Recommendation of Approval:

Staff recommends a YES vote. Passage of this motion will result in approval of the permit as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

Resolution to Approve the Permit:

The Commission hereby approves a coastal development permit for the proposed development and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of Chapter 3 of the Coastal Act. Approval of the permit complies with the California Environmental Quality Act because either (1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or (2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.

II. STANDARD CONDITIONS: See Attachment A.

III. SPECIAL CONDITIONS:

1. Permit Expiration and Condition Compliance

Because some of the proposed development has already commenced, this coastal development permit shall be deemed issued upon the Commission's approval and will not expire. Failure to comply with the special conditions of this permit may result in the institution of an action to enforce those conditions under the provisions of Chapter 9 of the Coastal Act.

2. Extent and Timing of Fill Removal

All fill material shall be removed from the wetland down to the original grade. Removal shall take place prior to the onset of the rainy season, specifically on or before October 15, 2005. Should additional time be necessary in order for the permittee to carry out development in conformance with all other terms of this Permit, this date may be extended for such a purpose, at the discretion of the Executive Director.

3. Site Reclamation

All disturbed portions of the wetland shall be seeded with native vegetation, or otherwise non-invasive naturalized species within 10 days following completion of removal of the fill material. Seeded areas shall be irrigated until plants are established, or until the rainy season begins on October 15th, 2005.

4. Fill Disposal Plan and Implementation

A. PRIOR TO THE COMMENCEMENT OF DEVELOPMENT, the applicant shall submit, for the review and approval of the Executive Director, a fill disposal plan for all of the fill material to be removed.

- (1) The fill disposal plan shall demonstrate that:
 - (a) No fill material to be removed shall be temporarily placed or stored during grading activities where it may be subject to entering wetlands or other coastal waters;
 - (b) All of the fill to be removed shall either be: (i) placed and used pursuant to and consistent with a valid coastal development permit, as well as consistent with the terms and conditions of this permit

(CDP No. 1-04-018) or (ii) disposed of at an authorized disposal site capable of receiving such fill materials. Side casting or placement of any such material within Arcata Bay, any slough, or any other wetland area, including any grazed seasonal wetlands, except as specified above is prohibited; and

(c) Fill removal activities shall not occur during the rainy season consistent with Special Condition No. 2;

(2) The plan shall include, at a minimum, the following components:

(a) A site plan showing all proposed locations for stockpiling construction materials, debris, or waste during fill removal operations;

(b) A description of the manner by which the material will be removed from the construction site and identification of all debris disposal sites that will be used;

(c) If the removed fill material is to be placed and used as part of a development approved by the Commission under a valid coastal development permit, the permittee shall provide (i) a copy of the approved permit, (ii) written permission from the owner of the property governed by the approved permit authorizing the fill, and (iii) a written description and site map indicating when and where the materials will be stockpiled for later use in the approved development;

(d) A schedule for removal of all debris.

B. The permittee shall undertake development in accordance with the approved final plan. Any proposed changes to the approved final plan shall be reported to the Executive Director. No changes to the approved final plan shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

5. Local Government Approval

PRIOR TO COMMENCEMENT OF DEVELOPMENT, the permittee shall provide to the Executive Director a copy of any permits or approvals issued by the City of Arcata, or evidence that no permit or permission is required. The applicant shall inform the Executive Director of any changes to the project required by the City of Arcata. Such changes shall not be incorporated into the project until the applicant obtains a Commission amendment to this coastal

development permit, unless the Executive Director determines that no amendment is legally required.

6. U.S. Army Corps of Engineers Approval

PRIOR TO COMMENCEMENT OF DEVELOPMENT, the permittee shall provide to the Executive Director a copy of a permit issued by the U.S. Army Corps of Engineers, or letter of permission, or evidence that no permit or permission is required. The applicant shall inform the Executive Director of any changes to the project required by the U.S. Army Corps of Engineers. Such changes shall not be incorporated into the project until the applicant obtains a Commission amendment to this coastal development permit, unless the Executive Director determines that no amendment is legally required.

