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Attorney for Petitioner  
California Healthy Communities Network

BEFORE THE  
STATE WATER RESOURCES CONTROL BOARD

In the matter of Wal-Mart Stores, Inc.,  
Walters Road Development Project, Suisun  
City, Solano County - Waste Discharge  
Requirements and 401 Water Quality  
Certification issued March 14, 2012  
(Order No. R2-2012-0021).

**PETITION FOR RECONSIDERATION**

[23 Cal.Code.Regs § 3867]

Pursuant to Section 3867 of Title 23 of the California Code of Regulations, Petitioners CALIFORNIA HEALTHY COMMUNITIES ("Petitioner") hereby petitions the State Water Resource Control Board for reconsideration of the San Francisco Bay Regional Water Quality Control Board's ("Regional Board") Order No. R2-2012-0021, dated March 14, 2012, revising and re-issuing waste discharge requirements and water quality certification to Wal-Mart Stores, Inc. ("Wal-Mart"); for the Walters Road Development Project in Suisun City, Solano County ("Project").

Following is the information required by Section 3867.

**1. Petitioner**

California Healthy Communities Network  
P.O. Box 1353  
Martinez, CA 94553  
Tel: (707) 479-6000  
Tel: (650) 493-5540

**2. Action For Which Reconsideration is Requested**

Regional Board Order No. R2-2012-0021 (“the Order”) revising and re-issuing waste discharge requirements and water quality certification to Wal-Mart Stores, Inc. for the Walters Road Development Project in Suisun City, Solano County (“Project”). A true and correct copy of the Order is attached to this Petition as **Attachment 1**.

**3. Date on Which Action Occurred**

March 14, 2012.

**4. Reasons Why Regional Board’s Action Is Improper**

Under governing state and federal regulations, policies, and guidance documents, off-site mitigation for the Project’s fill of seasonal wetlands was required at a ratio substantially greater than 1:1, the ratio authorized by the Regional Board. In addition, the adequacy and viability of off-site mitigation has not been sufficiently established to support a finding that the Project’s wetland impacts will be fully mitigated. These arguments are set forth in greater detail below, following a statement of facts and procedural history.

**A. Factual Background**

The Project site is located in the Suisun Marsh watershed, on a 20.8-acre site at the intersection of Highway 12 and Walters Road in eastern Suisun City. The Project site is a triangularly-shaped property, with Highway 12 forming the southern boundary, Petersen Road forming the northern boundary, and Walters Road forming the eastern boundary. The site is comprised of three habitat types: non-native annual grasslands, stream, and seasonal wetlands.

The site contains approximately 2.996 acres of jurisdictional waters of the State and the United States, including wetlands and a stream channel. The jurisdictional waters are comprised of 2.596 acres of seasonal wetlands and vernal pools; and 0.4 acres (1,100 linear feet) of a stream channel with riparian/wetland vegetation. The unnamed stream bisects the Project site in a north to south direction, and is tributary to Hill Slough, which enters the northern portion of Suisun Slough and Suisun Marsh. A portion of the Project site is within federally-designated critical habitat for the endangered vernal pool tadpole shrimp (*Lepidurus packardi*) and threatened vernal pool fairy shrimp (*Branchinecta lynchi*). In addition, waters on the Project site provide

for flood water attenuation, groundwater recharge, and water quality enhancement including the filtering of sediment and nutrients to downstream waters.

#### Project Description

Wal-Mart proposes to construct a retail shopping center on 20.14 acres of the 20.8-acre site. The shopping center will be comprised a 182,000 square foot "supercenter" with 879 parking stalls on 18.44 acres; an 8,000 square foot restaurant with 69 parking stalls on 1.41 acres; and two stormwater detention basins totaling 12,850 square feet on 0.29 acres.

#### Impacts to Wetlands

The total delineated jurisdictional waters of the State and U.S. on the Project site are approximately 2.996 acres. The site's jurisdictional waters are comprised of:

- 2.596 acres of seasonal wetlands, some of which are considered vernal pools; and
- 0.4 acres (1,100 linear feet) of stream channel with associated riparian/wetland vegetation.

The Project will result in the permanent fill of approximately 2.63 acres of the site's 2.996 acres of jurisdictional waters. This impact is comprised of the following:

- 2.35 acres of wetlands; and
- 0.28 acres (786 linear feet) of stream channel.

#### Procedural History

Wal-Mart first applied to the Regional Board for water quality certification on November 20, 2007. On November 19, 2008, the Regional Board's Executive Officer denied the application without prejudice on grounds the application did not include an adequate alternatives analysis or stormwater management plan. Wal-Mart submitted a new application on or around January 22, 2009. Once again, due to the lack of a complete application detailing the Project proposal, including an incomplete alternatives analysis and stormwater management plan, the Regional Board's Executive Officer denied the application without prejudice on April 23, 2010.

On June 21, 2010, Wal-Mart submitted a third application, this time for a partially downsized version of Project that, among other changes, omitted a proposed gas station. The net loss of jurisdictional waters resulting from the new Project was thus 2.35 acres of wetlands and 0.28 acres (786 linear feet) of stream channel. As mitigation for the loss of wetlands, Wal-Mart proposed to purchase mitigation credits from the Elsie Gridley Mitigation Bank, near Dixon in Solano County, at a 1:1 ratio, and as mitigation for the loss of stream channel it proposed to

purchase riparian credits at a 2:1 ratio from the Noonan Ranch Mitigation Bank, a planned but not yet existing mitigation bank area in Fairfield, Solano County.

Soon after the Regional Board accepted Wal-Mart's third application as complete, it became apparent that the future availability of riparian credits from the Noonan Ranch was highly doubtful, given that the Noonan Ranch Mitigation Bank did not yet even exist. Thus, despite nominally finding the application complete, Regional Board Staff notified Wal-Mart that there was insufficient information in the application for staff to make the prerequisite determination that water quality standards will be met in order for it to issue water quality certification.

Meanwhile, in April, 2010, representatives from U.S. EPA, the Army Corps of Engineers, and the Department of Fish & Game had conducted an "Interagency Compensatory Mitigation Site Visit" to the Elsie Gridley Mitigation Bank, in order to inspect the facility for compliance with applicable performance criteria. In a report forwarded to the Corps and Regional Board on August 18, 2010 (*See Report with cover e-mail, Attachment 2*), U.S. EPA staff identified several performance criteria were not being met. Specifically, EPA observed, based on this field visit and 2008 data that:

- Phase I wetlands had failed to meet Year 3 performance criteria for hydrophilic plant species cover or species diversity. (p. 3.)
- Phase II wetlands "look very similar to Phase I pools," though no detailed performance sampling was undertaken (p. 3.)
- "The site looked trampled and beat down. This may have been due to the recent introduction of cattle or perhaps due to ORV use." (p. 4.)
- "The constructed wetlands looked to be holding large amounts of water and were pooling very deep (most were at least 2' deep). They looked more like seasonal marsh and playa pools than vernal pools. . . . We were unable to differentiate between vernal pools and playa pools." (p. 4.)

Thus, the long term success of the wetlands at the Elise Gridley Mitigation Bank was and remains far from assured. At the very least, EPA's report strongly suggests that one acre of wetlands at this facility does not possess the ecological functions, habitat values, and other wetland assets of one acre of undisturbed wetlands at this Project's site.<sup>1</sup>

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<sup>1</sup> In a response to comments on the 2012 Tentative Order No. R2-2012-0021, Regional Board staff stated that the bank's owner had submitted an amendment to its Bank Enabling Instrument (BEI) to address how it plans to deal with these compliance issues *in the future*. There is no evidence, however, that the Bank has actually addressed or rectified then.

