CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

RESOLUTION No. 99-073

AUTHORIZING THE EXECUTIVE OFFICER TO ENTER INTO AN AGREEMENT FOR MUTUAL RELEASE AND COVENANT NOT TO SUE FOR PROPERTY PURCHASED BY WAL-MART REAL ESTATE BUSINESS TRUST AT THE FORMER SHEARWATER AND USX FACILITY, OYSTER POINT BOULEVARD, IN THE CITY OF SOUTH SAN FRANCISCO, SAN MATEO COUNTY

WHEREAS, the California Regional Water Quality Control Board, San Francisco Bay Region (hereinafter Board), finds that:

1. **Jurisdiction:** The Shearwater and former USX Facility is located on Oyster Point Boulevard, South San Francisco, on a 167 acre parcel (the Property). The Property is more particularly described in Attachment 3. Pollution exists in the soil at the Property. The Board is the lead agency for site cleanup at the Property.

2. **Site Cleanup Requirements and Status:** The Board adopted site cleanup requirements (SCR) July 17, 1996, for the Property in Order No. 96-102. The SCR names Bay West Cove LLC ("BWC") and USX Corporation ("USX") as dischargers. Remediation activities required by the SCR (the "Conceptual Remedial Action Plan") have commenced and include soil remediation via spot removal, fixation, re-emplacement and cover of the entire upland portion of the Property with two to three feet of clean fill. The Executive Officer has approved BWC's compliance with this phase of remediation. The dischargers' remaining obligations under the Order for the on-shore/upland parcels (e.g., Wal-Mart Parcels) include installation of groundwater monitoring wells, reporting, and curtailment activities.

   Remediation activities required on other portions of the Property include mitigation of the potential impact of contaminated sediments found within and immediately outside of the launch basin, near a former storm drain outfall and along a former channel. The final remediation plan is dependent of further sediment characterization results and approvals by the Board and other appropriate regulatory agencies.

   The current owner of the Property, BWC, a California limited liability company, is financially viable, has completed and paid for all investigation, monitoring and remediation requirements to date and has agreed to fully fund the Conceptual Remedial Action Plan, including, without limitation, the placement of a soil cap at the Property. USX Corporation is required to comply with the requirements contained in Order 96-102 in the event the Executive Officer finds that BWC has failed to comply with said requirements.

3. **Wal-Mart's Request:** Wal-Mart Stores, Inc., through its affiliated Wal-Mart Real Estate Business Trust ("Wal-Mart") desires to purchase an approximately 13.09 acre portion of the Property, which is more particularly described in Attachment 3 to the Resolution (the "Wal-Mart Parcels"), which Wal-Mart would develop for retail sales uses. Wal-Mart seeks a commitment from the Board that Wal-Mart and its officers, directors, shareholders, employees, representatives, agents, affiliates, tenants, lenders, and respective successors in

interest will not be named as dischargers (or responsible parties) in a Board enforcement order with regard to Known Conditions solely by virtue of having a property interest in the Parcels. Specifically, Wal-Mart requests that the Board issue a mutual release, covenant not to sue, and contribution protection to Wal-Mart, subsequent purchasers, tenants, lenders and related parties for the Parcels relative to Known Conditions. Without this assurance from the Board, Wal-Mart states that, while it may be able to complete the purchase of the property, it may be unable to obtain future financing, and the property may be unable to attract the level of investment required to achieve its full potential for redevelopment, and thus the full public and private benefits of the purchase and redevelopment of the property may not be realized.

4. **Remediation Status on Wal-Mart Parcels:** BWC has funded and completed almost all the portions of the Conceptual Remedial Action Plan (as defined in the Order) which are applicable to the Wal-Mart Parcels, including soil remediation, fixation, re-emplacement and covering the Parcels with two to three feet of clean fill. The Executive Officer has approved BWC's compliance with this phase of remediation. BWC's remaining obligations under the Order for the Parcels include installation of groundwater monitoring wells, reporting, and curtailment activities.

