



## CITIZENS COMMITTEE TO COMPLETE THE REFUGE

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Dear Mr. Grindall,

The Citizens Committee to Complete the Refuge continues to urge the City to correct the substantive flaws of the Environmental Impact Report (EIR) for the Area 3 & 4 Specific Plan Project and to re-circulate a revised document that remedies the issues identified by CCCR, its consultants and attorneys, other environmental groups and resource and regulatory agencies.

**Area 4 mitigation measures for biological impacts are inadequately described:**

**Importance of Upland Transition Zones to the Functional Values of the Wetlands and Preservation of Endangered and Common Bay edge Species:**

The EIR/FEIR maintains adequate mitigation has been provided to offset the significant adverse impacts to upwards of 85.6 acres of direct wetland fill. The EIR/FEIR do not provide sufficient information regarding potential acreage of indirect impacts to wetlands nor does the document indicate the acreage of impacts to wetlands that could arise through efforts to “create” new wetlands out of uplands, or “enhancement” activities of existing on-site wetlands. Thus it is impossible to determine if the full extent of impacts have been identified or mitigated.

The DEIR (p. S-8) MMBIO-1.2A - Impacts to wetland and aquatic habitat on the site states:

- Future project proponents will utilize a combination of on-site wetland creation and enhancement, and/or acquisition of existing wetlands located off site.
- On-site component will include the **creation of wetland and aquatic habitat within the upland that is currently disked and graded w/in Area 4** and will enhance portions of remaining areas of agricultural field/seasonal wetland habitat (emphasis added)

The DEIR also indicates:

“The Specific Plan is consistent with the Refuge approved acquisition boundary. The value of Area 4 **in providing upland transition zones adjacent to tidal wetlands has also been identified by the Baylands Ecosystem Habitat Goals Report (1999)**, a report of habitat recommendations prepared by the San Francisco Bay Area Wetland Ecosystem Goals Project, a consortium of nine state and federal agencies, including the San Francisco Estuary Institute.” (page 115).

MMBIO-1.2A is inconsistent with the stated and regionally documented need to preserve upland transition zones as retreat habitat for the recovery of listed species in the face of sea level rise. MMBIO-1.2A attempts to mitigate for the loss of filled wetlands by creating/enhancing wetlands out of other habitats of importance for

survival of bay edge species. This measure would destroy the unique mosaic of habitats these lands currently host - a multitude of wetlands and upland habitats as indicated in Table 3.5-2 (page 115) that provide habitat resiliency and preserve regional biodiversity.

FEIR Master Response 2 statement (p. 11) implies all of the remaining undeveloped uplands in Sub Area E could be impacted through wetlands creation:

Assuming full development and 85.6 acres of wetland impacts, the creation portion of the wetland mitigation standard would require the creation of 85.6 acres (applying the creation ratio of 1:1) of wetlands in areas that are currently uplands. **Sub-Area E, which would remain undeveloped, contains approximately 35 acres of uplands that could be used for wetland creation.** As a result, 50.6 acres of such wetland fill could not be mitigated within Area 4, and would instead have to be mitigated through the alternative mitigation option (MM BIO-1.2B) which allows for the acquisition and permanent preservation of existing wetlands at a ratio 1.5:1 (habitat preserved: habitat impacted) at an approved wetland mitigation bank (i.e. off site) or other private lands within 10 air miles of the Project and located along the eastern shore of south San Francisco Bay within the same geographic watershed. (emphasis added)

This master response is **internally inconsistent** with other comments provided in the FEIR.

The USFWS commented on the DEIR:

**COMMENT A-2:** *Comment 2: S-8, BIO-1, Mitigation Measure 1.2:* Upland habitat areas onsite should not necessarily be destroyed to create/enhance wetland for mitigation of impacts. Adjacent uplands and adequate upland/marsh ecotone should be included in the wetland creation/enhancement design. These higher areas provide critical high tide refugia for marsh species like the salt marsh harvest mouse and California clapper rail. The Refuge is currently experimenting with ecotone and adjacent upland restoration at their Environmental Education Center.

