GRESHAM | SAVAGE
ATTORNEYS AT LAW

Garry.Brown@GreshamSavage.com · San Bernardino Office
(909) 890-4499 · *fax* (909) 890-9877

January 29, 2015

VIA U. S. MAIL

Mr. Minh Thai, Director of Economic Development
Mr. Frank Senteno, Director of Public Works
City of El Monte
11333 Valley Blvd.
El Monte, California 91731-3227

Re: *Eastside El Monte Operable Unit Work Parties Comments*
El Monte Walmart Draft Environmental Impact Report
CEQA State Clearinghouse No.: 2014031042

Dear Sirs:

As you know, the City of El Monte (the "City") is currently in the process of circulating a Draft Environmental Impact Report ("DEIR") for a proposed Walmart store (the "Project") in the City of El Monte at 4000 N. Arden Drive (the "Site"). Through this process, it has come to our attention that the City has received comment letters requesting that the City require, as a condition of approval, Walmart to: (i) repair or (ii) close/abandon *and* replace the two monitoring wells located on the Site previously constructed for monitoring remediation and recovery activities related to the San Gabriel Valley Area 1 Superfund ("Superfund") site. As will be explained in greater detail below, these letters represent a highly inappropriate attempt by the requesting parties to discharge their mandated responsibilities on an innocent third-party, without a legal basis or justification. As this letter will explain:

- Under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), the only parties liable for the costs incurred with maintaining and/or repairing the monitoring wells are those entities/persons that have been found to be liable by the U.S. Environmental Protection Agency ("U.S. EPA") as a Responsible Party, or if a party was found to be a Potentially Responsible Party ("PRP") but later settled with U.S. EPA ("Settling

Defendants").[1] Walmart has never been deemed a "Responsible Party" by U.S. EPA, nor has it ever reached a settlement with EPA with respect to any actual or alleged liability for the Superfund cleanup. Further, since purchasing the Site in May of 2012, Walmart has attempted to ensure the integrity of all remedial elements (the wells) on the Site and to comply with all environmental restrictions applicable to the Site.

- The Eastside Work Parties ("EWPs")[2] are the Settling Defendants that are solely responsible for advancing and monitoring the cleanup work required by U.S. EPA, which includes the ongoing monitoring of groundwater through the use of monitoring wells. The EWPs have previously utilized the monitoring wells located on the Site, and the EWPs are required to maintain and repair these wells.

- Although Walmart continues to offer the EWPs access to the Site, the parties have failed to respond to Walmart's multiple offers, and have instead sought to mislead the City by alleging that Walmart is responsible for the EWPs' obligations.

- Contrary to the allegations contained in the comment letters, Walmart has never damaged any wells located on the Site. Before Walmart took ownership of the Site, monitoring well BIMW-5 was buried/damaged by the previous owner and the City buried/damaged BIMW-4 during site work for the installation of Valley Circle on the east side of the property.

Responsibility for the Wells

CERCLA was drafted to enshrine into law the proposition that the *polluter must pay* for the damage they are responsible for contributing to, including the costs incurred for any remedial actions or monitoring work that may be deemed necessary by U.S. EPA. ("CERCLA ... imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania v. Union Gas Co.* 491 U.S. 1, 7 (1989)). In April 2004, numerous defendants – which had been deemed by U.S. EPA as "Potentially Responsible Parties" in connection with the Superfund – settled with U.S. EPA and

[1] Either by declaration or by cost recovery action.

[2] The party submitting the comment letters represents one of the EWPs, Nikko Materials USA, dba Gould Electronics.

California Department of Toxic Substances Control ("DTSC") on issues related to liability for contamination present on the Site. These parties entered into a settlement agreement with U.S. EPA, pursuant to which the parties agreed to bear the costs and responsibility for the Superfund cleanup and recovery work. This settlement agreement is embodied in the El Monte Operable Unit Consent Decree (the "Consent Decree").

Under the Consent Decree, the EWPs are responsible for addressing the contamination in the Eastern Shallow Zone of the Superfund area, which encompasses the Site. As part of these requirements, the EWPs are also expressly responsible for the operation and maintenance of all activities required to maintain the effectiveness of the remedial action, including the operation and maintenance of the required wells. (See Consent Decree Section 26 and 27). Pursuant to the Consent Decree, the EWPs are required to negotiate an agreement that will provide for allowing U.S. EPA and its contractors access to the Site for the purposes of "Assessing the need for ... implementing additional response actions at or near the site" (i.e. repairing or closing/abandoning wells). (Consent Decree Section 26 (a)(5).)

