

California Regional Water Quality Control Board
San Francisco Bay Region

RESPONSE TO WRITTEN COMMENTS

on December 9, 2011 Tentative Order to Amend 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 Water Board received written comments on the tentative order distributed for public comment in December 2011 from the following parties:

1. Anthony Moscarelli
2. Citizens Committee to Complete the Refuge (CCCR)

This response to the above parties' comments summarizes each comment in *italics* (paraphrased for brevity) followed by the Water Board staff response. For the full context and content of each comment, refer to the comment letters. We also made staff-initiated changes to the tentative order, detailed below.

Anthony Moscarelli

Moscarelli – Comment 1. *We question why the RWQCB has chosen to set precedence by picking an outkind area to approve the mitigation for this project. The Lynch Canyon area picked is not marshland and on a hillside.*

Response to Moscarelli Comment 1. The “Mitigation and Monitoring Plan for the Old Homestead Wetland and Riparian Enhancement, Lynch Canyon” (MMP) will be mitigating the Project’s stream channel impacts with stream restoration. This proposed restoration is not ‘out of kind’ mitigation. The restoration site is located in the Suisun Hills and Valleys Ecological Subregion, and the headwaters of the South Fork of Lynch Creek originates in the restoration area. Lynch Creek flows downstream and eventually drains to Cordelia Slough, the same slough that the unnamed channel on the Project site drains to. Restoration of a headwaters stream in Lynch Canyon will contribute to restoration of the Subregion’s stream network at the watershed level. We have not revised the tentative order in response to this comment.

Moscarelli – Comment 2. *We question why the RWQCB has chosen to set precedence by picking an outkind area when there is the Solano Union Creek mitigation bank with in-kind credits that will be available well within a reasonable time frame?*

Response to Moscarelli Comment 2. Solano Union Creek is not an approved wetlands/waters mitigation bank. Solano Union Creek does not currently have a mitigation bank prospectus under review with the U. S. Army Corps of Engineers (Corps) Interagency Review Team; therefore it will not have credits to sell in the near future. We have not revised the tentative order in response to this comment.

Moscarelli – Comment 3. *We want to know how the Section 404 of the Clean Water Act guidelines is being upheld by this mitigation plan?*

Response to Moscarelli Comment 3. The Corps is the agency charged with administering Section 404 of the Clean Water Act and plans to issue an individual permit for the Project. If the author is referring to the Section 404(b)(1) Guidelines, the MMP as proposed meets the Guidelines, since the applicant has avoided and minimized project impacts to the extent possible, and the MMP proposes appropriate mitigation for the Project's stream impacts. We have not revised the tentative order in response to this comment.

Moscarelli – Comment 4. *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?*

Response to Moscarelli Comment 4. U.S. Fish and Wildlife Service (USFWS) staff is currently amending the existing Biological Opinion (BO) for the Project. Although the USFWS has not issued an amended BO, its staff has stated that it does not anticipate that any additional changes to the MMP, which contains a schedule for blackberry removal, will be necessary. We have not revised the tentative order in response to this comment.

Citizens Committee to Complete the Refuge (CCCR)

CCCR – Comment 1. *What is the status of Elsie Gridley Mitigation Bank? Has the Elsie Gridley Mitigation Bank been operating successfully – that is, have credits been issued and tracked appropriately?*

Response to CCCR Comment 1. The Elsie Gridley Mitigation Bank, located within the Corps' Sacramento District jurisdictional boundaries, is currently operating as a mitigation bank and has wetland creation credits for sale. The Corps' Interagency Review Team (IRT) is made up of various resource agencies that have regulatory oversight on mitigation banks and are signatory on the Bank Enabling Instrument (BEI). The Corps' Sacramento District releases the credits to sell, as well as keeps track of credit sales as detailed in the BEI. The BEI contains a credit release schedule, which releases credits when certain performance criteria are met by the bank. The bank is currently on its third credit release.

