CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

ORDER NO. R2-2006-0006

WASTE DISCHARGE REQUIREMENTS FOR:

COUNTY OF SANTA CLARA
ELMWOOD COMMERCIAL DEVELOPMENT PROJECT - WETLAND FILL
MILPITAS, SANTA CLARA COUNTY

The California Regional Water Quality Control Board, San Francisco Bay Region, hereinafter Board, finds that:

1. The County of Santa Clara (hereinafter Discharger) is developing a commercial area known as the Elmwood Commercial Development on a 22-acre parcel in the City of Milpitas located adjacent to the intersection of Interstate Highway 880 and Great Mall Parkway (hereinafter the Project).

2. The Project will result in the direct placement of approximately 6,500 cubic yards of earthen fill material into 0.46 acres of isolated wetlands.

3. To mitigate for its permanent fill of 0.46 acres of isolated wetlands, the Discharger will create 0.52 acres of seasonal wetland as proposed in its "*Waste Discharge Requirements Application for the Elmwood Commercial Development*", May 2005 and amended on August 13, 2005 (WDR Application). The 0.52 acres of seasonal wetland habitat will be at the southeast corner of the site and will be created by excavating an existing upland habitat so that normal rainfall will create a seasonal wetland adjacent to a drainage tributary to Penetencia Creek. Attachment A is a site diagram indicating wetland fill and mitigation areas for the Project.

4. On February 24, 2004, the U. S. Army Corps of Engineers (Corps) determined that the isolated wetlands affected by the Project are not jurisdictional wetlands under the Clean Water Act.

5. The Board desires to regulate the proposed discharge of fill materials into waters of the State by issuance of Waste Discharge Requirements (WDRs) pursuant to Section 13263 of the California Water Code (CWC). The Board considers WDRs necessary to adequately address impacts and mitigation to beneficial uses of waters of the State from this Project, and to meet the objectives of the California Wetlands Conservation Policy (Executive Order W-59-93).

6. Basin Plan: The Board adopted the Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan), which represents the Board's master water quality control planning

document. The Basin Plan defines beneficial uses and water quality objectives for waters of the State, including surface waters and groundwater. The Basin Plan also identifies discharge prohibitions intended to protect beneficial uses.

7. The Project is located at the intersection of Interstate Highway 880 and the Great Mall Parkway. The existing wetland that will be retained by the Project drains to a channel tributary to Penetencia Creek, which in turn is a tributary to Coyote Creek. The Basin Plan defines the existing and potential beneficial uses of Coyote Creek as: cold freshwater habitat, fish migration, preservation of rare and endangered species, contact and non-contact water recreation, fish spawning, warm freshwater habitat, and wildlife habitat.

8. The Basin Plan Wetland Fill Policy (Policy) establishes that 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, and that mitigation for wetland fill projects is to be located in the same area of the Region, whenever possible, as the project. The Policy further establishes that wetland disturbance should be avoided whenever possible, and if not possible, should be minimized, and only after avoidance and minimization of impacts should mitigation for lost wetlands be considered. By eliminating fill of one of the existing wetlands, the Discharger did significantly reduce wetland impacts from the original application proposal, thus demonstrating sufficient avoidance and minimization of wetland impacts before mitigation was accepted.

9. The goals of the California Wetlands Conservation Policy (Executive Order W-59-93, signed August 23, 1993) include ensuring "no overall loss" and achieving a "...long-term net gain in the quantity, quality, and permanence of wetland acreage and values...." Senate Concurrent Resolution No. 28 states that "[i]t is the intent of the legislature to preserve, protect, restore, and enhance California's wetlands and the multiple resources which depend on them for benefit of the people of the State." Section 13142.5 of the CWC requires that the "[h]ighest priority shall be given to improving or eliminating discharges that adversely affect...wetlands, estuaries, and other biologically sensitive areas."

10. This Order addresses the temporary and permanent fill and indirect impacts to waters of the State associated with the Project, which is described in Findings 1-3. Construction of the Project will result in the permanent placement of fill in and/or disturbance of 0.46 acres of isolated waters. The California Environmental Quality Act (CEQA) documents certified for the Project included requirements for the development of appropriate measures to mitigate the impacts of this fill.