Nevertheless, despite the significant uncertainty surrounding the availability and viability of mitigation and both Noonan Ranch and Elsie Gridley, Regional Board staff prepared and circulated a tentative order ("TO") for public review on August 23, 2010, imposing a public comment deadline of September 22, 2010. Subsequent to the Regional Board's issuance of the TO, however, Wal-Mart notified the Regional Board via letter that it had been unable to acquire any mitigation credits at the Noonan Ranch site or elsewhere. Accordingly, Wal-Mart was unable to provide the Regional Board with any details or specifics whatsoever regarding how mitigation for the permanent fill of 786 linear feet of stream channel would be planned, implemented, and monitored to success.

On October 6, 2010 Regional Board staff prepared a staff report for the October 13, 2010 meeting that disclosed that no location for mitigation of the Project's stream channel impacts had been identified. On October 13, 2010, following a public hearing the Regional Board adopted Order No. R2-2010-0109 issuing water quality certification and WDRs to Wal-Mart. Regarding mitigation for stream channel impacts, the Order included a condition that Wal-Mart submit a Final Mitigation and Monitoring Plan (MMP) before commencing construction of the Project that included adequate mitigation for these impacts.

Petitioner here, joined by the Citizens Committee to Complete the Refuge and San Francisco Baykeeper, timely filed a Petition for Reconsideration before the State Board on November 10, 2010. (SWRCB/OCC File No. A-2137). The State Board has taken no action to review, grant, or deny on that Petition.

Meanwhile, Wal-Mart has also applied to the U.S. Army Corps of Engineers (Corps) for an individual permit under Section 404 of the Clean Water Act (33 U.S.C. § 1344). The Corps issued a Public Notice for the Project on January 31, 2008, but has not issued a permit for the Project at this time. The United States Fish & Wildlife Service (USFWS) issued a Final Biological Opinion for the Project on August 10, 2011. However, on September 29, 2011, the Corps re-initiated consultation with the USFWS under the authority of Section 7 of Endangered Species Act regarding endangered species issues on a newly proposed offsite mitigation parcel. The USFWS has not yet issued an amended Biological Opinion for the Project at this time.

On November 9, 2011, Wal-Mart submitted a letter to the Regional Board stating it had secured 2.35 acres of seasonal wetland creation credits from the Elsie Gridley Mitigation Bank.

On November 11, 2011, Wal-Mart submitted a proposed Final MMP to the Regional Board that purported to specify adequate mitigation for the Project's stream channel impacts. Specifically, the Final MMP proposes restoration and enhancement of 1,637 linear feet of stream channel and 1.43 acres of jurisdictional wetland and waters on a 9.25-acre site within the 1,039-acre Lynch Canyon Open Space property in Solano County, owned and managed by the Solano Land Trust.

On December 9, 2011, Regional Board staff issued Tentative Order No. R2-2012-0021 for public review and comment. In pertinent part, the revised TO: (1) approved Wal-Mart's Final MMP while imposing a condition requiring its implementation, and (2) imposed a condition requiring Wal-Mart to submit proof of purchase of 2.35 acres of seasonal wetland credits from the Elsie Gridley Bank. In addition, and notwithstanding the fact that USFWS has yet to issue a final amended Biological Opinion under Section 7 of the ESA, the revised TO included a condition requiring various additional mitigation measures designed "to ensure minimization of impacts to any endangered species that might be present at the mitigation site."

Significantly, the revised TO also included a new provision stating: "[t]he Executive Officer is delegated the authority and discretion to approve minor modifications to the Final MMP. The Discharger shall submit requests for approval of a minor modification not later than 45 days prior to the proposed date of implementation of the modification."

On March 14, 2012, the Regional Board held a public hearing on the revised TO, prior to and during which various organizations and individuals, including Petitioner, objected to its issuance. Notwithstanding these objections, the Regional Board voted to adopt the TO as Order No. R2-2012-0021.

As explained below, the Regional Board's action was improper.

**A. The Regional Board Impermissibly Issued Certification Based On Off-Site, Out-of-Kind Mitigation For Seasonal Wetland Loss At The Troubled Elsie Gridley Bank At Only A 1:1 Ratio.**

As described above, the Regional Board included a condition in its water quality certification requiring mitigation of 2.35 acres of wetland impacts via the purchase of credits at the Elsie Gridley Mitigation Bank at a 1:1 ratio. This, too, violated applicable guidance.

Under the Regional Board's own Wetland Fill Policy, contained in its Basin Plan, there is to be no net loss of wetland acreage and no net loss of wetland value when the project and any

proposed mitigation are evaluated together. State resource agencies have long understood that purchase of mitigation bank credits to mitigate permanent impacts to wetlands have generally been met with limited success, and that off-site habitat creation or purchase of mitigation bank credits generally fails to replace ecological functionality, resulting in net loss of wetland acreage and/or resource value.<sup>2</sup> Accordingly, mitigation ratios greater than 1:1 are generally required when dischargers propose the use of mitigation banks or where it is intended to enhance existing wetlands at an off-site location.

The State and Regional Boards have developed several methodologies to determine appropriate wetland mitigation ratios, considering multiple factors such as existing habitat quality, acreage, ecosystem functionality and the type of mitigation being proposed. Required mitigation ratios vary from region to region. However, as a general rule, enhancement of an existing degraded site demands at least a 2:1 replacement ratio and preservation of existing wetland habitat requires a higher mitigation ratio, typically 5:1, since this approach does not effectively achieve the 'no-net loss' standard.

As the Regional Board staff itself explained in a letter to Wal-Mart informing it that its original application was incomplete:

"If, after a more thorough evaluation of site development alternatives has been performed, it is demonstrated that some portion of the wetland mitigation must be provided by purchasing credits at the mitigation bank, such credits will likely need to be acquired at a ratio at least 2: 1 (mitigation acreage to impacted wetlands acreage)." Regional Board, letter to Wal-Mart, December 18, 2007. **Attachment 3**; emphasis added.

There is no indication that the Regional Board required or received any comprehensive baseline study of the ecological quality, functionality, or habitat values of the mitigation credits available at the Elise Gridley Mitigation Bank before it issued certification. On the contrary, what the Regional Board did receive was EPA's 2010 inspection report highlighting the failure of the Bank's Phase I and II wetlands apparent inability to meet applicable performance criteria – a problem that remains unresolved to this day. Clearly, mitigation credits at a 1:1 ratio from a banking facility of unproven performance and a demonstrated inability to meet performance criteria cannot support a finding that the project will comply with all water quality standards.

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<sup>2</sup> Ambrose, R. F., J. C. Callaway, and F. F. Lee. 2006. *An evaluation of compensatory mitigation projects permitted under Clean Water Act Section 401 by the California State Water Quality Control Board, 1991–2002*. California Environmental Protection Agency, California State Water Resources Control Board. Los Angeles, CA, USA. 03-259-250-0.

The Regional Board accordingly erred by issuing water quality certification based on credits at this ratio from this particular facility.

**B. The Regional Board Impermissibly Delegated Unlimited Discretion in The Executive Officer to Approve “Minor Modifications” to the FMMP, Without Identifying Criteria for Determining What Constitutes “Minor” and Without Providing for Public Notice.**

As indicated, Order No. R2-2012-0021 includes a condition delegating to the Executive Officer “the authority and discretion to approve minor modifications to the FMMP.” Petitioner is unaware of any provisions of Title 23 that authorize the delegation of wholesale, unfettered discretion in this manner. The term “minor modification” is nowhere defined in the Order, and there do not appear to be any objective criteria contained in Title 23 for determining whether a proposed modification is or is not “minor.” Furthermore, the Order does not provide for any public notice of any request by the Discharger for approval of a modification under this provision.