IV. FINDINGS AND DECLARATIONS

The Commission hereby finds and declares:

A. Site Description & Project Description.

The immediate project site is a seasonal grazed wetland on the applicant's property, referred to as Windy Acres, which is located off the side of Moxon Road, 300-feet north of Vassaide Road, in the City of Arcata (see Exhibit Nos. 1 and 2). The property is located in an area known as the Arcata Bottoms, a low-lying agricultural area that was, historically, subject to tidal inundation via channels extending from Arcata Bay. The area no longer receives tidal flow, however the water table is very high and nearby water features such as Liscom Slough and scattered depressions still exist as freshwater wetlands. Virtually all of the adjoining pastureland consists of seasonal grazed wetland. The historic and present use of the subject site is dairy and other agricultural use.

The applicant seeks authorization for the removal of approximately 270-300 cubic yards of fill placed in the wetland during the summer of 2003, without the benefit of a coastal development permit. The fill is composed of clean dirt, which was obtained from a nearby "Windsong" residential subdivision, where grading for home construction has been occurring. The subdivision is within the City of Arcata, about ½ mile from the Windy Acres site.

Upon removal of the fill from the wetland, the applicant proposes to provide the fill to a local Reclamation District (No. 768) for use as needed for dike maintenance activity on the Reclamation District's property in the local area. One of the Reclamation District's levee maintenance projects was recently approved by the Commission under Coastal Development Permit No. 1-03-004.

B. Wetlands Resource Protection

1. Maintenance of Biological Productivity and Water Quality in Wetlands

Section 30231 provides in applicable part that:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes... shall be maintained and, where feasible restored...

2. Diking, Filling, or Dredging Wetlands

Coastal Act Section 30233 states, in applicable part:

(a) *The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:*

...

(7) *Restoration purposes...*

(c) *In addition to the other provisions of this section, diking, filling, or dredging in existing estuaries and wetlands shall maintain or enhance the functional capacity of the wetland or estuary...*

Section 30108.2 of the Coastal Act defines "fill" as:

'Fill' means earth or any other substance or material, including pilings placed for the purposes of erecting structures thereon, placed in a submerged area.

3. Analysis

The applicant proposes to remove approximately 270-300 cubic yards of unpermitted fill material previously placed in a grazed seasonal wetland, and provide the removed material to Reclamation District No. 768, for use in an approved dike repair project. The removal of the fill is a form of wetland dredging, and thus, in addition to the water

quality and resource protective provisions of Coastal Act Section 30231, the project is also subject to the wetland filling and dredging requirements of Section 30233.

The above policies set forth a number of different limitations on what types of diking, filling, or dredging projects may be allowed in wetlands and other coastal waters, and on how such projects must be carried out. For analysis purposes, the limitations applicable to the subject project can be grouped into four general categories or tests. These tests are:

- (1) The purpose of the dredging, diking or filling must be for one of the eight uses enumerated in Section 30233(a);
- (2) The project must have no feasible less environmentally damaging alternative;
- (3) Feasible mitigation measures must be provided to minimize adverse environmental resource impacts of the project; and
- (4) The biological productivity and functional capacity of the habitat shall be maintained and enhanced where feasible.

a. Removal of Fill as a Permissible Use

Under Section 30233(a), dredging, filling or diking in wetlands can only be performed for one of eight different uses, including under sub-section (7), "restoration purposes." The proposed project consists of the removal of unpermitted fill. The proposed development will return the project site to conditions that existed prior to the placement of the unpermitted fill materials. As such, the proposed removal of fill is solely for "restoration purposes." Therefore the Commission finds that the purpose of the fill is consistent with subsection (7) of Section 30233(a) of the Coastal Act.

b. No Feasible Less Environmentally Damaging Alternatives

The second general limitation set forth by the above-referenced Chapter 3 policies is that any proposed dredge or fill project must have no less environmentally damaging feasible alternative. Coastal Act Section 30233 does not allow the dredging, diking, or filling of coastal waters if there is a feasible, less environmentally damaging alternative to the project. Alternatives to the project as proposed must be considered before a finding can be made that the proposed dredging is the least environmentally damaging feasible alternative. Only one potentially feasible less environmentally damaging alternative has been identified, the "no project" alternative.

The "no project" alternative would be to leave the previously placed fill material in place without removal. This alternative would not meet the project objectives of removing previously placed fill material placed without benefit of a coastal development permit. Moreover, the "no project" option is not a less environmentally damaging alternative, than the proposed removal of the fill material, as conditioned.