5. **Future Remediation on the Property and Wal-Mart Parcels:** While no further remediation is expected on the Wal-Mart Parcels, BWC is still working to complete the remainder of the Conceptual Remedial Action Plan for the upland and off-shore areas of the Property. Migration of pollutants from other portions of the Property of existing pollutants to the Wal-Mart parcels is not expected.

6. **Responsible Party Status:** Wal-Mart is not a responsible party or affiliated with a responsible party for the known pollution, and the sole interest of Wal-Mart in the Wal-Mart Parcels is to facilitate their development for retail sales uses.

7. **Future Activities on Parcels:** No activities at the Wal-Mart Parcels, with the exercise of due care, will aggravate, contribute to, or create a condition of, pollution as a result of the known pollution; and any activities conducted by Wal-Mart or tenants, successors, or assigns at the Wal-Mart Parcels will be in compliance with the requirements contained in the deed restriction required pursuant to the Order.

8. **No Health Risks:** The development of retail sales uses on the Wal-Mart Parcels will not result in health risks to those persons likely to be present at the site.

9. **Board Authority:** On July 9, 1996, the State Water Resources Control Board Executive Director issued a memorandum regarding brownfields for regional water board consideration in evaluating requests for release of liability. The memorandum addresses agreements between regional water boards and owners or prospective purchasers of polluted property, including covenants not to sue. Pursuant to the Board's statutory authority, the Board can enter into agreements whereby the Board covenants not to name prospective purchasers, tenants, lenders, and related parties in enforcement actions for remediation of polluted properties if such agreements are sufficiently in the public interest to warrant expending public resources necessary to reach such an agreement.

10. **Enforcement Status:** The Wal-Mart Parcels are not the subject of an active enforcement action or agreement with another agency to address the remediation at the site.

11. **Benefits of Redevelopment:** The site has been inactive and unproductive for many years, at least in part because of the threat of environmental liability to future property owners. Redevelopment of the Property would have economic benefits to the local community and to the public at large. The proposed redevelopment, according to Wal-Mart, could employ about 200-300 persons with payroll taxes and income taxes accruing to the State and locality. Anticipated annual real estate taxes are estimated at $185,000. Additional expected benefits to the City of South San Francisco include substantial retail sales taxes.

12. **Potential Concerns and Resolution:** Wal-Mart's request raises potential concerns:

    - Remediation at the Property could be impeded if Bay West Cove LLC or its successors and/or assigns is unable to gain access to a portion of the Property necessary to comply with the Board's SCR. Resolution of this concern is provided by conditions of the Mutual Release, reasonable planning for and access to the monitoring and/or remediation facilities, and deed restrictions and institutional constraints on the Property to be imposed as required by Board Order 96-102.

    - By approving an agreement for a mutual release and covenant not to sue, the Board will be unable to require the Released Parties including Wal-Mart (or their respective successors and assigns) to perform remediation tasks in the event that Bay West Cove LLC is unable or unwilling to comply with the Site Cleanup Requirements (Order No. 96-102 and its subsequent amendments). In that event, and if there were no other parties that could be named as dischargers, the State of California would have to fund any further remediation and monitoring activities. Since there is still some residual pollution on the site, the State is assuming a small but non-zero risk by approving the agreement for mutual release and covenant not to sue. However, remediation in compliance with the requirements of Board Order 96-102 has been completed on the Wal-Mart portion of the Property with the exception of compliance monitoring, reporting, and curtailment activities which Bay West Cove LLC has committed to complete as required by the Order. Also, in the event that Bay West Cove LLC fails to meet the requirements, USX Corporation is required to meet them pursuant to Order 96-102. Additionally, Bay West Cove LLC continues to remediate the remaining portion of the Property which will also be developed, most likely through a future request for a Mutual Release from the Board.

13. **CEQA:** The purchase of the Parcels and the agreements between Bay West Cove LLC and Wal-Mart are not activities that require Board approval and, therefore, do not constitute a "project" as defined by Public Resources Code Section 21065 and 14 CCR 15378(a). Thus, the activities are exempt from CEQA.