U.S. EPA and the Consent Decree acknowledge that third-party landowners such as Walmart have no direct obligation to incur costs associated with the EWPs' obligations. As specified by the Consent Decree, if a certain site is found to be necessary for implementing the required remedial or monitoring action, as the EWPs allege here, it is the EWPs' obligation to use their "best efforts" to obtain an agreement to access the site from the new ownership; these "best efforts" include "the payment of reasonable sums of money in consideration of access, access easements." (Consent Decree, Sections 27 & 28.) In specifying this, the Consent Decree acknowledges that a landowner's obligation to the EWPs includes providing access and not obstructing the operation or integrity of any remedial component at the Site, both requirements with which Walmart has fully complied.

As Walmart is not a Responsible Party, nor a Settling Defendant, neither the EWPs nor the City may require or order Walmart to incur any costs or liabilities in connection with the EWPs' remediation and monitoring responsibilities. Moreover, Walmart was not responsible for damaging the wells as was documented in Walmart's due diligence reports performed prior to Walmart acquiring the property. If the EWPs believe that an entity should be held liable for damage caused to the wells, it maintains the legal right to seek compensation from the party that caused the damage.

Walmart's Responsibilities

While the EWPs are responsible for carrying out their responsibilities for implementing the Consent Decree's Statement of Work ("SOW"), including installation and maintenance of monitoring wells, the EWPs are also required to enter into agreements with land owners that are not parties to the remedial action to allow access to the Site. (See Consent Decree Section 27.) Walmart acknowledges the importance of assisting the EWPs in their effort to advance the remediation and monitoring effort. Thus, as previously expressed to the EWPs on previous occasions, Walmart continues to be willing and able to negotiate and enter into an access agreement to allow the EWPs to access and repair the wells for ongoing use. Notwithstanding the EWPs attempt to improperly assign Walmart their own obligations, should an access agreement be reached, Walmart would be willing allow the EWPs to maintain the wells during construction and after build-out.

This approach is consistent with the Consent Decree and with the DEIR, specifically Section 4.6.4, which provides that Walmart will "coordinate with the parties responsible for the existing groundwater monitoring wells" and "demonstrate to the satisfaction of the City of El Monte that agreements for the proper abandonment of these wells are in place." The DEIR therefore recognizes that Walmart's responsibility is to assist the EWP's by negotiating access to the Site, not to assume responsibility for the costs associated with repairing or replacing the wells.

***

In summary, Walmart stands ready to work with the EWPs, by providing access to the Site, so that the EWPs can appropriately carry out their Consent Decree required responsibilities. However, attempts by the EWPs or their contractors to force Walmart to bear remedial costs that have been legally apportioned to the EWPs are contrary to law and to the equitable assignment of responsibility for the wells' loss.

Sincerely,

Garry M. Brown
Senior Counsel, for
GRESHAM SAVAGE
NOLAN & TILDEN,
A Professional Corporation

GMB:jmk
cc: Bella Dizon, United States EPA, San Francisco
James Collins, United States EPA, San Francisco
Christine Bucklin, Cal EPA/DTSC
Luz Rabelo, Los Angeles Regional Water Quality Control Board
Arthur G. Heath, Los Angeles Regional Water Quality Control Board
Raul Godinez II, City of El Monte, City Manager
David F. Gondek Olivarez Madruga, P.C.
Caesar Roldan, City of El Monte, Building Permits
Jason Mikaelian, City of El Monte, Planning
CEQA State Clearinghouse
Gregory Tesoro, Wal-Mart
General Counsel (Saint-Gobain)
Randall Kendrick, Arden B.A.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

March 26, 2015

Garry M. Brown
Gresham Savage Nolan & Tilden, PC
550 East Hospitality Lane, Suite 300
San Bernardino, CA 92408

RE: Walmart Property at 4000 N. Arden Drive, El Monte, California: monitoring wells MW-4 and MW-5

Dear Mr. Brown:

This is to confirm the understanding between the United States Environmental Protection Agency (EPA) and Walmart with regard to damaged monitoring wells MW-4 and MW-5 situated on the referenced property now owned by Walmart.

Walmart has committed to EPA that Walmart will locate and properly abandon the referenced wells (the Walmart commitment) as soon as reasonably possible. Upon completion of the Walmart commitment, EPA will have no further expectations of Walmart respecting wells MW-4 and MW-5,

EPA will advise the parties implementing the CERCLA remedial action in El Monte that Walmart will provide them access to this property for replacement of these wells.

EPA appreciates Walmart's cooperation in this matter.