11. CEQA requires all discretionary projects approved or carried out by public agencies to comply with CEQA, and requires a lead agency to prepare an appropriate environmental document for such projects. The City of Milpitas, City Council, certified the *Final Environmental Impact Report for the Elmwood Residential and Commercial*

*Development* (Final EIR) on December 14, 2004. The Board has duly considered the Final EIR and by this Order imposes additional requirements to mitigate any water quality related significant environmental impacts to less than significant levels.

12. The Board has notified the Corps, City of Milpitas, U.S. Fish and Wildlife Service (USFWS), California Department of Fish and Game (CDFG), and other interested agencies and persons of its intent to prescribe WDRs for this discharge.

13. The Board, in a public meeting, heard and considered all comments pertaining to the discharge.

14. This Project file is maintained at the Board under File No. 2188.07.

IT IS HEREBY ORDERED that the Discharger, in order to meet the provisions contained in Division 7 of the California Water Code and regulations adopted thereunder, shall comply with the following, pursuant to authority under CWC Sections 13263 and 13267:

**A. Discharge Prohibitions**

1. The direct discharge of wastes, including rubbish, refuse, bark, sawdust, or other wastes into surface waters or at any place where they would contact or where they would be eventually transported to surface waters, including flood plains, is prohibited.

2. The discharge of floating oil or other floating materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity, or discoloration in surface waters is prohibited.

3. The discharge of silt, sand, clay, or other earthen materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity, or discoloration in surface waters is prohibited.

4. The Project activities subject to these requirements shall not cause a nuisance as defined in CWC Section 13050(m).

5. The discharge of materials from active excavation or fill sites and stockpile or storage areas to surface waters or surface water drainage courses is prohibited.

6. The groundwater in the vicinity of the Project shall not be degraded as a result of the Project activities or placement of fill for the Project.

7. The discharge of materials other than stormwater, which are not otherwise regulated by a separate NPDES permit or allowed by this Order, to waters of the State is prohibited.

8. The discharge of drilling muds to waters of the State, or where such muds could be discharged to waters of the State, is prohibited.

**B. Provisions**

1. The Discharger shall comply with all Prohibitions and Provisions of this Order immediately upon adoption of this Order or as provided below.

2. The Discharger shall submit copies of all necessary approvals and/or permits for the mitigation from applicable government agencies.

Project Implementation Deadlines

3. A detailed mitigation construction design and monitoring plan for mitigating the impacts of wetland fill (Mitigation Plan) shall be submitted for approval by the Executive Officer no later than June 1, 2006. The Mitigation Plan shall include detailed establishment and success criteria for the seasonal wetlands to be created, to be monitored for a minimum of 5 years, including types and coverage of wetland vegetation, control of non-native invasive plants, and avoidance of dense cat-tail monoculture. The plan shall also include contingency measures for correction of inadequate wetland performance, and further contingency of replacement if the wetland failure is irreparable. Means of financial assurance for repair and/or replacement of inadequate wetland performance shall also be described in the Mitigation Plan. Compliance with this provision shall not be deemed to have occurred until the created seasonal wetland meets the success criteria in the approved Mitigation Plan, or in the event of irreparable wetland failure, replacement wetland is provided that meets the success criteria. Mitigation construction shall be completed no later than October 31, 2006, according to the approved Mitigation Plan.

4. As-built plans for the mitigation site shall be prepared as per the approved Mitigation Plan, and submitted to the Board within 12 weeks of the completion of mitigation site construction.

5. Annual monitoring reports shall be submitted to the Board by December 31 of each monitoring year for at least 5 years and until the site has successfully established wetland vegetation and hydrology, and met the success criteria outlined in the approved Mitigation Plan.

6. Any changes to the approved Mitigation Plan must be approved in writing by the Executive Officer.

Notice of Mitigation Completion

7. When the Discharger has determined that the mitigation area has achieved the successful establishment of wetland vegetation and hydrology, a notice of mitigation completion (notice) shall be submitted, for approval by the Executive Officer. The notice shall include a status report on the implementation of the Mitigation Plan and demonstrate how

the success criteria set forth in the approved Mitigation Plan have been achieved. After receipt of the notice and the Executive Officer concurs that the mitigation has satisfied the success criteria, the Discharger's submittal of annual mitigation monitoring reports is no longer required.

Other Provisions

8. All reports pursuant to these Provisions shall be prepared under the supervision of suitable professionals registered in the State of California.

9. The Discharger shall comply with and the Project shall be implemented in accordance with (a) all the engineering plans, specifications, and technical reports submitted with Discharger's WDR Application and (b) all of the terms and conditions of this Order and any approved report or plan required hereunder. In the event of a conflict between the foregoing, the requirements of this Order or any approved report or plan shall prevail.

