

January 11, 2012  
Elizabeth Morrison  
Regional Water Quality Control Board  
San Francisco Bay Region  
1515 Clay St., Suite 1400  
Oakland, CA 94612

Elizabeth:

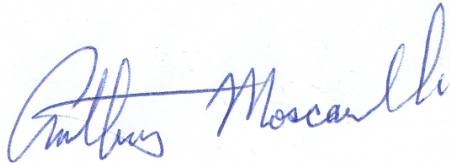
We question why the RWQCB has chosen to set precedence by picking an out-kind area to approve the mitigation for this project when there is the Solano Union Creek mitigation bank with in-kind credits that will be available well within a reasonable time frame? The Lynch Canyon area picked is not marshland and on a hillside.

We want to know how the Section 404 of the Clean Water Act guidelines is being upheld by this mitigation plan?

We find that you still have incomplete questions by the Army Corps of Engineers such as their Biological Opinion for that site and that if the berry bush removal can really be completed on the Lynch Canyon site as questioned by your own documents. How can you ask for a hearing without these matters resolved?

Thank you,

Sincerely,



Anthony Moscarelli  
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## CITIZENS COMMITTEE TO COMPLETE THE REFUGE

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January 16, 2012

**Re: Tentative Order (TO) Regarding Waste Discharge Requirements (WDR) and Water Quality Certification (WQC) for Wal-Mart Stores, Inc., Walters Road Development Project, Suisun City, Solano County**

Dear Ms. Morrison,

The Citizens Committee to Complete the Refuge (CCCR) would like to thank you for the opportunity to express our concerns regarding the latest Tentative Order for this project. We have participated in the public review process dating back to the initial U.S. Army Corps of Engineers (Corps) Public Notice (PN) in March 2008. During that time we submitted comments to the Corps and subsequently to the San Francisco Bay Regional Water Quality Control Board (RWQCB).

We appreciate that RWQCB staff have worked to reduce the adverse impacts of the project on waters of the State however we must question the decision to prematurely publish a TO when the RWQCB does not have all the information necessary to inform the decision-making process.

It appears substantive concerns expressed in our comment letter to the RWQCB October 1, 2010 remain unresolved. In that letter we expressed the following concerns we believe are still pertinent:

- use of the Elsie Gridley Mitigation Bank as mitigation for losses of wetlands and inadequacy of mitigation ratio proposed,
- inability of the applicant to produce an adequate mitigation and monitoring proposal for the impacts to the riparian habitat that will be filled by the proposed project

Wetlands impacts:

In our previous letter we made the following comments regarding the use of the Elsie Gridley Mitigation Bank:

To mitigate the loss of wetland habitat, the applicant proposes to mitigate at a 1:1 ratio at the Elsie Gridley Mitigation Bank. This mitigation ratio is inadequate.

What is the status of the Elsie Gridley Mitigation Bank? Will the applicant be purchasing credits for successfully created wetlands or will the applicant be purchasing preserved wetlands habitat? This is critical information because purchasing of preserved wetlands is counter to the

California Wetlands Conservation Policy (Executive Order W-59-93) of ensuring there is “no overall loss” of wetlands, or achieving “long-term net gain in the quantity, quality, and permanence of wetland acreage and values.” If the wetland credits to be purchased are for wetlands that have been preserved the mitigation ratio must be higher than a 1:1 ratio.

If the mitigation credits to be purchased are for created wetlands it is important to consider whether the created wetlands have met their final mitigation success criteria. If not, then consideration of the temporal losses of beneficial uses must be taken into consideration and the mitigation ratios must be higher than 1:1. This stance is consistent with current RWQCB policy, as evidenced by the following statements made to the applicant in a February 7, 2008 letter sent by the San Francisco Bay Regional Water Quality Control Board (RWQCB) in response to the Final Environmental Impact Report (FEIR) for the Walters Road West Project. That letter discussed the need for minimization of impacts and stated:

If after, such analysis 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 of at least 2:1 (mitigation acreage to impacted wetlands acreage) to offset the temporal effects (impacts) if the mitigation habitat has not already been successfully created at the mitigation bank or other mitigation site.

Has the Elsie Gridley Mitigation Bank been operating successfully – that is, have credits been issued and tracked appropriately? What level of oversight will RWQCB staff have over the wetland mitigation credits purchased at the Elsie Gridley Mitigation Bank (e.g. would RWQCB staff verify the wetland creation site is functioning successfully?)?

These questions are pertinent as an April 21, 2010 Interagency Compensatory Mitigation Site Visit Form completed by staff of the Environmental Protection Agency (EPA) indicates monitoring reports have not been submitted in a timely fashion and Phase I wetlands have “not met Year 3 performance standards for hydrophytic plant species cover or species diversity.” Also that “Both metrics are significantly different than the on-site reference wetlands.” In response to question #23 on the inspection form, “Does the mitigation comply with performance standards and conditions set forward in the Bank Enabling Instrument?” EPA staff answered, “*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 [Bank Enabling Instrument].*”[emphasis added]

Based upon information available to date we question whether it is appropriate to consider purchase of mitigation credits at the Elsie Gridley Mitigation Bank as adequate compensatory mitigation for impacts proposed to wetlands and waters of the State. Furthermore, it is evident a mitigation ratio of 1:1 would be completely inadequate to replace the temporal loss of functions, values, and beneficial uses. Lastly, there is the matter of non-compliance and the uncertainty of whether final success criteria will be achieved Elsie Gridley Mitigation Bank. For all these reasons we question whether the purchase of credits is appropriate. If the RWQCB decides this bank is a suitable site for purchase of wetland mitigation credits, it is clear a significantly higher mitigation ratio is warranted.