Retention of the fill materials in the formerly seasonal wetland would have several potentially significant adverse environmental impacts, including the loss of wetland habitat (covered up by the fill material) and functional values, which could result in water quality impacts. Therefore, the "no project" alternative, which would leave the fill in place, is not a feasible less environmentally damaging alternative to the project as conditioned. Thus, the Commission finds that the proposed development is consistent with the requirement of Section 30233 of the Coastal Act that no dredging, diking, or filling project be approved if there is a feasible less environmentally damaging alternative.

c. Mitigation for Adverse Impacts

A third general limitation set forth by Sections 30231 and 30233(a) is that adequate mitigation to minimize the adverse impacts of the proposed project on habitat values must be provided.

Ultimately, removal of the fill from this wetland will have more environmental benefit than impact, as doing so will lead to site restoration. Still, some measures are available which can help mitigate potential significant adverse impacts associated with the process of removing and restoring the former wetland. Removing the fill from the wetland will expose the underlying wetland basin. If left barren, the soil would be more readily encroached upon by invasive species which may then result in the establishment of a lower quality of habitat than could be achieved by active re-seeding with a native or naturalized mix of vegetation. In addition, the exposed soil would be subject to greater erosion from stormwater runoff, which would cause greater sedimentation of adjoining and downstream wetlands, adversely affecting water quality. Therefore, to mitigate the effects of disturbing and exposing the wetland basin when removing the fill, Special Condition Nos. 2 and 3 together require that the fill be removed prior to the rainy season, and that the disturbed area be re-seeded with native or naturalized plant species within 10 days following fill removal. Special Condition No. 2 does allow for an extension of the deadline for fill removal at the discretion of the Executive Director, but only in the event the extension is necessary to ensure permittee compliance with all other terms of this Permit.

The applicant has proposed to place the removed material on dikes maintained by the Reclamation District (No. 768) for dike repair purposes. The Commission notes that a separate coastal development permit application filed by the aforementioned Reclamation

District for maintenance of the District's extensive levee system along Arcata Bay and Mad River Slough was recently approved by the Commission. This Permit (CDP No. 1-03-004) sets forth standards pertaining to the type and quality of fill material acceptable for use in the approved levee repairs. Should the fill material proposed to be removed under the *subject* coastal development permit application be found compatible with, and in conformance with a Commission approved coastal development permit which authorizes the placement of fill material, such as the previously referenced Reclamation District CDP, Special Condition No. 4 will allow such placement, provided the owner of the property governed by the approved permit authorizing the fill agrees to accept the material. If the fill is unsuitable and/or not accepted by the owner of the property governed by the approved permit authorizing the fill, placement of the fill in an unauthorized disposal site could create additional resource impacts. Therefore, Special Condition No. 4, which requires the submittal of a fill disposal plan for the review and approval of the Executive Director, requires, alternatively, that the fill material be disposed of at an approved disposal facility. To summarize, in order to ensure that the fill material being removed is not placed in a location where it may adversely impact coastal resources, the Commission attaches Special Condition No. 4. Special Condition No. 4 requires that the removed material be disposed of at either an approved disposal facility, or at a location wherein the placement and/or use of the material therein, has been approved by the Commission under a coastal development permit.

The Commission finds that as conditioned, the proposed project is consistent with the third test for approvable diking, filling, or dredging projects set forth in Section 30233 of the Coastal Act, and the requirements of Section 30231 of the Act, in that measures to minimize and mitigate potential adverse environmental effects of the proposed project will be provided.

d. Maintenance and Enhancement of Wetland Habitat Values

The fourth general limitation set by Sections 30231 and 30233(a) on dredging, diking, and filling projects is that any such proposed project shall maintain and enhance the biological productivity and functional capacity of the habitat, where feasible.

The proposed restoration work will both maintain and enhance the biological productivity and functional capacity of the seasonal wetland. As discussed above, the project entails the removal of fill materials placed without first securing a coastal development permit. While the process of removing the material could potentially have significant adverse impacts on environmental resources, conditions have been required that will minimize and/or mitigate this impact. In addition, as conditioned, the proposed project will restore the site to the conditions that existed prior to the placement of the fill material, thereby maintaining the biological productivity and functional habitat that previously existed.

Special Condition Nos. 2 and 3 together require that the fill be removed prior to the onset of the rainy season, and that the disturbed area be seeded with native or naturalized vegetation in order to enhance site restoration. Special Condition No. 2 does allow for an extension of the deadline for fill removal at the discretion of the Executive Director, but only in the event the extension is necessary to ensure permittee compliance with all other terms of this Permit.