Sincerely,

James Collins
Assistant Regional Counsel

cc: Bella Dizon, EPA Project Manager

RECEIVED
MAR 30 2015
GRESHAM, SAVAGE, NOLAN & TILDEN APC

TAIT
RISING TO THE CHALLENGE
701 N. Parkcenter Drive, Santa Ana, CA 92705
p:714/560/8200 www.tait.com

April 15, 2015

Mr. Garry M. Brown
Senior Counsel
Gresham Savage Nolan & Tilden, PC
550 East Hospitality Lane, Suite 300
San Bernardino, CA 92408-4205

SUBJECT: SUMMARY OF WELL LOCATION ACTIVITIES AT PROPOSED WALMART RETAIL STORE #5970-01 PROPERTY LOCATED AT 4000 N. ARDEN DRIVE IN EL MONTE, CALIFORNIA

Dear Mr. Brown:

At the request of Wal-Mart, Tait Environmental Services, Inc. (TAIT) conducted activities needed to locate monitoring wells MW-4 and MW-5 at the proposed Walmart retail store #5970-01 property at 4000 Arden Avenue in El Monte, California (the "Site").

BACKGROUND

Two monitoring wells, MW-4 and MW-5, are reported to have been located in the southeastern and southwestern portions of the Site, respectively. These wells were installed during previous investigations by Hydro-Fluent, Inc. in 1989. As part of the research conducted during its Phase I Environmental Site Assessment (ESA) report for the Site dated March 27, 2012, TAIT did not identify documentation regarding the abandonment of these wells or copies of well logs.

During its Site reconnaissance for the Phase I ESA, conducted on January 12, 2012, TAIT observed what appeared to be an uncapped groundwater monitoring well in the southeastern portion of the Site. The well was located in the area of groundwater monitoring well MW-4, and thus was assumed to be well MW-4. The well was constructed of 4-inch diameter polyvinyl chloride (PVC) casing, which appeared to be intact, as observed from the surface. The well casing was located within an 8-inch diameter metal well box without a cover. On April 13, 2012, TAIT gauged the depth of the well using a water level meter. At that time, the well was open to 71 feet below the top of the casing, where moisture was detected. The bottom of the well felt soft, which most likely indicated the presence of dirt/mud at the bottom. A slight obstruction was detected inside the well casing at 65 feet below the top of the casing. After gauging the well, TAIT placed a cap on the well.

On April 13, 2012, TAIT searched the area of well MW-5, but did not observe evidence of well MW-5.

On January 9, 2014, TAIT was on Site with a representative of the Responsible Party's consultant (Geosyntec Consultants) to observe their attempt to locate the two groundwater monitoring wells. At

that time, neither well was visible at the surface. Attempts were made to locate the wells using GPS coordinates with a hand-held GPS and hand digging. The well casings were not located.

On February 6, 2015, TAIT was on Site with a representative of the Los Angeles Regional Water Quality Control Board to verify the locations of the groundwater monitoring wells. Evidence of the well casings was not visible at the surface, and the wells could not be located.

WELL LOCATION

On March 30, 2015, a TAIT geologist returned to the Site to locate the buried monitoring wells using an excavator. After measuring the approximate well locations, TAIT directed the excavator to carefully dig to uncover the well casings. Well MW-4 was found outside of the fenced area, off Valley Circle, near the southeast side of the Site. The casing was buried approximately one foot below the surrounding grade, and was in similar condition to when it was last observed in 2012. The well is constructed of 4-inch diameter PVC casing located within an 8-inch diameter metal well box. The well box does not have a cover and soil was present in the well box to the top of the PVC well casing. The cap that had been placed on the well in 2012 was still in place. TAIT placed an approximately 18-inch long PVC riser on the well casing, raising the top of the casing above the surrounding grade, and placed the cap back on the well. Photographs of the uncovered well are included in Attachment A.

Monitoring well MW-5 was located beneath approximately two feet of fill. The metal well box was found largely intact. However, the threaded well box lid was stripped and the well box could be pried open by hand. A well cap was present on the PVC well casing inside the well box.

WELL EVALUATION

On March 30, 2015, TAIT gauged each well using a water level meter. Monitoring well MW-4 did not have any measurable water. The bottom of the well felt soft, which most likely indicates the presence of dirt/mud at the bottom. Water was detected in monitoring well MW-5.

On April 2, 2015, a representative of Geosyntec visited the Site to gauge the water levels and measure the total wells depths. Geosyntec reported that the total depth of well MW-4 was measured to be three feet shallower than the total well depth as shown on the well completion log. Geosyntec concluded that based on observed surface conditions of the well, sediment may have fallen into the well, rendering it unusable. Geosyntec recommended that well MW-4 be properly destroyed in accordance with the California Department of Water Resources Water Well Standards.

Geosyntec measured the total depth of well MW-5 to be consistent with the well log (total depth of 85 feet), and noted that the well contained 1.65 feet of water. Geosyntec concluded that well MW-5 can still be used as a groundwater monitoring well. However, repairs are needed in order to restore the well to a water-tight condition. Based on their observations, Geosyntec recommended that well MW-5 should be preserved in such a way as to minimize ponding of water in close proximity to the well head, and that the well vault and well cap should be replaced.

