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City of Newark Planning Commission  
37101 Newark Boulevard  
Newark, CA 94560-3796

Re: City of Newark Areas 3 and 4 Specific Plan Project and EIR  
Comments of Citizens Committee to Complete the Refuge  
June 8, 2010 Planning Commission Hearing - Agenda Items E.1 and E.2

Dear City of Newark Planning Commissioners:

I write on behalf of our client, Citizens Committee to Complete the Refuge (“CCCR”) and its members regarding the Newark Areas 3 and 4 Specific Plan Project (“Project”) and EIR. All of the comments raised by CCCR, both orally and in writing, including those of its consultants, Richard Grassetti of Grassetti Environmental Consulting and Carol Beahan of Wildscape Engineering Services, are hereby incorporated by reference as if set forth in full in this letter, and are re-raised as substantive and procedural reasons why the City should not approve this Project.

As a preliminary matter, CCCR continues to object to review of this Project at today’s hearing based on lack of adequate notice, and lack of opportunity for meaningful public review and comment (Gov. Code, §§ 65033, 65090, 65353; *Environmental Defense Project v. County of Sierra* (2008) 158 Cal. App. 4th 877.)

CCCR was not provided the opportunity to review and/or comment on the Development Agreement which is before the Planning Commission under Agenda Item E.1. The Development Agreement was only posted on the City’s website yesterday evening. Other key documents such as the Staff Report and other documents referred to in Agenda Items E.1 and E.2 were not made available to the public including, *inter alia*, related General Plan amendments: a map amendment to the General Plan Diagram to change the General Plan land use designations for certain parcels of land; and DA-10-14, Z-10-17, a Map amendment to Title 17 (Zoning) of the Newark Municipal Code rezoning parcels.

CCCR has previously commented on the procedural and substantive inadequacies of the EIR for the Newark Areas 3 and 4 Specific Plan Project, and appeared at prior Planning Commission meetings to raise its concerns about this Project. The Project is inconsistent with the City’s General Plan, as well as multiple regional plans, and adversely impacts wetlands, traffic, air quality, cultural

resources, biological resources, noise, climate change, hydrology and flooding. The EIR fails to mitigate significant impacts and impermissibly defers mitigation. The EIR fails to adequately analyze alternatives. In addition, CCCR has commented that this Project conflicts with state and regional planning as it relates to climate change, as well as every state law passed to address climate changes impacts.

This Project fails to comply with the mandates of the California Environmental Quality Act ("CEQA") to inform decision makers and the public about the potential significant environmental effects of proposed activities, identify ways that environmental damage can be avoided or mitigated and approve only projects with no feasible mitigation measures or environmentally superior alternatives. This Project as proposed fails to identify and incorporate all feasible mitigation measures and fails to avoid most of the significant impacts even though a feasible alternative has been identified as the No Development in Area 4 and Higher Density Area 3 Alternative. The EIR also fails to address the conclusions reached by its own experts regarding hydrology and flooding impacts from climate change, especially to Area 4, by artificially limiting analysis to a 50 year planning horizon, despite the fact that those conclusions require that the EIR mitigate for those significant unavoidable impacts and that revisions to the Project must be made.

#### **I. THE ENVIRONMENTAL BASELINE USED FOR DETERMINING BOTH TRAFFIC AND AIR QUALITY SIGNIFICANT IMPACTS VIOLATES CEQA**

Newark failed to utilize the proper baseline conditions in determining the significance of both traffic and air quality impacts. In *Communities for a Better Environment v. South Coast Air Quality Management District*, (2010) 48 Cal.4th 310, 322 the Court held that the "environmental baseline, against which the significance of a proposed project's physical environmental effects shall be judged, will normally be the existing physical or operational conditions, rather than the maximum allowable level under an existing permit. The impacts of a proposed project are to be compared to the actual environmental conditions at the time CEQA analysis is conducted, rather than to the maximum allowable level of conditions defined by a plan or regulatory framework.

Because the "background conditions" relied upon in Draft EIR section 3.2.2.4 (DEIR p.47) reflect "approved" projects rather than actual existing conditions, this baseline is not consistent with CEQA Guideline § 15125. The DEIR's analysis of the impact of the proposed Project on the regional roadway network is flawed because it relies on this improper baseline: the development on Areas 3 and 4 allowed under the existing General Plan.