Additionally, special conditions have been attached that will address the disposal of the fill material such that impacts to environmentally sensitive habitat areas and coastal water degradation do not result, and therefore habitat values associated with such resources are maintained. As discussed in the previous sub-section on *Mitigation for Adverse Impacts*, the applicant has proposed to place the removed material on dikes maintained by the local Reclamation District (No. 768) for dike repair purposes. Special Condition No. 4 requires that the removed material be disposed of either at a location wherein the placement and/or use of the material therein has been approved by the Commission under a coastal development permit, such as the Reclamation District dikes, if accepted by the property owner, or at an approved disposal site.

Therefore, the Commission finds that the project, as conditioned, will maintain the biological productivity and functional capacity of the wetland habitat consistent with the requirements of Section 30231 and 30233 of the Coastal Act.

4. Conclusion

The Commission thus finds that the project is an allowable use, that there is no feasible less environmentally damaging alternative, that measures to minimize and mitigate potential adverse environmental effects of the proposed project are required, and that wetland habitat values will be maintained or enhanced. Therefore, the Commission finds that the proposed development, as conditioned, is consistent with Sections 30231 and 30233 of the Coastal Act.

C. U.S. Army Corps of Engineers Review

The project is within and adjacent to a navigable waterway and is subject to review by the U.S. Army Corps of Engineers (USACE). Pursuant to the Federal Coastal Management Act, any permit issued by a federal agency for activities that affect the coastal zone must be consistent with the coastal zone management program for that state. Under agreements between the Coastal Commission and the USACE, the Corps will not issue a permit until the Coastal Commission either approves a federal consistency certification for the project or approves a coastal development permit. To ensure that the project ultimately approved by the Corps is the same as the project authorized herein, the Commission attaches Special Condition No. 6 that requires the applicant, prior to the commencement of construction, to demonstrate that all necessary approvals from the USACE for the proposed project have been obtained.

D. Alleged Violation.

As noted above, the subject wetland site was filled in an area within the Commission's jurisdiction without the benefit of a coastal development permit. Consideration of this application by the Commission has been based solely upon the Chapter 3 policies of the Coastal Act. Review of this permit does not constitute a waiver of any legal action with regard to the cited alleged violation nor does it constitute an admission as to the legality of any development undertaken on the subject site without a coastal permit. Special Condition No. 1 ensures that this permit is deemed issued upon Commission approval, and that it will not expire, as development has already commenced and been completed.

E. California Environmental Quality Act (CEQA).

Section 13096 of the Commission's administrative regulations requires Commission approval of a coastal development permit application to be supported by findings showing that the application, as modified by any conditions of approval, is consistent with any applicable requirement of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available, which would substantially lessen any significant adverse effect the proposed development may have on the environment.

The Commission incorporates its findings on Coastal Act consistency at this point as if set forth in full. As discussed above, the proposed project has been conditioned to be found consistent with the policies of the Coastal Act. These findings address and respond to all public comments regarding potential significant adverse environmental effects of the project that were received prior to preparation of the staff report. Mitigation measures which will minimize or avoid all significant adverse environmental impact have been required. As conditioned, there are no feasible alternatives or feasible mitigation measures available, beyond those required, which would substantially lessen any significant adverse impact that the activity would have on the environment. Therefore, the Commission finds that the proposed project, as conditioned to mitigate the identified impacts, can be found consistent with the requirements of the Coastal Act and to conform to CEQA.

V. EXHIBITS:

1. Regional Location Map
2. Vicinity Map
3. Site Plan

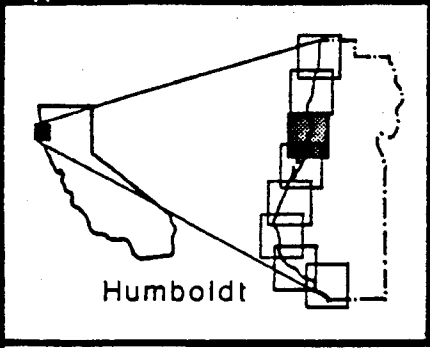
ATTACHMENT A

Standard Conditions:

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. **Interpretation.** Any questions of intent of interpretation of any condition will be resolved by the Executive Director or the Commission.
3. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
4. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