14. **Public Notice:** The Board provided notice of its intention to consider this matter at the September 15, 1999, Board meeting and provided an opportunity for interested persons to comment on the draft resolution and its attachments.

15. **Public Hearing:** The Board, at a public meeting, heard and considered all comments pertaining to this discharge.

NOW, THEREFORE BE IT RESOLVED, that the Board authorizes the Executive Officer to negotiate minor amendments to the draft Mutual Release (Attachment 1), sign, and execute the Mutual Release and Covenant Not to Sue (Attachment 1 as amended) with Wal-Mart.

I, Loretta K. Barsamian, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of a Resolution adopted by the California Regional Water Quality Control Board, San Francisco Bay Region, on September 15, 1999.

Loretta K. Barsamian
Loretta K. Barsamian
Executive Officer

Attachment 1: Mutual Release and Covenant Not to Sue
Attachment 2: Instrument of Release
Attachment 3: Legal Description and Map of Property

California Regional Water Quality Control Board
San Francisco Bay Region

Attachment 1 to Resolution No. 99-073
Mutual Release and Covenant Not To Sue
for the Shearwater and Former USX Facility

Oyster Point Boulevard, in the City of South San Francisco, County of San Mateo, California

I. INTRODUCTION

THIS MUTUAL RELEASE AND COVENANT NOT TO SUE (the "Mutual Release") is provided in response to a request by Wal-Mart Stores, Inc., and pursuant to San Francisco Bay Regional Water Quality Control Board ("Regional Board") Resolution No. 99-073 ("Resolution") authorizing its Executive Officer to negotiate and sign the Mutual Release concerning the Shearwater and former USX facility located at Oyster Point Boulevard, in the City of South San Francisco, County of San Mateo, California [which is more particularly described in Attachment 3 to the Resolution (the "Property")]. This Mutual Release took into consideration the State Water Resources Control Board ("State Board") Executive Director's memorandum dated July 9, 1996, regarding prospective purchaser agreements.

The Regional Board understands that Wal-Mart Stores, Inc., through its affiliated Wal-Mart Real Estate Business Trust (collectively "Wal-Mart" herein) desires to purchase two parcels of the property, referred to as Parcels 5 and 6, totaling approximately 13.09 acres, which are more particularly described in Attachment 3 to the Resolution (the "Wal-Mart Parcels"), which Wal-Mart will develop for retail sales uses. Wal-Mart desires a commitment, to the maximum extent permitted by law, that it, subsequent purchasers, tenants, lenders, and any occupants of the Wal-Mart Parcels, as well as all of their respective directors, officers, shareholders, employees, partners, affiliates, members, agents, successors, and assigns (individually a "Released Party" and collectively the "Released Parties") and their respective successors in interest will not be subject to liability for, or the subject of any actions, claims, orders, demands, enforcement actions or other civil or administrative proceedings, including without limitation, any investigation, monitoring or remediation requirements, related to or arising from the Known Conditions as of the date this Mutual Release is fully executed ("Effective Date").

II. DEFINITIONS

For purposes of this Mutual Release, "Known Conditions" means all conditions of pollution at, under, or originating from the Wal-Mart Parcels or any portion thereof, that was known to the Regional Board prior to the Effective Date. The term "known to the Regional Board" means all information regarding the pollution at, under, or originating from the Wal-Mart Parcels, or any portion thereof, that was disclosed to the Regional Board or is reasonably discernible from the reports listed in Board Order 96-102, the Resolution, or the investigations, workplans, reports, or any other information submitted to the Regional Board

prior to the Effective Date. With respect to any claim, cause of action, investigation, or enforcement action asserted or required by the Regional Board, the Released Parties shall bear the burden of proving that any condition of pollution at, under, or originating from the Wal-Mart Parcels is a Known Condition.