10. No equipment shall be operated in areas of flowing or standing water; no fueling, cleaning, or maintenance of vehicles or equipment shall take place within any areas where an accidental discharge to Penetencia Creek may occur; and construction materials and heavy equipment must be stored outside of the ordinary high water mark.

11. Discharger shall ensure that the entity that will develop the infrastructure on the Project site complies with and implements any and all applicable stormwater treatment controls during and after construction and operation of the Project. This shall include conformance with the requirements for post-construction stormwater treatment as specified in Provision C.3 of the municipal NPDES stormwater permit for the Santa Clara Valley Urban Runoff Pollution Prevention Program, Permit No. 01-119 as amended by Permit No. R2-2005-0035, of which Santa Clara County and the City of Milpitas are permittees.

12. The Discharger shall immediately notify the Board by telephone whenever an adverse condition occurs as a result of this Project. Such a condition includes, but is not limited to, a violation of the conditions of this Order, a significant spill of petroleum products or toxic chemicals, or damage to control facilities that would cause noncompliance. A written notification of the adverse condition shall be submitted to the Board within two weeks of occurrence. The written notification shall identify the adverse condition, describe the actions necessary to remedy the condition, and specify a timetable, subject to the modifications of the Executive Officer, for the remedial actions.

13. The Discharger is considered to have full responsibility for correcting any and all problems that arise in the event of a failure that results in an unauthorized release of waste or wastewater.

14. The discharge of any hazardous, designated or non-hazardous waste as defined in Title 23, Division 3, Chapter 15 of the California Administrative Code, shall be disposed of in

accordance with applicable state and federal regulations.

15. The Discharger shall remove and relocate any wastes that are discharged at any sites in violation of this Order.

16. In accordance with CWC §13260, the Discharger shall file with the Board a report of any material change or proposed change in the ownership, character, location, or quantity of this waste discharge. Any proposed material change in operation shall be reported to the Executive Officer at least 30 days in advance of the proposed implementation of any change. This shall include, but not be limited to, all significant new soil disturbances, all proposed expansions of development, or any change in drainage characteristics at the Project site. For the purpose of this Order, this includes any proposed change in the boundaries of the area of wetland/waters of the State to be filled.

17. The Discharger shall maintain a copy of this Order at the Project site so as to be available at all times to site operating personnel and agencies.

18. The Discharger shall permit the Board or its authorized representative at all times, upon presentation of credentials:

    a. Entry onto Project premises, including all areas on which wetland fill or wetland mitigation is located or in which records are kept.

    b. Access to copy any records required to be kept under the terms and conditions of this Order.

    c. Inspection of any treatment equipment, monitoring equipment, or monitoring method required by this Order.

    d. Sampling of any discharge or surface water covered by this Order.

19. An annual fee for Waste Discharge Requirements pursuant to Section 13260 of the California Water Code is required.

20. This Order does not authorize commission of any act causing injury to the property of another or of the public; does not convey any property rights; does not remove liability under federal, state, or local laws, regulations or rules of other programs and agencies; nor does this Order authorize the discharge of wastes without appropriate permits from other agencies or organizations.

21. The Board will consider rescission of this Order upon Project completion and the Executive Officer's acceptance of notices of completion of mitigation for all mitigation, creation, and enhancement projects required or otherwise permitted now or subsequently under this Order.

I, Bruce H. Wolfe, Executive Officer, do hereby certify that the foregoing is a full, complete, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Francisco Bay Region, on January 11, 2006.