Tait has been directed by Walmart to properly destroy well MW-4 in accordance with California Well Standards (Bulletin 74-90), and to raise well MW-5 to grade in order to protect the well for future use. Tait has been informed that future maintenance activities with respect to well MW-5 will be undertaken by contractors for the El Monte Operable Unit Eastside Performing Settling Defendants, the current responsible parties for well monitoring/maintenance at the site.

Should you have any questions, please do not hesitate to contact me at 714-560-8688 or via e-mail at ahillyard@tait.com.

Sincerely,

Ann M. Hillyard, PG, CHMM
Senior Project Manager

Attachment:
A – Photographs

ATTACHMENT A - SITE PHOTOGRAPHS
EL MONTE, CALIFORNIA
MARCH 30, 2015

Uncovered well MW-4

Well MW-4, uncovered

ATTACHMENT A - SITE PHOTOGRAPHS
EL MONTE, CALIFORNIA
MARCH 30, 2015

Well MW-4

Well MW-4 with riser

ATTACHMENT A - SITE PHOTOGRAPHS
EL MONTE, CALIFORNIA
MARCH 30, 2015

Well MW-5

Well MW-5

GRESHAM | SAVAGE
ATTORNEYS AT LAW

Garry.Brown@GreshamSavage.com · San Bernardino Office
(909) 890-4499 · *fax* (909) 890-9877

May 18, 2015

VIA U. S. MAIL

Mr. Minh Thai
Director of Economic Development
Mr. Frank Senteno
Director of Public works
City of El Monte
11333 Valley Blvd.
El Monte, California 91731-3227

Re: *El Monte Walmart Draft Environmental Impact Report Comments/Clarifications*
CEQA State Clearinghouse No.: 2014031042

Gentlemen:

Walmart has prepared a Draft Environmental Impact Report ("DEIR") for its El Monte project and is completing its requirements for the entitlement process. This letter is to inform the City of El Monte about the currently scheduled work involving well BIMW-4 and to clarify and to provide additional information with respect to burial of the well and the integrity of the well after its re-discovery by Walmart's contractor, Tait Environmental, ("Tait") in late March of this year.

In furtherance of its obligations to address comments to the DEIR, a letter that Walmart submitted in January 2015 commented on the potential destruction and/or burial of a well on the Walmart property. In the January 29, 2015 letter, Walmart stated that the City of El Monte may have been involved in the destruction or burial of monitoring well BIMW-4. Apparently well BIMW-4 came to be buried subsequent to its discovery in 2012 and prior to when it could not be found in early 2014, when it was no longer visible above ground. While the City's Valley Circle road construction project occurred during this time frame (in late 2012) there is no obvious evidence of how the well actually came to be buried. This well was subsequently relocated by Tait and was determined not to be damaged.

In 2012, during Walmart's due diligence on the site, monitoring well BIMW-4 was found to be open and in poor condition. Prior to Walmart's acquisition of the property in May of 2012, the well was capped by Tait, thereby preventing any soils migration into the well. While the well was subsequently lost when it became buried, when relocated, the well was found to be still capped, and secure.

Access was provided to the Responsible Parties' consultant, Geosyntec to evaluate the well for its potential use for monitoring the groundwater at the site. Geosyntec found the well to be unusable due to its dry condition and because of the presence of approximately three (3) feet of soil in the bottom of the casing. Geosyntec recommended that the well be closed. The US Environmental Protection Agency ("US EPA") agreed that the well could be abandoned/closed and would have no further use as part of the Superfund site remedy. The well abandonment is scheduled for May 20, 2015.

US EPA has been informed of the schedule for closure of BIMW-4. US EPA has also informed us that they have not yet determined whether a replacement for well BIMW-4 will be needed for this location. US EPA has confirmed that the responsible parties for the site (Gould Electronics and Johnson Control) will be required to install and maintain any replacement well that should be required. Walmart recognizes that access will be needed for any maintenance or well installation activities and an access agreement has been forwarded to Geosyntec for their signature and/or comments.

We appreciate this opportunity to clarify the events surrounding well BIMW-4. The sole remaining issue with respect to the well will be its proper closure, which Walmart has scheduled as described above.

Please let me know if you need additional information regarding the above.

Sincerely,

Garry M. Brown
Senior Counsel, for
GRESHAM SAVAGE
NOLAN & TILDEN,
A Professional Corporation

GMB:jmk
cc: Raul Godinez II, City of El Monte, City Manager
David F. Gondek, Olivarez Madruga, P.C.
Caesar Roldan, City of El Monte, Building Permits
Jason Mikaelian, City of El Monte, Planning Department