THE FEIR response to Comment A-2 stated, **“It is fully acknowledged the importance of the upland/wetland ecotone in and adjacent to marsh habitats** even though the future wetland mitigation will not be tidally influenced. The City agrees that the **future design related to wetland creation should maintain a mosaic of upland and wetland habitats**, particularly in the southern portion of the project site” (page 14). (emphasis added)

The master response comment and approach to wetland mitigation is in conflict with the above statement to “maintain a mosaic of upland and wetland habitats.” There is no mitigation plan offered for uplands in the EIR/FEIR. Conflicting comments such as these call into question even the basic intent of the mitigation measures.

The EIR/FEIR provides conflicting statements regarding the importance of the upland transition zones that occur onsite and how they will be impacted by proposed mitigation measures. The documents recognize the regional importance of the upland habitat, their value for tidal marsh species as sea level rises and yet no mitigation is proposed to offset the loss of this important upland habitat.

The DEIR indicates that:

*“A detailed mitigation plan shall be developed by a qualified biologist under contract to each future developer for individual development projects within the Specific Plan area which result in direct impacts to wetland habitats. This plan will be submitted and approved by the City of Newark prior to the initiation of grading within wetlands (page S-9).*

This statement fails to acknowledge that no grading permit should be authorized anywhere on the site until a comprehensive mitigation plan has been submitted and reviewed by the regulatory and permitting agencies. Issuance of a grading permit for any portion of the site may have negative indirect impacts on wetlands, may have direct impacts on survival of endangered species through the loss of upland refugia habitat, may compromise the ability to provide the necessary wetland mitigation and would be an irretrievable commitment of resources.

The EIR/FEIR does not demonstrate that sufficient land is available on-site or off-site to mitigate for the loss of 85.6 acres of wetlands and the transitional upland habitat needed to maintain the ecological functions of the various wetlands types and survival of bay edge species.

There is no conceptual comprehensive mitigation plan for the area that demonstrates how all the required mitigation measures might be accomplished on site and how they might interface with each other. Such an overview is necessary to guide future decision makers and developers as review of impacts and review of mitigation will be piece-mealed, and each developer will be required to develop their own mitigation plan.

The approach also fails to recognize the role of regulatory and resource agencies in permitting this project. Newark city staff lacks the qualifications to determine what is or is not appropriate biological mitigation.

The DEIR further indicates that:

*A detailed mitigation plan will outline the necessary steps for mitigation; including plan view graphic of target mitigation activities, brief seeding plan, and monitoring and reporting plan, including success criteria.*

This statement assumes sufficient information has already been provided and is known about the adequacy of upland sites for supporting wetlands creation e.g. sufficient hydrology, soils, etc. No discussion of the adequacy of these lands to serve as mitigation is provided. The EIR/FEIR does not discuss the existing conditions of the site to support the feasibility of mitigation nor does it address the changed conditions of the site after development has occurred. These changed conditions may include 2.1 M cubic yards of fill that may impact local hydrology, soundwalls along the length of UPRR tracks that will require significant deep foundations that may disrupt the lateral flow of groundwater recharge to the lands, artificial irrigation of golf course turf that may change local hydrology and introduce herbicides, pesticides, rodenticides and fertilizers that may indirectly impact the ability of the land to support the targeted mitigation habitat and/or listed species.

The DEIR further indicates that:

*Potential impacts associated with grading activities required for mitigation of seasonal wetlands have been considered during this current specific plan CEQA impacts analysis no additional significant impacts have been identified.*

This simply cannot be known without at least a conceptual mitigation plan that indicates the locations of mitigation areas and their relationship to the existing mosaic of wetlands and transitional uplands scattered across Area 4. No attempt is made to offer this level of detail or even indicate conceptually what areas are considered impacted by the direct placement of fill, by the indirect impacts of the changed conditions resulting from the fill and the direct and indirect impacts of mitigation measures placed on the remaining landscape.