Bruce H. Wolfe
Executive Officer

Attachment A – Site Diagram indicating wetland fill and mitigation areas

# Attachment A

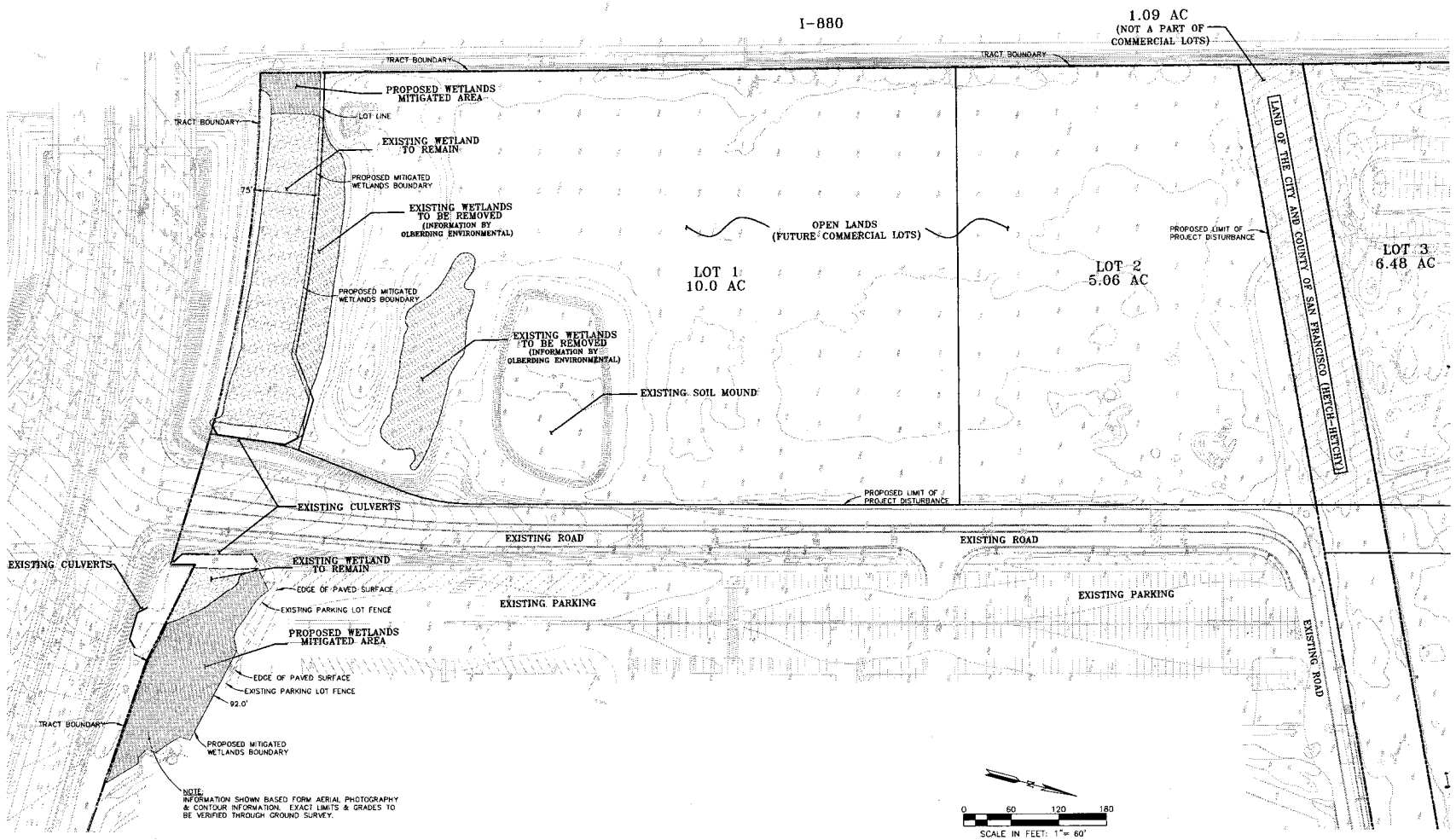
## Site Diagram with Fill and Mitigation Areas

# EXHIBIT A - CONCEPTUAL WETLANDS AREAS
# FUTURE COMMERCIAL LOTS

LEGEND

- EXISTING CULVERT
- TRACT BOUNDARY
- APPROXIMATE LIMITS OF PROJECT DISTURBANCE
- EXISTING WETLAND TO BE REMOVED (TOTAL = 0.46 AC)
- PROPOSED WETLAND MITIGATION AREA (TOTAL = 0.52 AC)
- EXISTING WETLAND TO REMAIN (TOTAL = 0.72 AC)

* LIMITS OF ALL EXISTING WETLANDS AREAS SHOWN PROVIDED BY OLBERDING ENVIRONMENTAL ELECTRONIC FILE RECEIVED BY RJA ON 11/16/04





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KB HOME

EXHIBIT A
CONCEPTUAL WETLANDS AREAS
ELMWOOD
MILPITAS, CALIFORNIA

| DATE | MK | SHEET REVISIONS | BY | CK |
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SCALE 1" = 60'
DATE MAY 2, 2004

SHEET 1 OF 1 SHEETS

JOB NO. 032011