III. FINDINGS OF FACT

This Mutual Release is based on the findings made by the Regional Board in Resolution No. 99-073, and on the following findings by Regional Board staff:

1. The Wal-Mart Parcels are within the jurisdiction of the Regional Board due to the Known Conditions and are subject to the provisions of Regional Board Order No. 96-102 (the "Order"). The Regional Board enters into this Mutual Release pursuant to California Water Code Sections 13300, et seq. The Regional Board has authority to release and covenant not to sue or assert claims for environmental investigation or remediation or other related claims against current owners and prospective purchasers of environmentally impacted properties, where, as here, the agreement is sufficiently in the public interest.

2. The current owner of the Wal-Mart Parcels, Bay West Cove LLC ("BWC"), a California limited liability corporation, is named pursuant to the Order as a discharger. USX Corporation is also named as a discharger in connection with its former ownership and operation of a steel manufacturing facility which caused the discharge. BWC has funded and completed the portions of the Conceptual Remedial Action Plan (as defined in the Order) which are applicable to the Wal-Mart Parcels, including soil remediation, fixation, re-emplacement and covering the Parcels with two to three feet of clean fill. The Executive Officer has approved BWC's compliance with this phase of remediation. The dischargers' remaining obligations under the Order for the Wal-Mart_Parcels include installation of groundwater monitoring wells, reporting, and curtailment activities.

3. Remediation activities required on other portions of the Property include mitigation of the potential impact of contaminated sediments found within and immediately outside of the launch basin, near a former storm drain outfall and along a former channel. The final remediation plan is dependent of further sediment characterization results and approvals by the Board and other appropriate regulatory agencies.

4. No active discharge is currently occurring on the Wal-Mart Parcels.

5. Wal-Mart is not a responsible party or affiliated with a responsible party for the Known Conditions, and the sole interest of Wal-Mart in the Property is to purchase a portion of the Property, the Wal-Mart Parcels, to facilitate its development for retail sales uses.

6. Wal-Mart plans to develop the Wal-Mart Parcels to a productive use which will benefit the public and the community. Benefits include infilling and the use of existing infrastructure, and according to Wal-Mart, will generate employment of about 200-300 persons with payroll taxes and income taxes accruing to the State and locality, and annual real estate taxes estimated at $185,000. Additional expected benefits to the City of South San Francisco include and substantial retail sales taxes.

7. By entering into this Agreement, Wal-Mart certifies that to the best of its knowledge and belief, it has fully and accurately disclosed to the Regional Board any and all information known to Wal-Mart and all information in the possession or control of its officers, directors employees, contractors and agents which relates in any way to any existing contamination or any past or potential future release of hazardous substances, pollutants or contaminants at or from the Wal-Mart Parcels.

8. The dischargers will pay for all costs associated with the Regional Board's development and oversight of this Agreement.

9. This Mutual Release is consistent with the goals and purposes of the Porter-Cologne Act and the federal Clean Water Act;

10. No activities at the Wal-Mart Parcels, with the exercise of due care, will aggravate, contribute to, or create a condition of, pollution as a result of the Known Conditions; and any activities conducted by Wal-Mart or its tenants, successors, or assigns at the Wal-Mart Parcels will be in compliance with the requirements contained in the deed restriction required pursuant to the Order.

IV. AGREEMENT

1. In accordance with the Resolution, and the findings of the Regional Board staff, the Regional Board expressly finds that the Released Parties shall not be liable or otherwise responsible for such Known Conditions and hereby covenants and agrees not to initiate, bring, or support any claim, order, demand, enforcement action or other civil or administrative proceeding against the Released Parties arising out of or related to such Known Conditions under any local, state or federal statute or the common law, including but not limited to, in their entirety, the United States Code, the various California Codes, or other applicable laws, regulations, ordinances, or civil, judicial or administrative authorities, having application to the handling, release, presence, migration, cleanup, containment or maintenance of the Known Conditions at, on, under or originating from the Property, or any portion thereof. This Mutual Release shall inure to the benefit of, and pass with each and every portion of the Wal-Mart Parcels and the benefits and burdens provided under this Agreement shall run with the land, to the benefit and burden of any respective successors and assignees of the Released Parties, unless such successors and assignees caused or contributed to the Known Conditions.