Furthermore there are inconsistencies in the number of wetland acres that will be impacted. The biological resources section and summary indicates 85.6 acres of impacted wetland habitat, but in Appendix G – Hydrology and Water Quality Report the Environmental Impacts section (page 7) indicates a total of 92.4 acres of wetlands in Sub Areas B, C and D could be filled if the site is fully developed with housing and a golf course.

**THE DEIR MM BIO-1.2B indicates:** Alternatively, **at the discretion of the project developer(s), and as approved by the City of Newark**, all or a portion of the mitigation requirements for impacts to seasonal wetland habitats, may be satisfied through the acquisition and permanent preservation of existing wetlands at a ratio 1.5:1 (existing habitat: habitat impacted) at an approved wetland mitigation bank (i.e. off site) or other private lands. (emphasis added)

This decision should certainly not be left to the discretion of the project developers. In addition, there is no indication of where such private lands might exist, no indication of how the lands would be acquired, and no conceptual plan of how mitigation will occur on the site. Acquisition and preservation does not equal “no net loss” as is the policy of the State.

FEIR Master Response 2:

Ultimately, if the developer cannot comply with the wetland mitigation proposed in the Draft EIR, then they cannot build their project utilizing the maximum footprint as shown in the Draft EIR. Prior to obtaining City approval for any development that would fill wetlands in Area 4, the applicant will be required to demonstrate precisely how and where the Draft EIR wetland mitigation measures will be satisfied. **If the developer is unable to satisfy the wetland mitigation measures in a full development scenario, then the developer will have to reduce the scope of the proposed development and the associated wetland impacts to the degree necessary to be able to satisfy the wetland mitigation measures. Note that wetland creation could occur not just in Sub-Area E, but also elsewhere within Area 4. For example, instead of fully developing all of Sub-Area B, a portion of Sub-Area B could be developed, and the remaining uplands in Sub-Area B could be used to create wetlands in order to satisfy the Draft EIR wetland mitigation requirements. There are approximately 154.6 acres of upland habitat within Sub-Areas B, C, and D that could be used to create wetlands. In this scenario it is likely that all wetland creation mitigation could be completed on-site.**

This statement demonstrates that based upon the information provided in the EIR/FEIR we have no way of knowing how this area will be developed, where mitigation will occur onsite and what it's proximity will or won't be to the development envelope. This is important with respect to indirect impacts of the development on the mitigation site and with respect to habitat continuity – patches of mitigation surrounded by the development envelope are unacceptable mitigation. Nor is it possible for the City to determine if the development project is feasible and/or would produce sufficient property tax revenues to offset public service liabilities associated with a development on the outskirts of the City.

The focus on mere replacement of wetland acres may jeopardize the local populations of salt marsh harvest mouse and salt marsh wandering shrew. The mitigation proposed (aside from the puzzling master response

above) has been focused in Sub Area E – converting the uplands in this area to wetlands, presumably by soil removal to lower the topographic position and allowing the former uplands to be inundated by rainfall or springs. This would remove higher elevation escape habitat for the salt marsh harvest mouse and salt marsh wandering shrew, leaving only the developed areas as less than desirable escape habitat that would further imperil these species.