The Order has accordingly established a post-approval framework under which the Executive Officer could approve as “minor” a substantive modification of the Final MMP that members of the Regional Board and/or the public would deem substantial, without any notice to the public or to the Regional Board itself. Petitioner submits the procedural requirements of Title 23 simply do not countenance this approach.

**5. Manner In Which Petitioners Are Aggrieved**

Petitioner CALIFORNIA HEALTHY COMMUNITIES NETWORK (“HCN”) is a California unincorporated association maintaining its principal place of business in Martinez, Contra Costa County. HCN is a project of the Tides Center, an independent nonprofit organization based in San Francisco that is exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code. HCN is comprised of organizations and individuals who share common concerns regarding poorly planned, environmentally unsustainable land use and development practices in California. HCN’s organizational members include the Sierra Club, Greenbelt Alliance, East Bay Alliance for a Sustainable Economy, Solano Taxpayers, and the Solano County Green Party. HCN’s individual members include residents and taxpayers in Suisun City, including Suisun City resident Anthony Moscarelli.



HCN accordingly has a direct interest in the vigorous enforcement of state and federal environmental laws that protect water quality, wetlands, and species habitat. The Regional Board's unlawful issuance of Section 401 water quality certification and WDRs to Wal-Mart in the absence of any identified mitigation plan or program for stream channel impacts thereby directly and adversely affects these interests.

**6. Specific Action Requested by Petitioner**

Petitioner requests the State Board to reverse, overturn, or otherwise invalidate the Regional Board's Order No. R2-2012-0021, dated March 14, 2012, issuing water quality certification and WDRs to Wal-Mart.

**7. List of Other Interested Persons<sup>3</sup>**

City of Suisun City  
701 Civic Center Blvd.  
Suisun City, CA 94585

Save Our Suisun  
PO Box 841  
Suisun City, CA 94585

Citizens Committee to Protect the Refuge  
453 Tennessee Lane  
Palo Alto, CA 94306

San Francisco Baykeeper  
785 Market Street, Suite 850  
San Francisco, CA 94103

**8. Statement Of Notice to Regional Board and Applicant.**

Petitioner affirms that a copy of this petition is being simultaneously sent via U.S. Mail to the Executive Officer of the Regional Board and to Wal-Mart Stores, Inc. c/o its counsel of record in the Regional Board proceeding.

**9. Copy of Request for Preparation of Record**

A copy of the request to the Regional Board's Executive Officer to prepare the staff record, including a tape recording or transcript of any pertinent Regional Board meeting, is attached to this Petition as **Attachment 4**.

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<sup>3</sup> Petitioner is aware that numerous individuals submitted form letters to the Regional Board in support of the Project. These individuals are not included on this list.

**10. Summary of Prior Participation by Petitioner**

Prior to and during the October 13, 2010 public hearing on the original Order No. R2-2010-0109, representatives of HCN submitted written and/or oral testimony to the Regional Board objecting to the TO and proposed issuance of water quality certification and WDRS based on the alleged deficiencies in identified mitigation for the permanent loss of wetlands and riparian habitat. HCN, joined by SF Baykeeper and the Citizens Committee to Complete the Refuge subsequently file a Petition for Reconsideration of Order No. R2-2010-0109 before the State Board on November 10, 2010. (SWRCB/OCC File No. A-2137).

Representatives of HCN submitted written comments on TO No. R2-2012-0021 during the public comment period thereon, and appeared in opposition to Order No. R2-2012-0021 during the public hearing held March 14, 2012.

**Conclusion**

For the reasons stated in this Petition, Petitioner respectfully requests the State Board to set aside the Regional Board's Order No. R2-2012-0021 issuing water quality certification and WDRs to Wal-Mart for the Walters Road Development Project.

Dated: April 12, 2012

Respectfully submitted,

M. R. WOLFE & ASSOCIATES, P.C.



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Mark R. Wolfe  
Attorney for Petitioner CALIFORNIA HEALTHY  
COMMUNITIES NETWORK

**Attachment 1**

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN FRANCISCO BAY REGION**

**ORDER NO. R2-2012-0021**

**AMENDMENT OF ORDER NO. R2-2010-0109 WASTE DISCHARGE REQUIREMENTS  
AND WATER QUALITY CERTIFICATION FOR:**

**WAL-MART STORES, INC.  
WALTERS ROAD DEVELOPMENT PROJECT  
SUISUN CITY, SOLANO COUNTY**

**The California Regional Water Quality Control Board, San Francisco Bay Region,  
(hereinafter referred to as the Water Board) finds that:**

1. On October 10, 2010, the Water Board adopted Order No. R2-2010-0109, prescribing Waste Discharge Requirements and Water Quality Certification for Wal-Mart Stores, Inc., Walters Road Development Project, Suisun City. Order No. R2-2010-0109 conditionally authorized Wal-Mart Stores, Inc., (Discharger) to impact waters of the United States to construct a retail shopping center on a 20.8-acre site at the intersection of Highway 12 and Walters Road in Suisun City (Project).
2. There are approximately 2.996 acres of jurisdictional waters of the United States, including wetlands and a stream channel, on the Project site. The site's waters of the United States are comprised of:
  - a) 2.596 acres of seasonal wetlands, and
  - b) 0.4 acres (1,100 linear feet) of stream channel with riparian/wetland vegetation.
3. The Project will result in the permanent fill of approximately 2.630 acres of the site's 2.996 acres of jurisdictional waters of the United States. This impact is comprised of the following:
  - a) 2.35 acres of wetlands, and
  - b) 0.28 acres (786 linear feet) of stream channel.
4. The Discharger has applied to the U.S. Army Corps of Engineers (Corps) for an individual permit under Section 404 of the Clean Water Act (33 U.S.C. § 1344). The Corps issued a Public Notice for the Project on January 31, 2008, but has not issued a permit for the Project at this time.
5. The United States Fish & Wildlife Service (USFWS) issued a Final Biological Opinion for the Project on August 10, 2011. However, on September 29, 2011, the Corps re-initiated consultation with the USFWS under the authority of Section 7 of Endangered Species Act regarding endangered species issues on a newly proposed offsite mitigation parcel. The USFWS has not yet issued an amended Biological Opinion for the Project at this time.
6. Provision C.5. of Order No. R2-2010-0109 requires the Discharger to submit, not later than 90 days prior to the start of construction (defined as site grading), a Final Mitigation and Monitoring Plan (Final MMP) that addresses the proposed offsite mitigation elements for stream impacts. Provision C.5.a. of the Order requires the Final MMP to include a proposal to create and/or restore a minimum of 1,572 linear feet of stream channel and replace the impacted stream's ecosystem functions and values.