2. Section 113(f)(2) of the Comprehensive Environmental Response, Compensation, Liability and Recovery Act of 1980, 42 U.S.C. Section 9613(f)(2) ("CERCLA") provides that: "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." Accordingly, the Regional Board affirms that this Mutual Release and Covenant Not To Sue resolves the Released Parties' liability to the Regional Board with regard to any claims related to the matters included in the Order and the Resolution, including all claims regarding the handling, storage, presence, migration, cleanup, or disposal of the Known Conditions at, under, or originating from the Wal-Mart parcels

3. This Release shall remain effective notwithstanding the revocation or modification of Board Order No. 96-102 or Resolution No. 99-073 and shall be without prejudice to the ability of the Regional Board to take action against any party other than the Released Parties, relating to the investigation, cleanup, or cost of investigation or cleanup of the Known Conditions. Except with respect to contribution rights against the Released Parties, nothing contained in this Mutual Release is intended to waive, limit, preclude, diminish or hinder any right of BWC now or in the future available in law, equity, or by agreement.

4. Notwithstanding any other provisions of this Mutual Release, the Regional Board reserves the right to assert any claims, enforcement actions or other civil or administrative proceedings against the respective Released Parties relating to the acts or omissions of the Released Parties arising after the Effective Date and which are based on the failure of the respective Released Parties, to the extent they have control over the Wal-Mart Parcels, to (i) exercise due care at the Wal-Mart Parcels with respect to the Known Conditions, (ii) comply with the requirements and conditions of the Mutual Release, (iii) comply with any deed restrictions and/or institutional constraints currently imposed or that may be subsequently imposed pursuant to Regional Board Order 96-102 or its amendments, and, (iv) cooperate in providing reasonable access to the Wal-Mart Parcels for remediation and monitoring purposes and construction, maintenance, and repair of any necessary remediation and/or monitoring system required by the Regional Board pursuant to Regional Board Order 96-102 or its amendments. If the Regional Board determines that a Released party has failed to comply with any of these four enumerated requirements, and the Regional Board elects to proceed against that Released Party, then this Mutual Release shall be suspended as to that Released Party, and the Regional Board and the Released Party shall then have any rights or defenses they would have had if this Mutual Release and Covenant Not to Sue had not existed. If, following such proceeding, the Regional Board determines such action to be warranted, it may declare this Mutual Release to be null and void.

5. This reservation by the Regional Board shall be separately and distinctly applied with respect to each of the Released Parties, the intent being that failure by a particular Released Party to comply with any applicable requirement shall not render the Regional

Board's covenant inapplicable to any other Released Party. Nothing contained in this Mutual Release shall be deemed a waiver of, or a release by, any Released party of any defense, cross-claim, counter claim, offset or other rights available to such Released Party in response to any claim, order, demand, enforcement action or other civil or administrative proceeding by the Regional Board, as specifically reserved hereunder.

6. In partial consideration for this Mutual Release, the Released parties, on behalf of themselves and their respective successors in interest, hereby release and covenant not to sue the Regional Board, its authorized officers, employees or representatives, with respect to any and all liability or claims associated with or arising out of the Known Conditions.

7. The Mutual Release shall not prohibit the Regional Board from asserting any claim, enforcement action, or other civil or administrative proceeding related to any condition of pollution at, under, or originating from the Wal-Mart Parcels prior to the Effective Date that are not Known Conditions.

8. Each Released Party not represented as a signatory below shall, as a precondition to receiving the benefits conferred by this Mutual Release, execute a written instrument in the form attached hereto as Attachment 2. Execution of this Mutual Release or of Attachment 2 by or on behalf of any corporation, partnership, or other entity, shall be sufficient to confer the benefits of the Mutual Release upon all directors, officers, employees, partners, affiliates, members, agents, successors, and assigns of such entity.