Draft EIR section 3.2.3.3 relating to "CMA Modeling of the Project" is similarly flawed. It states in relevant part:

The existing General Plan land use designations on the undeveloped portions of Areas 3 and 4 allow for up to 1.175 million square feet of industrial park use, up to 2,700 dwelling units, an 18-hole golf course, and open space. The proposed Specific Plan would allow up to 1,260 dwelling units, a 600 student elementary school, an 18-hole golf course, and open space. Thus, the proposed Specific Plan project results in less overall development on Areas 3 and 4 than is allowed under the existing General Plan land use designations.

(DEIR p. 61.)

Establishing a baseline at the beginning of the CEQA process is a fundamental requirement so that changes brought about by a project can be seen in context and significant effects can be accurately identified. (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125 [“baseline determination is the first rather than the last step in the environmental review process”].) When an EIR omits relevant baseline environmental information, the agency cannot make an informed assessment of the project's impacts. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.) Due to these errors, the EIR failed its informational purpose under CEQA.

## II. THE EIR FAILS TO ADEQUATELY ANALYZE CUMULATIVE IMPACTS.

An EIR must adequately analyze the project's cumulative impacts. (*Laurel Heights Improvement Assn v. Regents of University of California* (1988) 47 Cal.3d 376, 394; CEQA Guideline § 15130.) California courts have repeatedly found that analysis of cumulative impacts is among the primary EIR functions. “[I]t is vitally important that an EIR avoid minimizing the cumulative impacts. Rather, it must reflect a conscientious effort to provide public agencies and the general public with adequate and relevant information about them.” (*Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1051; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 723.)

A mandatory finding of significance is required if the possible effects of a project are individually limited but “the incremental effects of an individual project are considerable when viewed *in connection with* the effects of past projects, the effects of other current projects, and the effects of probable future projects.” (§ 21083(b); CEQA Guideline § 15065(c), emphasis added.) “Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” (CEQA Guideline § 15355(b); *Communities for a Better Environment v. California Resources Agency* (“CBE”) (2002) 103 Cal.App.4th 98, 114; *Kings County, supra*, 221 Cal.App.3d at 720–721.) The cumulative impact requirement must be interpreted to afford the “fullest protection of the environment within the reasonable scope of the statutory and regulatory language.” (*Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 431–432.)

For the reasons discussed below, this EIR's cumulative impact analysis violates CEQA.

### A. The EIR Fails to Adequately Consider Past Projects as Part of the Cumulative Impact Analysis.

The EIR cumulative impact section affirmatively states that the “analysis in this section is based upon consideration of a list of approved and pending projects” in Newark. (DEIR p. 273.)

The analysis expressly omits consideration of any past projects.<sup>1</sup> Thus, the EIR violates CEQA's mandate for cumulative impact analysis: consideration of the Project's effects when viewed *in connection with* the effects of past projects, the effects of other current projects, and the effects of probable future projects." (§ 21083(b); CEQA Guideline § 15065(c), emphasis added.)

The EIR claims that the "effects of past projects are generally reflected in the existing conditions described in the specific sections of this EIR." (DEIR p. 273.) But the law requires more. For the Newark SP EIR's analysis of cumulative impacts to pass muster, it must discuss the combined effects of the project in combination with past, present and future projects, and not merely "catalogue current conditions." *Environmental Protection and Information Center v. California Department of Forestry and Fire Protection* ("EPIC v. CDF), 44 Cal. 4th 459, 523-424. This EIR fails to comply with this mandate.

In *EPIC v. CDF*, 44 Cal. 4th 459 (July 18, 2008), the California Supreme Court held that:

statutory injunction to assess 'the incremental effects of an individual project . . . in connection with the effects of *past projects*, the effects of other current projects, and the effects of probable future projects" (Pub. Resources Code, § 21083, subd. (b)(2), italics added) signifies an obligation to *consider the present project in the context of a realistic historical account* of relevant prior activities that have had significant environmental impacts. "Such historical accounting assists, for example, in understanding development trends. (See Governor's Off. of Planning & Research, General Plan Guidelines (1990) pp. 44-46 [need to understand population, environmental and economic trends, including historical data, to guide development].) This historical information also may help to identify previous activities that have caused intensive environmental impacts in a given area, the full effects of which may not yet be manifested, thereby disclosing potential environmental vulnerabilities *that would not be revealed merely by cataloging current conditions.*"

*EPIC v. CDF* at 523, emphasis added.