**Order No. R2-2012-0021**

7. On November 11, 2011, the Discharger submitted the Final MMP, *Mitigation and Monitoring Plan, Wal-Mart Mitigation Project, Old Homestead Wetland and Riparian Enhancement, Lynch Canyon, Solano County, November 2011, Nomad Ecology, Prepared in cooperation with Solano Land Trust*, to meet the Project's mitigation requirements for stream channel impacts. The Final MMP proposes restoration and enhancement of 1,637 linear feet of stream channel and 1.43 acres of jurisdictional wetland and waters on a 9.25-acre site within the 1,039-acre Lynch Canyon Open Space property in Solano County, owned and managed by the Solano Land Trust. This mitigation will restore, enhance, and protect in perpetuity aquatic habitat and watershed lands that will increase habitat value for wildlife, especially for listed endangered and threaten species. This Order approves the Final MMP and requires its implementation.
8. Provision C.7. of Order No. R2-2010-0109 requires the Discharger to submit, not later than 30 days prior to the start of any Project construction, proof of purchasing 2.35 acres of wetland creation and/or restoration credits that met prescribed performance standards from the Elsie Gridley Mitigation Bank or an approved mitigation bank in Solano County. On November 9, 2011, the Discharger submitted a letter stating that it had secured 2.35 acres of seasonal wetland creation credits at the Elsie Gridley Mitigation Bank. The Discharger will provide these credits in accordance with the provisions of this amendment.
9. Provision C.13. requires the Discharger to submit a revised Stormwater Control Plan that accurately reflects the Project as permitted by Order No. R2-2010-0109. On August 30, 2011, the Discharger submitted a final Stormwater Control Plan for the Project. This Order approves the final Stormwater Control Plan and requires its implementation.
10. It has been determined through regional, State, and national studies that tracking of mitigation/restoration projects must be improved to better assess the performance of these projects, following monitoring periods that last several years. In addition, to effectively carry out the State's No Net Loss Policy for wetlands, the State needs to closely track both wetland losses and mitigation/restoration project success.
11. This Order amends Order No. R2-2010-0109 to address outstanding requirements, specifically mitigation for stream impacts through implementation of the Final MMP, the securing of credits at the Elsie Gridley Mitigation Bank, and the submittal of the final Stormwater Control Plan. It also includes the procedural requirement that the Discharger use the California Wetlands Form to provide Project information related to impacts and mitigation/restoration measures and updates annual fee requirements. Amendments that add text to Order No. R2-2010-0109 are displayed in underlined type and those that delete text are displayed in ~~strikeout~~ format.
12. As a responsible agency, the Water Board considered the environmental impact report prepared by the lead agency, City of Suisun, for the Project as a whole when it adopted Order No. R2-2010-0109. Approval of this Order amending Order No. R2-2010-0109 is exempt from the California Environmental Quality Act (CEQA). Specifically, approval of the Final MMP is exempt from CEQA under Cal. Code Regs., tit. 14, section 15333, which exempts small habitat restoration projects not exceeding five acres to assure the maintenance, restoration, enhancement, or protection of habitat, provided, among other things, there would be no significant impact on threatened, rare or endangered species. The Final MMP involves less than five acres of habitat restoration and will not have any significant impacts to threatened, rare or endangered species because of specific requirements set forth therein and reiterated in this Order. The Final MMP is also exempt from CEQA under Cal. Code of Regs., tit. 14, section 15302 with respect to the mitigation project's replacement spring box.

**Order No. R2-2012-0021**

Approval of this Order amending Order No. R2-2010-0109 related to reporting on the Elsie Gridley Mitigation Bank, approval of the required Stormwater Control Plan, wetland information reporting, and fee requirement corrections is exempt from CEQA under Cal.Code Regs., tit. 14, section 15061(b)(3) because these activities will not have any significant effects on the environment.

13. The Water Board notified the Discharger and interested agencies and persons of its intent to consider adoption of this Order and provided an opportunity to submit written comments.
14. In a public meeting, the Water Board heard and considered all comments pertaining to this Order.

IT IS HEREBY ORDERED that Wal-Mart Stores, Inc., in order to meet the provisions contained in Division 7 of the California Water Code and regulations adopted thereunder, shall comply with the following amendments of Order No. R2-2010-0109, pursuant to authority under CWC Sections 13263 and 13267:

**C. Provisions**

***Compensatory Mitigation***

5. The Discharger shall comply with and implement the Final MMP, *Mitigation and Monitoring Plan, Wal-Mart Mitigation Project, Old Homestead Wetland and Riparian Enhancement, Lynch Canyon, Solano County, November 2011, Nomad Ecology, Prepared in cooperation with Solano Land Trust.* Not later than 90 days prior to the start of construction (defined as site grading), the Discharger shall submit, acceptable to the Regional Water Board, a Final Mitigation and Monitoring Plan (Final MMP) that The Final MMP addresses the proposed offsite mitigation elements for the stream impacts and includes the following: ~~The Discharger shall comply with and implement the Final MMP. The Final MMP shall include the following:~~
  - a. Restoration and enhancement of a minimum of 1,637 linear feet of stream channel and 1.43 acres of jurisdictional wetlands and waters; ~~A proposal that will create and/or restore a minimum of 1,572 linear feet of stream channel and replace the impacted stream's ecosystem functions and values. The proposed channel shall have similar characteristics of the impacted stream with a defined channel and enough water flow for scour and sediment transport to occur. If preservation and restoration of an existing stream is proposed, a higher amount of linear feet will be required;~~
  - b. Mitigation construction to commence prior to the start of any Project construction (defined as site grading) and to be completed within the same year as the impacts occur at the Project site; ~~The proposed mitigation site must occur within the Regional Water Board's jurisdictional boundaries, as well as within Solano County;~~
  - c. Not later than 30 days prior to the start of any Project construction, the Discharger shall submit proof of financial assurance to ensure completion of the mitigation, monitoring, and maintenance work; ~~A schedule providing for mitigation construction to commence prior to the start of Project construction. The schedule shall provide for all mitigation to be completed before construction is complete;~~
  - d. Not later than 30 days prior to the start of any Project construction, a deed restriction, to provide in perpetuity for the protection of the mitigation area for the purposes of retaining the land in its natural and open-space condition, shall be recorded; ~~An irrigation and planting plans;~~
  - e. Ongoing maintenance and monitoring shall be performed for a minimum of 10 years or until performance standards and final success criteria are met, whichever is later;

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and Provisions for use of native plant seeds/plantings and the avoidance of non-native vegetation;

- f. To ensure minimization of impacts to any endangered species that might be present at the mitigation site, the following measures shall be implemented:
  1. Restoration activities will not begin on the mitigation site until June 15, and only then if site conditions are dry enough to begin work;
  2. Staff of the Water Board, the California Department of Fish and Game (DFG), and USFWS will be notified when construction is to begin;
  3. DFG and USFWS staff will approve a qualified biologist/monitor (Approved Biologist);
  4. The contractor, the Approved Biologist, and Solano Land Trust staff will hold a pre-construction meeting. Items to be discussed at the meeting include avoidance and conservation measures that are to be implemented at the mitigation site;
  5. Construction workers will receive a field training course from the Approved Biologist prior to start of construction in which they will learn about the special-status species, including California red-legged frogs (CRLF), that could potentially be present, including how to identify them and what to do if one is sighted. A small pamphlet with photographs of the species will be provided to the workers;
  6. Within 24 hours prior to start of construction the Approved Biologist will search the work area for CRLF and western pond turtles (northern pacific pond turtle sub-species). Trained workers and/or the Approved Biologist will check any open trenches prior to start of work at the mitigation site each day for CRLF and turtles. Should any be found, the Approved Biologist qualified to handle the animals will be called in to address the issue. Open trenches will also have a sloped ramp of soil or lumber (or similar) left in them at the end of each work day that will allow any animal falling into the trench to escape. Trenching will be completed in as short a time as possible to minimize the amount of time that trenches are open;
  7. CRLF sighting plan: If CRLF is sighted at any time, USFWS and DFG staff will be notified within 24 hours of the sighting. If CRLF is sighted during a pre-construction survey, no work will be initiated until the Approved Biologist can confirm that CRLF has safely left the area. Once work is started and CRLF is sighted and is in immediate danger, the Approved Biologist will capture the CRLF and safely move it to the nearest appropriate aquatic habitat. If CRLF is sighted during work but is not in immediate danger, work will stop in that area and will not start again until the Approved Biologist can confirm that CRLF has moved from the area;
  8. Before and during plant debris removal, the Approved Biologist will be present for inspection for CRLF and other wildlife, such as pond turtles. Debris will be removed from work areas without harming CRLF and other wildlife;
  9. The Approved Biologist will remain onsite until such time all removal of CRLF or pond turtles (if any), training of workers, and initial habitat disturbance has been completed. After this time, the Discharger will designate a person, trained by the Approved Biologist, to monitor onsite compliance of all minimization measures;
  10. Any wildlife encountered during the course of mitigation construction shall be allowed to leave the construction area unharmed;