9. Wal-Mart shall record this Mutual Release in the County of San Mateo within thirty (30) days of Wal-Mart's acquisition of the Wal-Mart Parcels. A copy of the recording shall be provided to the Board within ten (10) days of the recording.

10. This Mutual Release may be executed in one or more counterparts, each such counterpart being deemed an original but all counterparts constituting a single instrument.

11. Each of the undersigned parties hereby certifies, and warrants that he or she is authorized to bind his or her agency or entity to the continuing obligations described herein, and that the foregoing is a full, true and correct copy of Attachment 1 to Resolution No.99-073, Mutual Release and Covenant Not To Sue adopted by the California Regional Water Quality Control Board, San Francisco Bay Region, on September 15, 1999.

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

By: _____
Loretta K. Barsamian, Executive Officer

Date: _____

WAL-MART STORES, INC.

By: _____

Title: _____

Date: _____

STATE OF _____)
) S.S.
COUNTY OF _____)

On _____, 19___ before me, _____, a notary public in and for such County and State, personally appeared _____ and _____, personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument, the person(s) or entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal.

_____
Notary Public

STATE OF _____)
) S.S.
COUNTY OF _____)

On _____, 19___ before me, _____, a notary public in and for such County and State, personally appeared _____ and _____, personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument, the person(s) or entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal.

_____
Notary Public

California Regional Water Quality Control Board
San Francisco Bay Region

Attachment 2 to Resolution No. 99-073

Instrument of Release

By signing below, _____ [name of owner, purchaser, lender, lessee, or occupant)] (hereinafter "Released Party") verifies and warrants as follows:

Released Party has read the Mutual Release and Covenant Not to Sue ("Mutual Release") document and the related Regional Water Quality Control Board (Regional Board) Resolution Number 99-073, for the "Wal-Mart Parcels", formerly the Shearwater and USX Facility, Oyster Point Boulevard, in the City of South San Francisco, County of San Mateo, California, recorded as Parcels 5 and 6 of Bay West Cove Final Subdivision Map entitled "Parcel Map 97-027" as Platted and Recorded at Series 98008274, Volume 70 of Parcel Maps, Pages 33 through 40, of the Official Records of San Mateo County, California.

Released Party understands and agrees that the Mutual Release contains a release by the Regional Board and a covenant not to bring or support any action or order against subsequent purchasers, tenants, lenders, and occupants of all or a portion of the Property (as defined in the Mutual Release), including their directors, officers, employees, partners, affiliates, members, agents, successors, and assigns, related to the Known Conditions (as defined in the Mutual Release), including contamination at, under, or originating from the Wal-Mart Parcels (as defined in the Mutual Release).

Released Party understands and agrees that it may enjoy the benefits of the Mutual Release only if it releases and covenants not to sue the Regional Board as set forth in the Mutual Release, and that by executing this Release, Released Party releases and covenants not to sue the Regional Board in accordance with the terms of the Mutual Release.

Released Party understands and agrees that its right to rely on the benefits of the Mutual Release is subject to and conditioned on its own, but only its own, compliance with its obligations under the terms of the Mutual Release.

This Instrument of Release shall be effective upon execution by the Released Party. Within three days of execution, Released Party agrees to mail a copy of the executed Release to: Executive Officer, Regional Water Quality Control Board, San Francisco Bay Region (address as of September 1999, 1515 Clay Street, Suite 1400, Oakland, CA 94612).