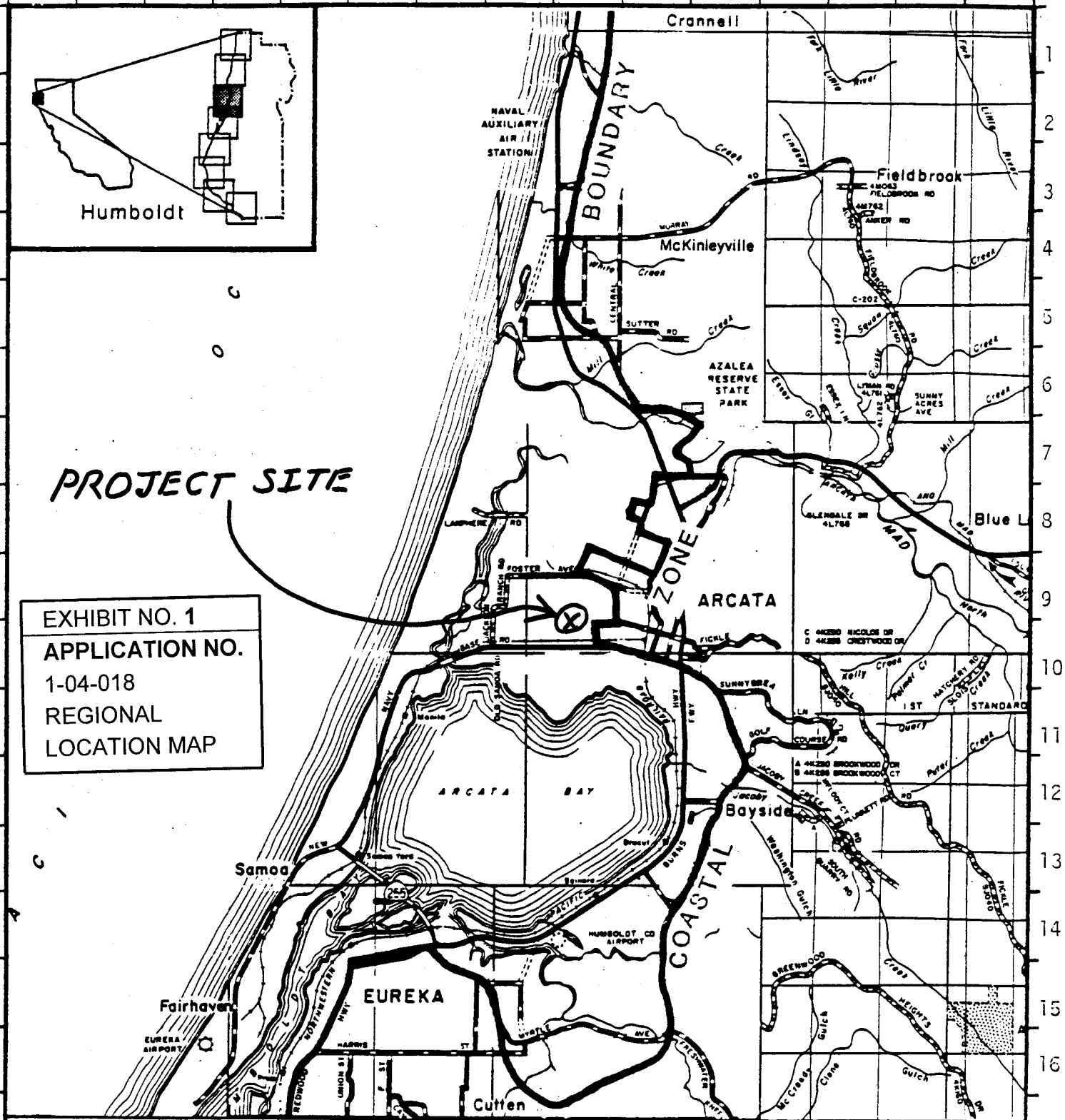


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PROJECT SITE

EXHIBIT NO. 1
 APPLICATION NO.
 1-04-018
 REGIONAL
 LOCATION MAP

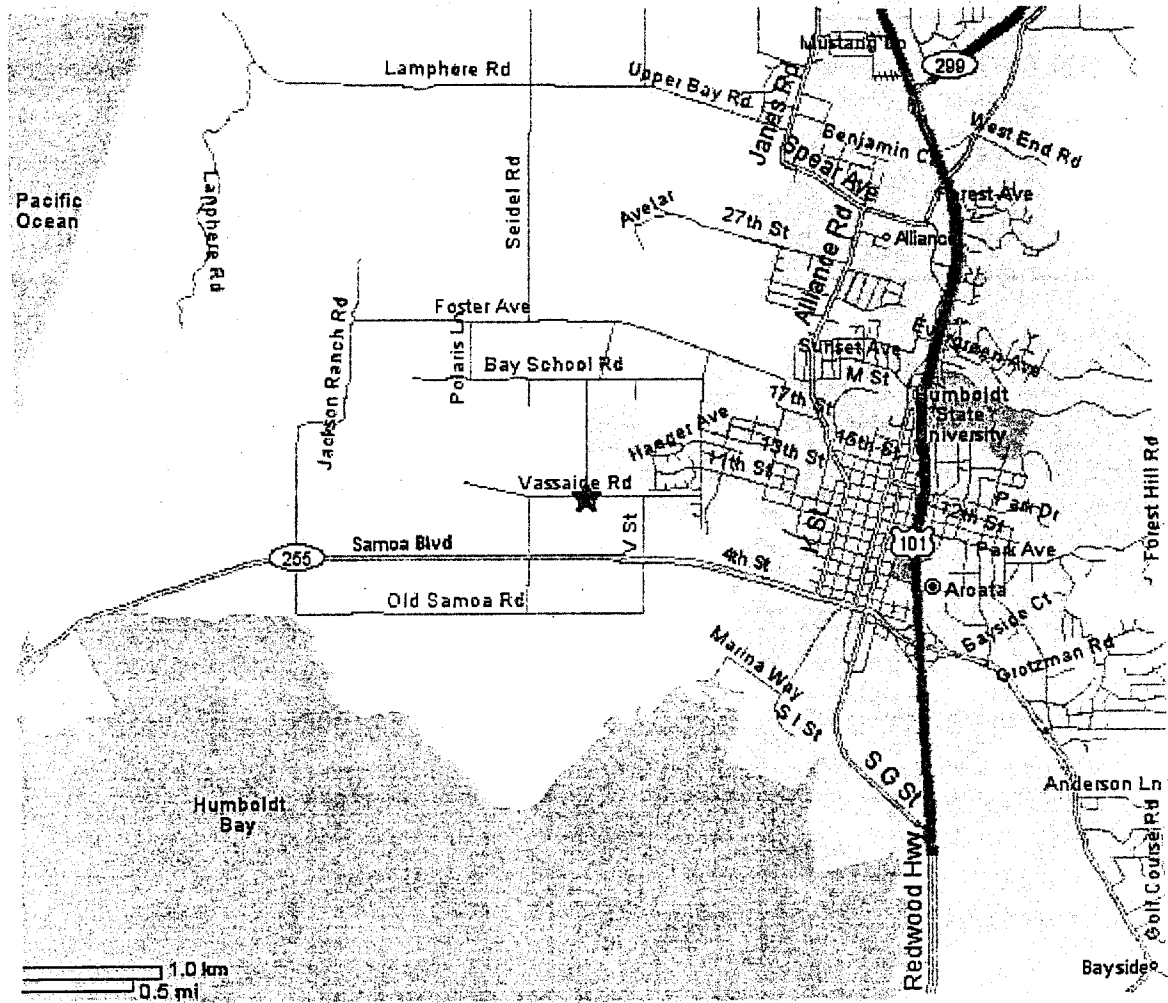


California Coastal Commission

LOCATION MAP

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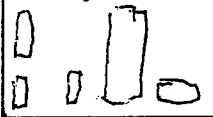
<p>EXHIBIT NO. 2</p> <p>APPLICATION NO.</p> <p>1-04-018</p> <p>PROJECT VICINITY</p> <p>MAP</p>
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Scale 1" = 300'



Windy Acres Dairy

Barndairy Buildings



House



Moxon Rd

300'

Sign Posted

Fill

270-300 yds
Clean Dirt
Summer 04

Drain Ditch

Vassallo Rd

Ap # 506-151-001

1320'

V ST

1320'

EXHIBIT NO. 3
APPLICATION NO.
1-04-018
PROJECT SITE
MAP