The Supreme Court reasoned further that an analysis of past projects in an EIR "must reasonably include information about past projects to the extent *such information is relevant to the understanding of the environmental impacts of the present project considered cumulatively with other pending and possible future projects.*" *Id.* at 524, emphasis added.<sup>2</sup> Thus, for the Newark SP

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<sup>1</sup> In addition, the EIR's cumulative impact analysis is based on only "pending projects in Fremont," but neither past nor present projects were considered in that adjacent city. (DEIR p. 273.)

<sup>2</sup> The Supreme Court found the EIR before it was sufficient where the cumulative impact discussion of past projects 1) "acknowledge[d] population declines and degradation of habitat, including increased water temperature and sediment buildup in streams and loss of habitat for various species, 2) contained "detailed information about the current population and distribution and loss of suitable habitat" for the species, and 3) acknowledged that "past logging practices are

EIR's analysis of cumulative impacts to pass muster, it must at a minimum "consider the proposed project in the context of a realistic historical account of relevant prior activities," actually discuss the combined effects of the project in combination with past, present and future projects and not merely "catalogue current conditions."

Failure to consider past projects is a prejudicial abuse of discretion. (*Environmental Protection Information Center, Inc. v. Johnson* ("EPIC") (1985) 170 Cal.App.3d 604, 625.)

B. The EIR Does Not Include a List of Past, Present and Probable Future Projects or a Summary of Projections from an Adopted General Plan.

The EIR claims that the analysis in the cumulative impact section is based upon consideration of a list of projects near the proposed Specific Plan, referring to Table 4.0-1. (DEIR p. 273.) This table, however, does not even provide a list of present projects. (DEIR p. 275.) It omits any "approved and completed" projects. Only "pending" or "not completed" projects are evaluated. (*Ibid.*)

The list of projects also fails to include the nearby Globe development on Stevenson Boulevard in the City of Fremont. This project is mentioned in a letter from the City of Fremont, is mentioned in the Notice of Preparation for this Project, and is also referenced under traffic impacts in the DEIR. (DEIR p.55) The list of projects also fails to include the City of Fremont's Fire Training Facility which will be completed and operational by the end of 2010, located near the intersection of Eureka Drive and Stevenson Boulevard. (Final EIR, p. 39) Further, the cumulative impacts list fails to include the Newark Redevelopment Plan for the recently completed Newark Redevelopment Project Area No. 2.

The list of projects at Table 4.0-1 also omits "additional development planned" within the "Pacific Commons Area in Fremont (including the addition of the A's baseball stadium and 3,150 housing units in Fremont)." (DEIR p. 305 ["Additional development planned in the region includes . . . additional development within the Pacific Commons Area in Fremont (including the addition of the A's baseball stadium and 3,150 housing units in Fremont), and the conversion of infill sites and redevelopment of areas within the Cities of Fremont and Newark."].)

In addition, the map reflecting the location of projects considered (Figure 4.0-1) expressly omits the single biggest project in terms of number of housing units to be added (5,300 housing units) and the number of acres of land (1189 acres) to be developed. (DEIR pp. 274, 275 fn. 1.)

A list of past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency is "necessary to an adequate discussion of significant cumulative impacts." CEQA Guideline §15130(b)(1)(A).

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at least in part responsible for this loss and degradation."

C. The EIR Fails to Consider All Reasonably Foreseeable Future Projects as Part of the Cumulative Impact Analysis.

To the extent that Newark's update of its General Plan Housing Element makes future projects reasonably foreseeable, then those projects must be considered now as part of this cumulative impact analysis. Simply claiming that "there are no specific developments proposed as a part of this plan" (DEIR p. 273), does not obviate the need to consider reasonably foreseeable projects. Moreover, under Newark's approach deferring such analysis until the future when a specific housing project is proposed risks that the cumulative impacts will never be adequately analyzed as Newark at that time will consider the projects listed at Table 4.0-1 as existing conditions and give them no further consideration.