IRT members visited the Elsie Gridley bank site in spring 2010 and identified some compliance issues with the bank. The bank's owner has submitted an amendment to its BEI to address how it plans to deal with compliance issues. Future credit release phases will not occur until the IRT determines the bank is in compliance with its BEI.

The tentative order requires Wal-Mart to submit proof of purchasing 2.35 acres of wetland creation and/or restoration credits that met prescribed performance standards from the Elsie Gridley bank no later than 30 days prior to the start of any Project construction. We have not revised the tentative order in response to this comment.

CCCR – Comment 2. *What level of oversight will RWCQB 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?)*

Response to CCCR Comment 2. Water Board staff coordinates with other resource and regulatory agencies in oversight of the bank as part of its participation in monthly IRT meetings and receipt of the bank's annual monitoring reports. We participate in discussions regarding the bank's performance and compliance issues. The BEI has performance criteria that the bank owner must meet prior to a release of credits for future sales. There is also an endowment to ensure funds for long-term maintenance of the wetlands. The IRT has a site visit to the Elsie Gridley bank planned for later this year and will follow up with the bank owner if any compliance issues are discovered. We have not revised the tentative order in response to this comment.

CCCR – Comment 3. *Will the applicant be purchasing credits for successfully created wetlands or will the applicant be purchasing preserved wetlands habitat?*

Response to CCCR Comment 3. As required by Provision C.7 of Order No. R2-2010-0109, Wal-Mart will be purchasing wetland creation credits from the Elsie Gridley bank.

CCCR – Comment 4. *To mitigate the loss of wetland habitat, the applicant proposes to mitigate at a 1:1 ratio at the Elsie Gridley Mitigation Bank. It is evident a mitigation ratio of 1:1 would be completely inadequate to replace the temporal loss of functions, values, and beneficial uses. This mitigation ratio is inadequate.*

Response to CCCR Comment 4. The 1:1 ratio is appropriate since Wal-Mart will be purchasing credits at an established mitigation bank. The credits it purchases are wetlands that have already been created and have met specified performance criteria, thus reducing or eliminating any temporal loss of wetland functions. We have not revised the tentative order in response to this comment.

CCCR – Comment 5. *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? How can the RWQCB determine this TO is in compliance with the Endangered Species Act*

Response to CCCR Comment 5. We have worked with the USFWS regarding the MMP and its potential endangered species impact. The USFWS has commented on the MMP, and the applicant has made revisions to the MMP based on these comments. We believe that the implementation of the terms and conditions of the MMP as required by the Order will mitigate impacts to endangered species to less than significant. We have revised the tentative order (see revised Provision C.5.f) to include specific terms and conditions of the MMP to ensure impacts to any endangered species on the restoration site are minimized.

CCCR – Comment 6. *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?*

Response to CCCR Comment 6. The Lynch Canyon restoration site was not analyzed in the Project's EIR. We have considered the potential impacts of the MMP and have made the determination that no significant impacts would occur as a result of implementing the MMP.

Implementation of the MMP will restore, enhance, and protect in perpetuity the Lynch Canyon watershed and increase habitat value for wildlife. We have determined that the MMP is exempt from CEQA review pursuant to CEQA Guidelines Sections 15333 and 15302(c). We revised the tentative order to add a new Finding 12 to specify this determination.

CCCR – Comment 7. *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?*

Response to CCCR Comment 7. Issues raised in the cited letters have been addressed by the applicant and Project plans have been modified and/or updated as appropriate. We have not revised the tentative order in response to this comment.

Staff Initiated Changes

In addition to making minor grammatical and formatting edits, we made the following staff initiated changes to the tentative order:

We revised Provision C.5 by adding the following:

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.

We revised Provision C.13 by adding the following:

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.

We revised Provision C.14 regarding annual permit fees by changing the current Threat and Complexity rating from 1A to 2B to reflect current project status, as well as adding language allowing the Executive Officer to approve any future rating changes as appropriate.

Lastly, we revised Provision C.33 to include when and how the Discharger shall submit the California Wetlands Form for tracking of restoration success.