_____ _____

Authorized Signature (Released Party) Date

Name/Title: _____

Company Name/Address: _____

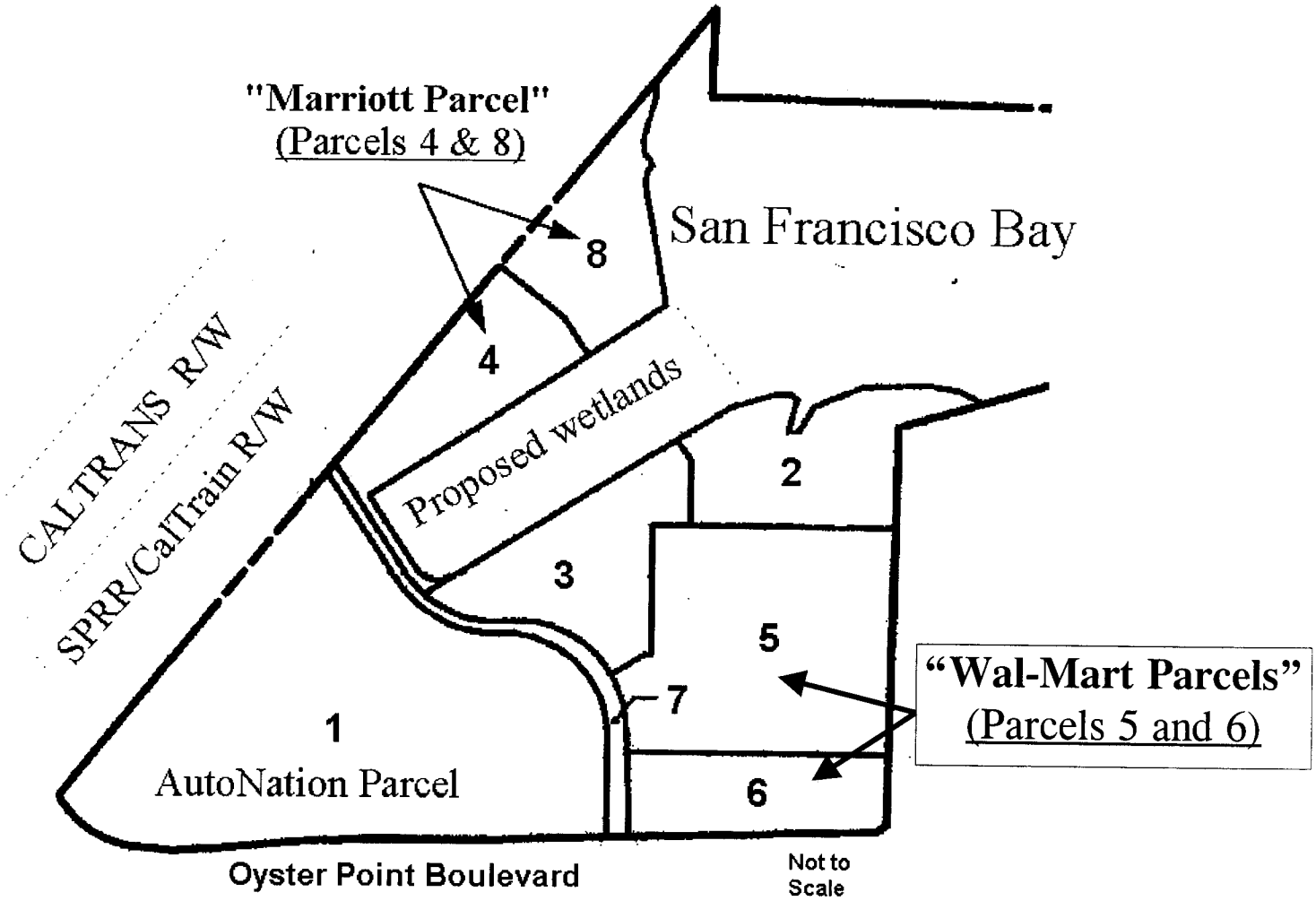
_____

_____

California Regional Water Quality Control Board
San Francisco Bay Region

Attachment 3 to Resolution No. 99-073

Legal Description and Site Map of Property and "Wal-Mart Parcels" in the City of South San Francisco

Parcels 5 and 6 of Bay West Cove Final Subdivision Map Entitled "Parcel Map No. 97-027"

as Platted and Recorded at Series 98008274,
Volume 70 of Parcels Maps, Pages 33 through 40,
of the Official Records of San Mateo County