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11. No pesticides will be used for weed management prior to construction, during construction, or post construction in accordance with injunction orders for CRLF as determined by the California Department of Pesticide Regulation and in accordance with the Final MMP;
12. California native trees and shrubs are not to be removed with the exception of invasive Himalayan blackberry in accordance with the Final MMP; and
13. The Discharger shall comply with additional terms and conditions in the amended USFWS Biological Opinion.
  1. ~~A monitoring program that consists of:~~
  2. ~~Establishment of performance criteria,~~
  3. ~~Selection of performance indicators,~~
  4. ~~Field sampling of performance indicators,~~
  5. ~~Analysis of the field data,~~
  6. ~~A remedial action plan,~~
  7. ~~Annual reports submittals, and~~
  8. ~~A minimum monitoring duration of 10 years adequate to evaluate site performance;~~
- g. ~~If the proposed mitigation parcel will be grazed by livestock, a detailed grazing plan, including stocking rates, fencing plans for waterbodies and upland water sources shall be submitted;~~
- h. ~~Financial assurances adequate to ensure the construction, maintenance, monitoring, and preservation of the proposed mitigation and other measures. Detailed cost estimates to cover these activities shall be submitted, as well; and~~
- i. ~~A conservation easement or similar mechanism to provide in perpetuity for the protection of the mitigation area for the purposes of retaining the land in its natural and open space condition.~~

The Executive Officer is delegated the authority and discretion to approve minor modifications to the Final MMP. The Discharger shall submit requests for approval of a minor modification not later than 45 days prior to the proposed date of implementation of the modification.

7. Not later than 30 days prior to the start of any Project construction, the Discharger shall submit proof of purchasing 2.35 acres of wetland creation and/or restoration credits that met prescribed performance standards from the Elsie Gridley Mitigation Bank ~~or an approved mitigation bank in Solano County.~~
13. ~~By November 12, 2010, the Discharger shall submit a revised Stormwater Control Plan, acceptable to the Executive Officer that accurately reflects the Project as permitted by this Order. The Discharger shall implement the Stormwater Control Plan. Wal-Mart Store #3708-01 Supercenter, Suisun City, California, Prepared by: Robert A. Karn & Associates, Inc., Submittal Date: November 10, 2010, Revision Date: August 26, 2011.~~ The Discharger shall install the proposed post-construction stormwater and hydromodification treatment measures during Project construction pursuant to ~~the revised this~~ Stormwater Control Plan as approved and other reports identified in Finding 14. The Discharger shall submit an as-built report within 60 days of the complete installation of the stormwater and hydromodification treatment measures. As part of the as-built report, the Discharger is required to submit a signed Stormwater Treatment Measures Maintenance Agreement between the Discharger and the City of Suisun to ensure monitoring, inspecting, and maintaining both the onsite and offsite



**Order No. R2-2012-0021**

treatment measures in perpetuity. The Executive Officer is delegated the authority and discretion to approve minor modifications to the Stormwater Control Plan. The Discharger shall submit requests for approval of a minor modification not later than 45 days prior to the proposed date of implementation of the modification.

14. This Order combines Waste Discharge Requirements and Clean Water Act Section 401 Water Quality Certification provisions. The annual fee shall reflect this, and consist of the following:

The fee amount for the Waste Discharge Requirements portion shall be in accordance with the current fee schedule, per California Code of Regulations, Division 3, Chapter 9, Article 1, section 2200(a)(1), based on the discharge's Threat to Water Quality and Complexity rating of the Discharge to Land or Surface Waters, plus applicable surcharge(s). The Threat and Complexity rating shall be rated as 1A2B, and may be modified upon Executive Officer approval. After the initial year, this portion of the fee shall be billed annually to the Discharger. The fee payment shall indicate the Order number, WDID number, and the applicable season.

**California Wetlands Portal**

33. In order to track mitigation/restoration projects' success, the Discharger shall complete and submit the Wetland Tracker Standard Form to provide Project information related to impacts and mitigation/restoration measures. The Discharger shall email the completed form to [Habitatdata@waterboards.ca.gov](mailto:Habitatdata@waterboards.ca.gov) within 14 days of the date of adoption of this Order. An electronic copy of the form and instructions can be downloaded at: <http://www.waterboards.ca.gov/sanfranciscobay/certs.shtml>. Project information concerning impacts and mitigation/restoration will be made available at the web link: <http://www.californiawetlands.net>.

I, Bruce H. Wolfe, Executive Officer, do hereby certify that the foregoing is a full, true and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Francisco Bay Region on March 14, 2012.

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Bruce H. Wolfe  
Executive Officer



## Elizabeth Morrison - long overdue follow-up on Elsie Gridley Mitgation Bank

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**From:** <Raffini.Eric@epamail.epa.gov>  
**To:** <Marc.A.Fugler@usace.army.mil>  
**Date:** 8/18/2010 12:00 PM  
**Subject:** long overdue follow-up on Elsie Gridley Mitgation Bank  
**CC:** <JGAN@dfg.ca.gov>, <Scianni.Melissa@epamail.epa.gov>, "Matsumoto, Bryan T SPN" <Bryan.T.Matsumoto@usace.army.mil>, "Valerie Layne" <valerie\_layne@fws.gov>, <emorrison@waterboards.ca.gov>, <James.T.Robb@usace.army.mil>, <Dwight\_Harvey@fws.gov>  
**Attachments:** Gridley\_compliance form2010.doc; Gridley\_photos.pptx; Elsie Gridley Mitgation Bank CTSAssessment-Gridley-GAN072310.pdf

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Hi Mark,

I think I promised to compile a list of issues from our compliance inspection to Elsie Gridley on 4/21/10 and IRT conference call on 5/19. I believe that I was going to send you this list and then you were going to inform the bank sponsor via a letter? Also, since our last meeting, we did receive the 2009 monitoring report (7 months late), but I have not had a chance for review it in detail. I think most of the issues are detailed in the attached report, but here are the major things that we noticed:

- (1) The bank sponsor changed the reference site from the on-site natural, existing pools to off-site pools at Muzzy Ranch. The IRT did not approve this change. Thus all performance remain the same, and constructed pools should be compared to on-site natural pools.
- (2) Constructed pools in both Phases are not meeting performance standards set forth in BEI. For example, Year 3 standards for hydrophytic plant cover, species diversity.
- (3) Grazing management had not been implemented
- (4) We were unable to differentiate between "vernal pools" and other "seasonal wetlands." Most of the pools looked very similar -- large, deep, and much more like seasonal marsh than vernal pools. The 2008 delineation for Phase I indicated: playa pools (16.52), vernal pools (9.02), incidental wetlands (1.23), incidental swales (1.54), wetland channel and adjacent wetlands (5.64). However, it was virtually impossible to notice the difference between playa pools and vernal pools. Most of the IRT felt that the entire site should be classified as "seasonal wetlands" - since it did not appear that the constructed vernal pools were performing correctly. See attached photos.
- (5) Riparian areas - Prior to our site visit, no detailed performance sampling was conducted for the riparian areas. Thus, it is difficult to assess compliance. Planting success appears to have been very variable across the site. The area also contains large stands of thistle and other invasive species.
- (6) Credit Ledger - There appears to once again be some serious problems with the credit ledger. Many mistakes were noticed (and subsequently corrected) in 2008. I've emailed Steve Foreman several times regarding some of these issues, but still have not heard anything back. Here's what I noticed;

According to the credit ledger, the IRT has approved the following credit releases of constructed wetlands to date:

Phase I - (27.8 acres): 4.17 acres ( 15% construction), 15.33 acres ( 55% - as-builts and hydro) = 20.07 released

Phase II - (31.6 acres): 4.74 acres (15% construction), 19.40 (55% as-builts and hydro) = 24.14 released

Riparian - (9.1 acres, phase I and II): 9.47 released ? - Why were all riparian credits for both phases already released without meeting any performance standards. Furthermore, the ledger stated 9.47 (not 9.1 acres from as-builts)...