D. The EIR Fails to Define the Geographic Scope of the Area Affected by Each Cumulative Impact or Provide a Supporting Justification.

The EIR fails to define the geographic scope of the area affected by each cumulative effects analysis and fails to provide a reasonable explanation for the geographic limitation used, as required by CEQA Guideline 15130(b)(3). The EIR claims that the analysis in the cumulative impact section is based upon consideration of a list of projects "near the proposed Specific Plan" and mentions the cities of Newark and Fremont. (DEIR p. 273.) However, the EIR fails to provide any explanation of why it chose this geographic limitation. Likewise, the EIR's discussion of cumulative hydrologic and water quality impacts is limited to "the near vicinity," but doesn't define this geographic limitation or provide an explanation for why it was employed. (DEIR p. 306.) Even when an EIR determines a geographic area for each category of potential cumulative impacts, omission of an explanation as to the criterion upon which such a determination was made constitutes a failure to comply with CEQA Guideline 15130(b)(3). (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1216.) Further, selection of geographic areas that omit other closely related projects "does not constitute the good faith disclosure and analysis that is required by CEQA" (*Ibid.*)

E. The EIR Fails to Adequately Analyze Cumulative Land Use Impacts

The EIR states that in "terms of the cumulative [land use] analysis, land use compatibility can be divided into short-term and long term impacts." (DEIR p. 276.) This EIR discusses short-term impacts, but omits any discussion of long term land use impacts. CEQA mandates that an EIR discuss "*all* significant effects on the environment." (Pub. Res. Code §21100, subd. (b)(1), emphasis added.) Both direct and indirect effects "shall be clearly identified and described, giving due consideration to both the short-term and long-term effects, . . . including physical changes, and alterations to ecological systems." (CEQA Guidelines 15126.2; 15065(a)(2).) This is particularly important in considering cumulative impacts, which by definition "can result from individually minor but collectively significant projects *taking place over a period of time.*" (CEQA Guideline § 15355(b), emphasis added.)

While the EIR claims that "the thresholds of significance used throughout the analyses of cumulative impacts are the same listed as those listed in Section 3, Environmental Setting, Impacts,

and Mitigation of this EIR” (DEIR p. 273), that is not true.

For example, the EIR fails to consider cumulative land use impacts under the land use thresholds of significance of whether the projects cumulatively will 1) physically divide an established community, or 2) conflict with any applicable habitat conservation plan or natural community conservation plan, or 3) conflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project (including, but not limited to, the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect. (DEIR pp. 32-33, 276-277.)

By failing to analyze the project’s cumulative impacts using the EIR’s significance threshold of significance, the EIR fails to serve its informational purpose of alerting the public and decision makers of whether the project’s impact are significant. A threshold of significance for a given environmental effect is that level at which the project’s effects are normally considered significant. (*Communities for a Better Environment v. California Resources Agency* (“CBE”) (2002) 103 Cal.App.4th 98, 111; CEQA Guideline 15064.7, subd. (a).) “Because the purpose of an EIR is to determine if identify the project’s significant environmental impacts ([Pub. Res. Code] § 21002.1, subd. (a)), thresholds of significance play a role in determining if any of the possible significant environmental impacts will, in fact, be significant.” (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109.)

The EIR does include some consideration of cumulative agricultural land use impacts (DEIR p. 277), but even there the EIR fails to consider whether the projects cumulatively will “conflict with existing zoning for agricultural use” – one of the EIR’s stated land use thresholds of significance. (DEIR p. 33.) This is particularly troubling given that the EIR elsewhere concludes that “[i]mplementation of the Specific Plan would result in the loss of upland agriculture.” (DEIR p. 164.) Likewise, the EIR states that the “existing zoning designation for Area 4 are predominantly Agricultural (A).” (DEIR p. 32.) Approximately 270 acres of the 889-acre Proposed Project site is comprised of upland areas currently in agricultural production. (DEIR p. 118.) Instead, the EIR only states that the “Specific Plan area is not designated by the City General Plan for agricultural use” (DEIR p. 277), but avoids utilizing the designated threshold of significance of whether the projects will cumulatively conflict with existing zoning for agricultural use.