Is the Elsie Gridley Mitigation Bank now meeting its interim/final success criteria? What of EPA’s recommendation that additional credit releases not be approved until more data is received to support

performance standards contained in the Banking Enabling Instrument? It would be irresponsible for the RWQCB to accept mitigation credits purchased at this bank if it is not meeting its performance standards. If these issues have been resolved and the RWQCB accepts purchase of mitigation credits at this bank, a wetlands mitigation ratio greater than 1:1 should be required for all of the reasons cited above.

Riparian impacts:

In our previous comments to the RWQCB, CCCR requested that RWQCB defer issuance of a TO until the applicant had provided a location corresponding mitigation and monitoring plan to mitigate impacts to on-site riparian habitat. Our reasons were as follows:

Contrary to what is indicated in the TO, we have learned in response to our recent inquiries, that a mitigation site still has not been identified for the loss of stream channel. If the Board approves the WDRs and WQC on October 13, 2010, it will be setting a terrible precedent of approving fill in waters of the State prior to review of compensatory mitigation for those impacts. Furthermore, such an action would deprive the public of our rights to review the mitigation proposal and provide comments.

We question how the Board can determine that impacts to waters of the State have been adequately compensated in the absence of, at minimum, a conceptual mitigation and monitoring plan complete with the mitigation location, information regarding the site's hydrologic regime, future land use of lands adjacent to the mitigation site, etc.

We have to wonder why a suitable mitigation site has not been identified. The February 7, 2008 letter referenced above provides the following reminder:

*As we previously mentioned, the Elsie Gridley Mitigation Bank and North Suisun Mitigation Bank are operating in Solano County but these banks cannot accommodate a mitigation habitat demand for riparian credits. [emphasis added]*

The applicant has repeatedly proposed buying credits at the Elsie Gridley Mitigation Bank for impacts to the riparian habitat despite repeated replies from RWQCB staff that this is not a suitable site. The RWQCB files for this project indicate the applicant and Suisun City were informed Elsie Gridley would not be a viable location for riparian mitigation on six different occasions dating back as far as November 2007.

We are relieved to read in the latest TO that the applicant has finally noted the concerns of RWQCB staff, agencies, and the public and is no longer proposing to purchase mitigation credits at the Elsie Gridley Mitigation Bank for filling riparian habitat – it took three years to reach this point. While the issue of the Elsie Gridley Mitigation Bank's inappropriateness for filling on-site riparian habitat has been addressed, it is evident our previous concern remains – namely, a TO must not be approved until the issue of mitigation for riparian impacts is finally resolved.

According to the TO the "Corps re-initiated consultation with the USFWS under the authority of Section 7 of the Endangered Species Act regarding endangered species issues on a newly proposed offsite mitigation parcel." At issue according to the August 10, 2011 "Final Biological Opinion for the Proposed Wal-Mart-Walters Road Project, Solano County, California (Corps #303520N)," is fact that the site identified as of July 12, 2011 is suitable habitat for the Federally-listed as threatened California red-legged frog (CRLF) and that the Corps needs to consult with the Service regarding the activities proposed

in Lynch Canyon. At the time the TO was released the USFWS had not issued its amended Biological Opinion.

This Tentative Order has been issued prematurely. It should not have been issued until after the amended Biological Opinion has been released and made available to decision-makers and the public for our review. How can RWQCB staff determine the impacts of the proposed mitigation will be acceptable to the USFWS in advance of receipt of the amended Biological Opinion? (TO Provision – Compensatory Mitigation #5 - Final MMP, *Mitigation and Monitoring Plan, Wal-Mart Mitigation Project, Old Homestead Wetland and Riparian Enhancement, Lynch Canyon, Solano County, November 2011*) How can the RWQCB determine this TO is in compliance with the Endangered Species Act? How can the RWQCB determine its compliance with the California Environmental Quality Act (CEQA) until the USFWS concludes its endangered species review? Impacts to California red-legged frog and/or its habitat were not analyzed within the CEQA document for this project. How can the public be assured significant adverse impacts will not occur to waters of the State or to endangered species if this information is not available for our review?

Other issues:

Have all the concerns raised in letters from the RWQCB dated December 17, 2010, October 6, 2011, and November 10, 2011 been addressed and corrected? If not, decision-makers and the public should be made aware what issues remain unresolved.

Conclusion:

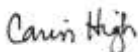
We have been extremely disappointed with decisions previously made regarding this project proposal. The process of locating a suitable mitigation site for impacts to riparian habitat has been unnecessarily difficult and lengthy for reasons mentioned above. The RWQCB previously kicked the decision down the road by granting conditional approval for the project. Instead of requiring a solid mitigation proposal prior to any approval, the RWQCB conditionally approved the project - the applicant was to address the matter of mitigation for riparian habitat before construction commences.

It has been over a year since the previous TO was issued. While some progress has been made, it appears there may be significant issues regarding the most recent mitigation location and proposal. It may be these issues can be resolved – whether they can be must be determined by the USFWS. It would be highly inappropriate for the RWQCB to approve a TO that ties compensatory mitigation for impacts to riparian habitat, to a site that has unresolved endangered species issues.

We urge the RWQCB defer any decision regarding this project until the amended Biological Opinion has been issued. Once the amended Biological Opinion has been received, the TO for this project should be revised to incorporate any changes required by the USFWS and then released for public review and comment.

Thank you for the opportunity to provide comments.

Sincerely,



Carin High  
CCCR Vice-Chair