Constructed Channel (1.2 acres phase I and .5 acres phase II): .18 (15%) + .62 (54%) = .80 acres phase I, and .08 (15%) + 1.3(?) phase II = 2.18 acres of 1.7 acres?? [this is questionable; also in the 2008 report, the sponsor stated they believe 90% of available credits should be released, but this is not consistent with the BEI]

So, I think those are the major issues. Did I miss anything? Attached are the photos, compliance report and also a recent letter from DFG regarding CTS credits. I assume since the Sac Dist is Chair of this IRT, that you all will take the lead in sorting some of this out? Has anyone on this email list reviewed the 2009 report or credit ledger yet?

Thanks

Eric

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Eric Raffini, Environmental Scientist  
tel: 415.972.3544 | fax: 415.947.3537

U.S. EPA, Region 9  
75 Hawthorne St., San Francisco, CA 94105  
[www.epa.gov/region9](http://www.epa.gov/region9)

Interagency Compensatory Mitigation Site Visit Form – Summary Findings for Mitigation Banks, Permittee-Responsible Mitigation, and In-Lieu Fee Mitigation approved to compensate for unavoidable impacts under Section 404 of the Clean Water Act		
1. Form Completed By: Name: Eric Raffini Agency: US EPA Email: raffini.eric@epa.gov		2. Date of site visit: 4/21/10
3. Reviewing Team: Eric Raffini (EPA), Melissa Scianni (EPA) Phillip Shannin (Corps-SF) Marc Fugler (Corps-Sac) Janice Gan (DFG) Dwight Harvey (FWS, unable to attend)		
PROJECT IDENTIFICATION		
4. Project name: Elise Gridley Mitigation Bank		
5. Corps Permit Number: 2000-00614 (Sac), 2003-283430 (SF)		6. Corps Project Manager: William Guthrie (Sac) – Lead District Phillip Shannin (SF)
7. County: Solano	8. Watershed (8-digit HUC): Lower Sacramento	9. Lat/Long: 38° 17' 46.47" N 121° 48' 27.28" W
10. Project type: Check one: <input checked="" type="checkbox"/> Mitigation Bank <input type="checkbox"/> Permittee-Responsible Mitigation <input type="checkbox"/> In-Lieu Fee Mitigation.		
11. Applicant name and/or organization: Wetland Resources LLC, contact Ed Flynn		
12. Contact for technical information: LSA Associates, Contact Steve Foreman		
13. Date of Construction: Phase I grading completed in November 2005 Phase II and Riparian plantings completed in Fall 2006		14. Age of Mitigation (Years): 4.5 years (Phase I) 3.5 years (Phase II)
15. Monitoring Reports on File: Phase I As-builts (Jan 2007), Phase II As-builts (Oct 2007), First Annual Report (Jan 2008), 2008 Annual Report (dated 8/19/09), LSA stated during field visit that 2009 annual report will be submitted shortly (it is 6 months late).		
16. Mitigation Goals: From the Habitat Restoration and Monitoring Plan in the BEI - the total size is 1837 acres of which 61 acres are encumbered by easements and excluded by the bank credits. This makes the remaining acreage 1776 after the easements are subtracted. 1,100 acres are being set aside as vernal pool and associated grassland species habitat preservation. 300 acres will remain in agricultural production for Swainson's hawk foraging habitat. The remaining 376 acres have had vegetation and topography altered and 100 acres of vernal pools are proposed to be built across them in multiple phases.		
17. Corrective Actions/Remediation (Include dates and description): Nothing major to date.		
18. Brief project description The Elsie Gridley Mitigation Bank (Gridley Bank) was established for the purpose of providing offsite mitigation opportunities for vernal pool grassland and riparian habitats as well as a number of associated rare, threatened and endangered species. The Bank Enabling Instrument (BEI) allows for the sale of wetland "credits" as mitigation for wetland impacts and preservation credits for an approved third-party within the designated bank service area. The BEI was formally approved by the Mitigation Bank Review Team (MBRT) members on March 8, 2006.  Phase 1 (total area 80 acres) [According to as-built reports] 27.8 acres constructed vernal pools/swales (min. w/observed hydrology) 1.2 acres channel (1900 linear feet) 2.0 acres riparian  Phase 2 (total area 75 acres) 31.6 acres constructed vernal pools/swales (min. w/observed hydrology) 0.5 acres channel (2200 linear feet) 7.1 acres riparian These two phases have a 38% vernal pool density.  Initial as-builts were calculated at 27.8 acres for Phase I, based on the Year 3 delineation 33.95 acres of wetlands are present in the Phase I restoration area (4.89 acres more than originally estimated) – much of this increase in acreage is due to swales. The wetlands mapped are differentiated into (according to 2008 delineation):  playa pools (16.52).		

vernal pools (9.02),  
incidental wetlands (1.23),  
incidental swales (1.54),  
wetland channel and adjacent wetlands (5.64)

## PERFORMANCE CRITERIA

## 19. Performance Criteria

Performance Standard	Compliance
<b>1. Hydrophytic Plant Species Cover - Wetlands</b> Year 1 – constructed pools and swales should show initial establishment of typical vernal pool indicator species. Year 3 – relative cover of vernal pool indicator species shall not be significantly different than reference pools (at $\alpha=0.05$ or 95% confidence)	Year 1 criterion appears to be met for both Phases. Year 3 – Phase I constructed pools were 11% hydrophytic cover, on-site reference pools were 57% , and 15% at Muzzy.
<b>2. Invasive Exotic Plant Species – Wetlands</b> Year 3 – By end of the third-year monitoring period, absolute cover by invasive exotic plants in the created wetlands shall be no greater than 5%.	Year 3 – perennial pepperweed was observed in the pools at less than 5%
<b>3. Species Diversity – Wetlands</b> Year 3 – The number of vernal pool indicator species (e.g. richness) shall not be significantly different (at $\alpha=0.05$ or 95% confidence) than reference sites.	Year 3 – Phase I Constructed pools is 4.4, reference pools is 10.0 and Muzzy was 4.0.
<b>4. Constructed Acreage – Wetlands</b> Year 3 – The extent of constructed wetland will be determined at the end of the third growing season for each active restoration phase. At a minimum, the extent of delineated restored wetland shall be equal to the acreage identified in the hydrology performance criterion 1. Acreage less than in criterion 1 will be subtracted and additional acreage will be added to available credits	Initial as-builts were calculated at 27.8 acres for Phase I, based on the Year 3 delineation 33.95 acres of wetlands are present in the Phase I restoration area (4.89 acres more than originally estimated) – much of this increase in acreage is due to swales. The wetlands mapped are differentiated into playa pools (16.52), vernal pools (9.02), incidental wetlands (1.23), incidental swales (1.54), wetland channel and adjacent wetlands (5.64)
<b>5. Plant Species Cover – Riparian</b> Year 3 – relative cover shall have at least 51% relative cover of riparian species.	Not assessed in the 2008 report
<b>6. Invasive Exotic Plant Species – Riparian</b> Year 3 – Absolute cover by invasive exotic plants in the created meander channels shall be no greater than 5%. This criterion extends through the entire restoration monitoring period as well as in perpetuity monitoring and management.	Not assessed in the 2008 report
<b>7. Species Diversity – Riparian</b> Year 3 – The created meander channels and Barker Slough restoration shall support at least 5 native riparian species characteristic of riparian zones in the Solano County region.	Not assessed in 2008 report
<b>8. Soil Saturation and Ponding – Wetlands</b> Year 1 – Restored/constructed wetlands must be inundated or have saturated soils for greater than 18 consecutive days (5% of the growing season) Year 3 – Restored/constructed wetlands* must be inundated or saturated during the rainy season for a duration sufficient to support vernal pool plant communities and the depth and duration shall not be significantly different than the reference pools (at $\alpha=0.05$ or 95% confidence). *some pools will have greater depth (1-2ft) to support CTS	(Jan 2007) Year 1 – this criterion was met (Oct 2007) Year 1 – this criterion was met Year 3 - not assessed in any report

## 20. Compliance with Performance Standards

These findings are based on the 2008 monitoring report as well as our 2010 field visit. The data from 2008 represents Year 3 for Phase I and Year 2 from Phase II. Data from 2009 field season was not submitted at the time to the IRT at the time of our field visit.