While CEQA requires consideration of the impacts of the project “in connection with” other projects, this EIR specifically excludes consideration of the Patterson Ranch project from its consideration of whether the projects will have a cumulative land use impact. “The Patterson Ranch property includes approximately 286 acres designated as prime farmland of the entire 428-acre site. With the exception of the Patterson Ranch property, the other cumulative projects and the proposed Specific Plan project would not result in the loss of lands mapped Prime Farmland, Farmland of Statewide Importance, and Farmland of Local Importance by the California Department of Conservation.” (DEIR p. 277.) The EIR can not exclude such a reasonably foreseeable project from its cumulative impact analysis.

F. The EIR Fails to Adequately Analyze Cumulative Traffic Impacts

The EIR's cumulative traffic analysis suffers from an impermissible ratio approach. CEQA Guideline 15065 (a)(3) states that a mandatory finding of significance is required where a "project has possible environmental effects that are individually limited but cumulatively considerable. 'Cumulatively considerable' means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects."

The EIR's flawed approach is manifest both in the EIR's stated cumulative traffic threshold of significance and in how the EIR applies this standard.

The EIR determines a significant cumulative traffic impact by comparing the impacts of "cumulative with project" to the impacts of all other projects without the project. (DEIR p. 277.) Under this approach, the worse that "cumulative without project conditions" are, the less significant that cumulative traffic impacts with the project will appear.

The flaw in this EIR's cumulative traffic approach can be seen by comparing Table 3.2-4 with Table 4.2-1.<sup>3</sup> (DEIR pp. 58-60; 279-281.) For example, the intersection of Cherry St and Thornton Avenue has PM level of service C with the project. Table 3.2-4. (DEIR p. 58.) This same intersection has degraded to PM level of service E under cumulative conditions with the project. Table 4.2-1. (DEIR p. 279.) While this would constitute a significant adverse impact under the thresholds of significance at EIR section 3.2.3.1 (significant if the level of service at the intersection degrades from an acceptable LOS C or better under background conditions to an unacceptable LOS D, E, or F under project conditions) (DEIR p. 54), the EIR reasons that it does not constitute a significant *cumulative* traffic impact. Why? Because cumulative conditions will already be at level of service E. Table 4.2-1. (DEIR p. 279.) Thus, the cumulative conditions with project at level of service E is judged insignificant.<sup>4</sup>

Because the EIR determines whether the Project's incremental traffic impacts are "cumulatively considerable" by evaluating them against the backdrop of the environmental effects of other projects, the EIR failed to determine whether there is a significant "cumulative" impact, and instead determined whether the effects of the "individual project are considerable." (*CBE*, 103 Cal.App.4th at 119.) The "relevant question" is whether "any additional amount" of effect should be considered significant in the context of the existing cumulative effect. (*Id.* at 118 & 120.)

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<sup>3</sup> Table 3.2-4 shows the level of service as a result of the proposed Project. Table 4.1-1 shows the cumulative intersection level of service with the proposed Project. (DEIR pp. 58-60; 279-281.)

<sup>4</sup> The same flawed approach can be seen at the intersection of Newark Blvd and 84E which is at PM level of service C as a result of the project (Table 3.2-4), and at PM level of service D under cumulative conditions with the project (Table 4.2-1), but is not considered a significant cumulative traffic impact. (DEIR pp. 58; 280.)

Conversely, this EIR's approach utilizes the "ratio theory/comparative approach" that was repudiated in both *Kings County, supra*, 221 Cal.App.3d 692 and in *Los Angeles Unified School District v. City of Los Angeles* (1997) 58 Cal.App.4th 1019. In *Los Angeles Unified School Dist.*, the court found an EIR's "ratio theory" trivialized the project's noise impact by focusing on individual impacts rather than their collective significance. (*Id.* at 1025.) The court held that the relevant issue was not the relative amount of traffic noise resulting from the project when compared to existing traffic noise, but whether any additional amount of traffic noise should be considered significant given the nature of the existing traffic noise problem. (*Ibid.*) The Newark SP EIR repeats the same flaw as in *Los Angeles Unified* by employing an impermissible "ratio theory" in analyzing cumulative traffic impacts.

G. The EIR Fails to Adequately Analyze Cumulative Biological Resource Impacts

The EIR fails to consider cumulative biological resource impacts utilizing the thresholds of significance designated at EIR section 3.5.3.1. (DEIR pp. 132; 305-306.)

The EIR's cumulative biological impact section avoids any analysis where it concludes that the Project's impacts would be "negligible" or "minimal." (DEIR p. 306.) This approach is flawed. The very purpose of CEQA's cumulative impact requirement is to consider whether incremental effects of individual projects are never-the-less significant when viewed in connection with other projects.

The EIR impermissibly assumes, without evidence or rationale, that mitigations prescribed for "all" otherwise significant cumulative impacts will be adequately mitigated, and thus that there will be no significant cumulative biological impacts.<sup>5</sup> (DEIR p. 306.) To fulfill CEQA's informational role, EIRs "must contain facts and analysis, not just the bare conclusions of a public agency. [] [T]he public and decision-makers, for whom the EIR is prepared, should also have before them the basis for that opinion so as to enable them to make an independent, reasoned judgment." (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831.) "There must be a disclosure of the analytical route the . . . agency traveled from evidence to action." (*Laurel Heights I, supra*, 47 Cal.3d at 404.) Thus, CEQA's required analysis of cumulative impacts cannot be avoided on the unsupported assumption that whatever impacts other projects may have will be mitigated. In *Kings County, supra*, the court held that:

The discussion in the EIR of cumulative impacts of energy developments similar to the GBF

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<sup>5</sup> This conclusion of insignificance is reached despite the EIR conceding that 1) planned and other proposed projects in Newark and Fremont "will impact some of the biological resources that will be impacted by the Areas 3 and 4 Specific Plan" project (DEIR p. 305), 2) impacts resulting from the Areas 3 and 4 Specific Plan project that are considered "less than significant with mitigation" would all contribute to cumulatively significance impacts in the region (*Ibid.*), and 3) the cumulative losses of seasonal wetland habitat around the South Bay are significant, and both direct and indirect impacts resulting from the Areas 3 and 4 Specific Plan would be significant without mitigation. (*Ibid.*)

project contains no list of the projects considered, no information regarding their expected impacts on groundwater resources and no analysis of the cumulative impacts. *It merely assumes whatever impacts such projects may have will be mitigated by existing and planned water conservation efforts of governmental agencies in the area. Absent some data indicating the volume of groundwater used by all such projects, it is impossible to evaluate whether the impacts associated with their use of groundwater are significant and whether such impacts will indeed be mitigated by the water conservation efforts upon which the EIR relies.*

(*Kings County, supra*, 221 Cal.App.3d at 729-730, emphasis added.) Here, rather than attempt to perform the required analysis of the cumulative impacts of related projects, the EIR impermissibly assumed, without supporting data, that all future projects will be adequately mitigated.

H. The EIR Fails to Adequately Analyze Cumulative Hydrology and Water Quality Impacts.

The EIR's discussion of cumulative hydrologic and water quality impacts only consider the project in combination with "future" or reasonably foreseeable projects (DEIR p. 306), thus impermissibly omitting consideration of past and present projects from its cumulative impact analysis.

The EIR fails to consider the designated thresholds of significance, including whether the proposed Project in combination with other projects will have a significant cumulative impact because they will 1) place housing within a 100-year flood hazard area as mapped on a Federal Flood Hazard Boundary or Flood Insurance Rate Map or other flood hazard delineation map; or 2) place structures within a 100-year flood hazard area, such that flood flows would be impeded or redirected; or 3) expose people or structures to a significant risk of loss, injury, or death involving flooding, including flooding as a result of the failure of a levee or dam; or be subject to inundation by seiche, tsunami, or mudflow; or 4) substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, or substantially increase the rate or amount of surface runoff in a manner which would result in flooding on-or off-site; or 5) substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, in a manner which would result in substantial erosion or siltation on-or off-site; or 6) create or contribute runoff water which would exceed the capacity of existing or planned storm water drainage systems or provide substantial additional sources of polluted runoff or otherwise substantially degrade water quality; or 7) substantially deplete groundwater supplies or interfere substantially with groundwater recharge such that there would be a net deficit in aquifer volume or a lowering of the local groundwater table level (e.g., the production rate of pre-existing nearby wells would drop to a level which would not support existing land uses or planned uses for which permits have been granted); or 8) violate any water quality standards; or 9) substantially degrade water quality; or 10) the Specific Plan does not meet Regional Water Quality Control Board (RWQCB) water quality objectives; would cause substantial erosion and sedimentation to occur in Mowry Slough, flood control channels, or San Francisco Bay; or would create or exacerbate a flood hazard. (DEIR pp. 306-307.)