Phase I Wetlands – Have not met Year 3 performance standards for hydrophytic plant species cover or species diversity. Both metrics are significantly different than the on-site reference wetlands. Invasive plant species within wetlands appears low, and delineation confirms the constructed wetland acreage.

Phase II Wetlands – No detailed performance sampling was conducted for Phase 2 restoration pools in 2008. Thus, it is difficult to assess compliance. The pools look very similar to Phase I pools.

Riparian - No detailed performance sampling was conducted for the riparian areas in 2008. Thus, it is difficult to assess compliance. Planting success has been variable across the site. The area also contains large stands of thistle and other invasive species (per site visit).

**ONSITE OBSERVATIONS****21. Describe conditions of mitigation project, include plants/animals observed on site, habitat type, surrounding land use, buffer and disturbance:**

It was apparent from our site visit that the site had not been actively grazed during the fall/winter 2009-2010. A new fence along the perimeter of the site was recently installed and cattle had been placed on the site less than a week prior to our visit. The sponsor states that they have entered into a long-term grazing agreement with a cattle provider. This should help control thatch in the constructed wetlands.

The site looked trampled and beat down. This may have been due to the recent introduction of cattle or perhaps due to ORV use.

The constructed wetlands looked to be holding large amounts of water and were ponding very deep (most were at least 2' deep). They looked more like seasonal marsh and playa pools than vernal pools (see attached pictures). We were unable to differentiate between vernal pools and playa pools.

Invertebrate sampling was positive, with many of the pools containing Vernal pool tadpole shrimp, California fairy shrimp, and mid-valley fairy shrimp. They have become established and appear to be reproducing and expanding.

Waterfowl on the site was abundant.

Riparian areas do not appear to be performing as expected. Although some of the plants have survived, overall cover is low (plants are spread out).

**RECOMMENDATIONS****22 Recommendations (e.g planting, regarding, fill removal, trash removal, sign installation, fencing, grazing, instream alterations, education, invasive species control, further monitoring or studies):**

Additional monitoring is necessary to determine compliance with standards. The 2009 monitoring report is 6 months behind schedule. Wetland vegetation establishment appears to be progressing slower than anticipated – perhaps due to the longer inundation and ponding as compared to on-site vernal pools.

The 2008 monitoring report compared sampling data with pools from Muzzy Ranch (located off-site). It is unclear whether the sponsor sought permission from the IRT to use Muzzy Ranch rather than the on-site reference pools. Additional information needed is from the sponsor as to why on-site reference pools are not appropriate. Thus, compliance performance will be based on on-site pools.

The new fence should improve grazing management on-site.

Purple star thistle should be controlled in the riparian areas.

It is unclear as to what types of wetlands were planned as compared to what is on the ground. Wetlands on-site have characteristics of playa pools, seasonal marshes and vernal pools. Differentiating among these three categories is difficult. Thus, it may be necessary for IRT to revisit and adjust credit allocations that are reflected in the ledger.

**23. Does the mitigation comply with performance standards and conditions set forward in the Bank Enabling Instrument?**

Partial compliance, but recommendation is to not approve any additional credit releases until more data is received to support performance standards contained in the BEI.

**ADDITIONAL INFORMATION****24. Comments and/or additional information on the project**

According to the credit ledger, the IRT has approved the following credit releases of constructed wetlands to date:

Phase I – (27.8 acres): 4.17 acres ( 15% construction), 15.33 acres ( 55% - as-builts and hydro) = 20.07 released

Phase II – (31.6 acres): 4.74 acres (15% construction), 19.40 (55% as-builts and hydro) = 24.14 released

Riparian – (9.1 acres, phase I and II): 9.47 released -? [this is questionable]

Constructed Channel (1.2 acres phase I and .5 acres phase II): .18 (15%) +.62 (54%) = .80 acres phase I, and .08 (15%)+ 1.3(?) phase II = 2.18 acres of 1.7 acres?? [this is questionable, also in the 2008 report, the sponsor stated they believe 90% of available credits should be released, but this is not consistent with the BEI]

**Endowment Account at Department of Fish and Game**

Report dated 4/19/10 – Endowment is fully funded - \$620,548 with an additional \$15,513 contingency security. Total interest earned on the account is \$57,070. The contingency security is used to assure performance obligations during the interim management period. This security is to be released to the bank sponsor. Also, the BEI states that a performance security in the amount of 15% of construction costs (\$18,750) to ensure implementation of remedial obligations to meet success criteria. This supposedly resides with the Corps, as there is no record of it in the DFG account. Need to check on this.



**Attachment 3**



Linda S. Adams  
Secretary for  
Environmental Protection

# California Regional Water Quality Control Board

## San Francisco Bay Region

1515 Clay Street, Suite 1400, Oakland, California 94612  
(510) 622-2300 • Fax (510) 622-2460  
<http://www.waterboards.ca.gov/sanfranciscobay>



Arnold Schwarzenegger  
Governor

Date: December 18, 2007  
File No. 2128.02 (JGU)  
Site No. 02-48-C0394  
Inc W Walters Rd Wal-Mart

Wal-Mart Stores, Inc.  
C/o Todd Anderson  
Robert A. Karn & Associates  
707 Beck Avenue  
Fairfield, CA 94333

**SUBJECT: Incomplete Application for Water Quality Certification under Section 401 of the Clean Water Act for the Walters Road Development Project, City of Suisun, Solano County**

Dear Mr. Karn:

Water Board staff has reviewed your application for a Clean Water Act Section 401 water quality certification that the proposed Walters Road Development Project will not violate State water quality standards. The application is incomplete, and furthermore, it appears that the project as currently proposed, would be in violation of State water quality standards. This letter is notification that the Regional Board does not grant water quality certification at this time.

### Project Description

The applicant, Wal-Mart Stores, Inc., through its agent, Jeff Olberding, submitted the application to develop the Walters Road Development Project (Project). The Project is located northwest of the intersection of State Route 12 (SR-12) and Walters Road in the City of Suisun in Solano County (38°14.329'N, 121°58.781'W). The proposed development of 18.34 acres for commercial retail center on a 20.8-acre parcel would include a Wal-Mart Supercenter, a sit-down restaurant, a gas station with a convenience store and automated car wash, an onsite roadway, approximately 1,021 parking stalls, and utility improvements. The Project site is bisected by an unnamed creek that runs north to south and drains into Hill Slough. Seasonal wetlands are scattered throughout the site. A jurisdictional delineation was field-verified in February 2007 and confirmed that the site contains 2,996 acres of jurisdictional wetlands and other waters including 1,025 linear feet of the creek. The Project, as proposed, would result in the discharge of approximately 3,500 cubic yards of fill into 2,996 acres of jurisdictional waters, (100% of the wetlands present on the Project site).