The EIR's cumulative hydrologic and water quality section does not consider, or even mention, any of the projects in its Table 4.0-1 list. (DEIR pp. 306-307.)

The EIR's cumulative hydrologic and water quality section concludes that "future" projects will not create a cumulative flooding impact without considering the section 3.8.3.1 thresholds of significance such as whether projects cumulatively will 1) place housing within a flood hazard area, or 2) place structures within a 100-year flood hazard area such that flood flows would be impeded or redirected, or 3) expose people or structures to a significant risk of loss, injury, or death involving flooding or be subject to inundation by seiche, tsunami, or mudflow. (DEIR pp. 197; 306.)

The EIR impermissibly assumes, without evidence or rationale, that every project will comply with City, State and federal regulations and implement similar mitigations to the proposed Project, and thus that there will be no significant cumulative hydrologic and water quality impacts. (DEIR p. 307.) This violates CEQA. See *Kings County, supra*, 221 Cal.App.3d at 729-730.

I. The EIR Fails to Adequately Analyze Cumulative Energy Impacts

The EIR fails to analyze the cumulative energy impact using the EIR's threshold of significance, including whether the projects cumulatively will 1) result in a wasteful, inefficient, and unnecessary consumption of energy; or 2) result in a substantial increase in demand upon energy resources in relation to projected supplies; or 3) result in longer overall distances between jobs and housing. (DEIR pp. 267; 307-308.)

The EIR's cumulative energy section does not consider, or even mention, any of the projects in its Table 4.0-1 list. (DEIR pp. 307-308.)

The EIR's cumulative energy impact section states that it "is reasonable to assume that other planned and approved projects would be required to comply with Title 24 energy efficiency standards" and, therefore, that there will be no cumulative impact. (DEIR pp. 307-308.) This approach, without supporting evidence or rationale, is impermissible. See *Kings County, supra*, 221 Cal.App.3d at 729-730.

J. The EIR Fails to Adequately Analyze Cumulative Water Supply Impacts.

The EIR states that cumulative water supply impacts could be substantial (DEIR p. 273), but fails to discuss such cumulative impacts. In fact, the only reference to water supply impacts is under EIR section 4.4 "Cumulative Global Climate Change Impacts." (DEIR p. 298.) This section, however, is not a discussion of cumulative water supply impacts as it is expressly limited to "Impacts to the project from global climate change," not the cumulative impacts of the Project in connection with all past, present and reasonably foreseeable projects. (*Ibid.*) Thus, none of the projects listed at Table 4.0-1 are considered in connection with the Project as to their cumulative water supply impacts. (DEIR pp. 276; 298.)

Moreover, in discussing *mitigations* from global climate change the EIR considers "[a]ll projects within the ACWD [Alameda County Water District] service area" (DEIR p. 298), but fails

to include such projects as part of a cumulative water supply *impacts* discussion. If the EIR considers such projects relevant for mitigations, then certainly they must also be considered for the initial step of determining cumulative impacts. Finally, the EIR fails to consider the cumulative water supply impacts pursuant to the EIR section 3.12.3.1 thresholds of significance:

- will the project require water supplies in excess of available existing entitlements and resources;
- will the project the project require or result in the construction of new water treatment facilities or expansion of existing facilities, the construction of which could cause significant environmental effects. (DEIR p. 250.)

K. The EIR Fails to Adequately Analyze Mitigations for Cumulative Impacts.

The EIR's cumulative visual resources analysis summarily concludes that there are no feasible mitigation measures to reduce significant impacts and that this cumulative impact is unavoidable, without any analysis. (DEIR p. 307.) CEQA requires an EIR to set forth and analyze feasible mitigation measures to eliminate or minimize each significant impact. (Pub. Res. Code §§ 21002, 21002.1(a) & (b); CEQA Guideline 15126(e), 15126.4.) "An EIR shall examine reasonable, feasible options for mitigating or avoiding the project's contribution to any significant cumulative effects." (CEQA Guideline 15130(b)(5).) Here, the EIR has not even attempted to set forth mitigations for cumulative visual impacts.

The EIR defers impermissibly defers analysis of the feasibility of potential mitigations to significant cumulative noise impacts. (DEIR p. 305.) Failure to evaluate the feasibility of any and all mitigation measures is "fatal to a meaningful evaluation" of a project. (*Kings County, supra*, 221 Cal.App.3d at 728; CEQA Guideline § 15126.4(a)(1).)

**III. THE EIR DOES CONTAIN THE REQUIRED LEVEL OF ANALYSIS OF PROJECT IMPACTS AND MITIGATIONS GIVEN WHAT IS KNOWABLE ABOUT THIS PROJECT**

The degree of specificity required in an EIR corresponds to the degree of specificity involved in the underlying activity. (CEQA Guideline 15146.) Where the effects can be predicted with greater accuracy, the EIR must be more detailed. (*Ibid.*) In *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 203 the court held that analysis of significant effects may not be deferred to later developments under the specific plan, nor to later tiered EIRs. The court concluded that the county could not defer the analysis of crucial impacts to later environmental documents that would be prepared as the specific plan was implemented. The Stanislaus court found that a specific plan EIR failed to discuss the impact of providing a long-term water supply for the project, and thus the county could not make an informed decision regarding the environmental consequences of the project.

This EIR concedes that it "provides a somewhat lesser degree of specificity," because the activity is solely a Specific Plan, General Plan Amendment and a Zoning Amendment. (Final EIR p. 45.) However, the proposed Project includes more than a specific plan. The approvals include a development agreement (DEIR p. 2), and therefore the EIR must contain adequate environmental

review commensurate with the proposed granting of such vested rights. A proposed Development Agreement was belatedly released on June 7, 2010, and reveals that substantially all of the Project site (583 acres) is controlled and owned by one developer - Newark Partners, LLC. Because one party controls the development, it was reasonably possible for the specifics of the project to described, analyzed and mitigated with far greater accuracy.

Instead, this EIR impermissibly defers more specific analysis on the basis that more details were unknown at this time. However, the only reason that project details “were not known” is because Newark circulated an EIR for the Project before it had the details of the Development Agreement – an integral part of the Project – in its possession. The EIR defers analysis as to adverse impacts to wetlands, including the amount and type of wetlands affected, as well as impacts to associated habitats. Likewise, the EIR defers formulation and analysis of mitigation measures, including, *inter alia*, mitigations for wetland impacts. For example, the EIR states that since “the amount of ultimate wetland fill is unknown,” future specific development proposals “must quantify their impacts to wetlands and other biological resources, and then propose in a mitigation plan specifically how and where those impacts will be minimized.” (Final EIR, p. 12:) The location, size, and design of such future mitigation “are unknowable at this time.” (*Ibid.*)

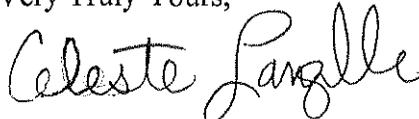
Adding insult to injury, this EIR foresees that all projects implementing the Project will be either exempt from CEQA review or will undertake minimal subsequent review in the form of an SEIR or Negative Declaration. For example, future “[t]entative maps will be evaluated to determine if the proposed action is consistent with the Specific Plan and, therefore, exempt from further CEQA review.” (DEIR p. 2.) Likewise, “[s]ubdivisions conforming to the Specific Plan shall be approved and shall be deemed exempt from CEQA.” (Final EIR p. 333; Newark Specific Plan Area 3 & 4 of the General Plan (March, 2010) p. 26.) “When future discretionary approvals related to the Project are sought from the City (as well as from any responsible agency) the City will consider whether there is a need for additional environmental review pursuant to CEQA Guidelines section 15162.” (Final EIR p. 45.) Conversely, the City may determine that no such further review is necessary unless it finds substantial changes or new information. (*Ibid.*)

### **Conclusion**

For the foregoing reasons, CCCR urges the Planning Commission not to recommend certification of the EIR at this time. Instead, an EIR which corrects the CEQA deficiencies pointed out by CCCR and the members of the public should be prepared and circulated.

Thank you for your attention to this matter.

Very Truly Yours,



Celeste C. Langille