*California Environmental Protection Agency*



Mr. Karn

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Walters Rd Wal-Mart Suisun - Incomplete Application  
Site No. 02-48-C0394

This letter serves as notification that the application is incomplete and inadequate. Please submit the following information and respond to the following comments in order to amend and complete the application:

**1) Alternatives Analysis:** The Water Board's Water Quality Control Plan (Basin Plan) prohibits all discharges of fill material into wetlands, unless a discharge, as proposed, constitutes the least environmentally damaging practicable alternative (LEDPA) that will achieve the basic project purpose. For non-water dependent projects, including this Project, it is assumed that there are less damaging alternatives, and the applicant must appropriately rebut this assumption. The following represents the sequence in which proposals should be approached:

- a) **Avoid:** Avoid impacts to waters;
- b) **Minimize:** Modify project to minimize impacts to waters;
- c) **Mitigate:** Once impacts have been fully minimized, compensate for the remaining unavoidable impacts to waters.

In situations where it has been clearly demonstrated that avoidance of impacts to waters is not possible, and that impacts have been fully minimized, then adequate mitigation for the loss of water body acreage (or, when applicable, linear feet) and functions is required. In-kind, on-site mitigation for all, or part of, the Project's impacts to wetlands and other waters should be provided if possible. If it can be adequately demonstrated that off-site and/or out-of-kind mitigation are the only viable option for a project, a further increase in mitigation area would be appropriate. A further increase in mitigation area is also appropriate if the mitigation waters and wetland and riparian habitats are not successfully established prior to the impacts. The applicant is also required to utilize a Low Impact Development (LID) planning approach. The State has endorsed the LID approach whereby development projects:

- Maintain natural waters, drainage paths, landscape features and other water-holding areas to promote stormwater retention and groundwater recharge;
- Preserve the amenity and other values of natural waters;
- Minimize generation of urban pollutants;
- Design communities and landscaping to minimize stormwater generation, runoff, and concentration, and
- Promote water conservation.

The Project seems not to incorporate the above into the proposed design, and therefore is not in line with the LID approach.

The proposed Project should take into consideration variations on the locations and design of the proposed buildings and infrastructure, footprint minimization through design(s) of multi-story structure(s), a roof-top restaurant and garden, and incorporation of the existing jurisdictional features into the Project design, especially those that avoid impacting jurisdictional waters. We require the applicant submit an Alternatives Analysis report that

*California Environmental Protection Agency*

considers other alternatives to meet the overall project purpose of a mixed-use commercial development and, at the same time, protecting the existing jurisdictional waters.

### **Mitigation**

Per the California Wetlands Conservation Policy, and the Regional Board's Basin Plan, mitigation is required to compensate for the project's temporary and permanent impacts to waters of the State. We also recognize that, given the significant loss of wetlands in the San Francisco Bay Area, avoidance and minimization of impacts are important for all remaining wetlands. A compensatory mitigation plan will only be considered after impacts to all waters have been fully characterized and minimized, as discussed in Item No. 1 above.

The Biological Assessment for Critical Habitat for the Vernal Pool Tadpole Shrimp and the Vernal Pool Fairy Shrimp for the Walters Road Development Project, Solano County, California, by Olberding Environmental, Inc., dated November 2007, states that credits would be purchased at an agency approved mitigation bank to compensate for the loss of jurisdictional wetlands and riparian habitat along the on-site channel. Although the Elsie Gridley Mitigation Bank and the North Suisun Mitigation Bank have been approved and operating in Solano County, it is our understanding that these banks cannot accommodate a mitigation habitat demand for riparian credits.

If, after a more thorough evaluation of site development alternatives has been performed, it is demonstrated that some portion of the wetland mitigation must be provided by purchasing credits at the mitigation bank, such credits will likely need to be acquired at a ratio at least 2:1 (mitigation acreage to impacted wetlands acreage). Since the final design cannot be determined before the alternatives analysis has been conducted, we are not able to provide further comments on the proposed mitigation at this time.

**2. CEQA:** The Walters Road West Project Draft Environmental Impact Report, dated September 20, 2007, was submitted with the 401 application, however, a copy of the final CEQA document (Final Notice of Determination) prepared for the activity (23 CCR §3856(f)) is needed with the application.

**3. Stormwater Management Plan (SWMP):** The SWMP should describe the Project's measures to minimize its urban runoff impacts for the life of the project, be comprised of source controls, design measures to minimize impervious surface, and treatment controls that remove pollutants from stormwater runoff. The SWMP must demonstrate that sufficient treatment controls will be installed to meet the criterion of treating approximately 85% of average annual storm water runoff from all of the site's impervious surfaces. The SWMP should include appropriate narrative, drainage plans, project-specific design details for the proposed controls, calculations, provisions for operation and maintenance (O&M), what entity will be responsible for O&M, description of how O&M will be funded, and all other corresponding information, as appropriate.

The proposed Project is located within approximately 72-acre drainage area that has been almost entirely developed. The Project would significantly increase surface runoff and impact water quality downstream from the Project site and possibly exceed the capacity of the existing outfall in tidally influenced Hill Slough. Since the Project would result in a significant cumulative effect within the

Mr. Karn  
Walters Rd Wal-Mart Suisun - Incomplete Application  
Site No. 02-48-C0394

- 4 -

watershed, changes in the watershed hydrology should be properly assessed while preparing the SWMP.

Staff will continue to work with you to complete your application for water quality certification. If you have any questions, please contact Jolanta Uchman of my staff at (510) 622-2432 or via email to [juchman@waterboards.ca.gov](mailto:juchman@waterboards.ca.gov). Future correspondence regarding this project should reference the Site Number indicated at the top of this letter.

Sincerely,  
*Original Signed by*  
*Wil Bruhns for*

Bruce H. Wolfe  
Executive Officer

Cc: Bill Orme, SWRCB-DWQ

Elizabeth Dyer  
U.S. Army Corps of Engineers, Regulatory Division  
1455 Market Street, 16<sup>th</sup> Floor  
San Francisco, CA 94103

Sandy Brunson  
California Department of Fish and Game  
P.O. Box 47  
Yountville, CA 94599

Michelle Tovar  
US Fish and Wildlife Service  
2800 Cottage Way, Room W-2605  
Sacramento, CA 95825

Eric Raffini  
U.S. EPA Region IX, WTR-8  
75 Hawthorne Street  
San Francisco, CA 94105-3901

Jeff Olberding  
Olberding Environmental, Inc.  
1390 Willow Pass Road  
Concord, CA 94520

John McNellis  
McNellis Partners

***California Environmental Protection Agency***

Mr. Karn  
Walters Rd Wal-Mart Suisun - Incomplete Application  
Site No. 02-48-C0394

- 5 -

914 Waverly Street  
Palo Alto, CA 94301

Heather McCollister  
Community Development Director  
701 Civic Center Blvd.  
Suisun City, CA 94585

***California Environmental Protection Agency***

 Recycled Paper

**Attachment 4**

April 12, 2012

**By FedEx**

Bruce H. Wolfe, Executive Officer  
California Regional Water Quality Control Board  
San Francisco Bay Region  
1515 Clay Street, Suite 1400  
Oakland, CA 94612  
Fax: (510) 622-2460

Re: Request to Prepare Staff Record – Order no. R2-2012-0021 , Waste  
Discharge Requirements and Water Quality Certification for Walters Road  
Development Project, Suisun City, Solano County, March 14, 2012

Dear Mr. Wolfe:

California Healthy Communities Network and Citizens Committee to Complete  
the Refuge have petitioned the State Water Resources Control Board for reconsideration  
of the above-referenced Regional Board order. A copy of that petition is enclosed. On  
their behalf, this is to request preparation of the staff record pursuant to Section 3867(d)  
(9) of Title 23 of the California Code of Regulations.

Thank you for your attention to this request and please call with any questions.

Yours sincerely,

M. R. WOLFE & ASSOCIATES, P.C.



Mark R. Wolfe

MRW:am