**Deferral of Mitigation:**

FEIR Master Response 2 states:

Since the amount of ultimate wetland fill is unknown, the Draft EIR established rigorous mitigation requirements and standards that will be implemented in the future through the City entitlements process as specific development proposals seek approval to construct within Areas 3 and 4. **Those 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 consistent with the standards established in the EIR. As a result, the specific location of such future mitigation (either on-site, or off-site), and the size and design of future created or enhanced wetlands, are unknowable at this time.** As described in MM BIO-1.2A, such future mitigation plan(s) will be prepared, submitted, and approved by the City of Newark prior to initiation of any grading within or fill of wetlands. (emphasis added)

The “rigorous mitigation requirements” appear to be the 1:1 creation ratio and the 0.5:1 enhancement ratio, as well as the ratios for burrowing owl, waterbird, and salt marsh harvest mouse/wandering shrew ratios. There are numerous mitigation measures that might reduce the adverse impacts of the development on the preserved wetlands...measures regarding water quality, invasive species control, however, there is very little language regarding the standards future mitigation monitoring plans must adhere to in order to demonstrate the feasibility of the mitigations proposed – the focus is all on the monitoring requirements. This omission was described in the RWQCG comment letter cited in this review below. The ratios for creation and enhancement of wetlands, and salt marsh harvest mouse/wandering shrew are not likely to be acceptable to the resource or regulatory agencies as demonstrated by the RWQCB comments and CDFG. The manner in which the City proposes to identify on-site habitat available for burrowing owl is not likely to be acceptable to resource agencies (e.g. foraging habitat could be golf course, levees, etc.) The burrowing owl discussion in Appendix E p. 110 has slightly more protective language than that found in the EIR itself. The mitigation and monitoring report standards set by the City are inadequate and not up to the standards of the regulatory agencies as demonstrated by the RWQCB comments. Neither the City nor the public has any certainty based upon the requirements of the EIR to determine whether the adverse biological impacts of the proposed “project” will be mitigated. We have only the City’s promise that it will be.

The U.S. Fish and Wildlife Service (USFWS) commented about the uncertainty that off-site mitigation could occur and provided guidance on the additional information that would be required:

**COMMENT A-3:** *Comment 3: S-8, BIO-1, Mitigation Measure 1.2:* It is unclear where acquisition of off-site wetlands for mitigation would occur. There are few mitigation banks left in the South Bay. Areas should be clearly identified in the DEIR to determine if they sufficiently address impacts of the proposed action. Any mitigation for the proposed action should result in one specific mitigation site with a detailed restoration plan. Individual detailed mitigation plans developed by each future developer as proposed in the DEIR will result in a fragmented patchwork of small parcels of poor quality wetland.

Furthermore, any mitigation sites should include an endowment to support long-term management success.

The City responded:

**RESPONSE A-3:** Specific off-site wetlands for mitigation, if needed, **will be identified as part of the future entitlement process and environmental review.** The basic criteria for the location of off-site wetlands are described in the Draft EIR as having to occur within 10 air miles of the current project site and are to be located along the eastern shore of the South San Francisco Bay within the same geographic watershed. The City also notes that *California Native Plant Society v. City of Rancho Cordova* (2009)172 Cal.App.4th 603, confirmed an EIR need not identify specific habitat mitigation sites and that the City could rely on the result of a future study to determine replacement habitat location. (emphasis added)

To our knowledge there are no mitigation banks in existence within the area specified and few public lands that could be acquired. The only site the City has provided is a proposed mitigation bank along Newark Slough that has been proposal stage for at minimum three years, and already supports a majority of wetlands habitat. According to the City this site has the potential for 20 acres of mitigation credits should it ever become available. It is not unreasonable under these circumstances to ask the City to provide additional credible documentation that indicates mitigation for impacts to 85.6 or 92 acres of wetlands can be accomplished.

#### **Mitigation Feasibility:**

Please refer to Comment E-3 of the RWQCB:

#### **COMMENT E-3: Comment 3 Section 3.5, Biological Resources, 3.5.3.2, Impacts and Mitigation Measures for Biological Impacts, Pages 135 and 136.**

Implementation of the Specific Plan would result in the loss of up to 85.6 acres of wetland/march/aquatic habitat, including 7.65 acres of salt marsh harvest mouse/salt marsh wandering shrew habitat. As mitigation for this significant impact the DEIR offers Mitigation Measure BIO-1.2A.

To offset impacts to the wetland and aquatic habitat on the site, the future project proponent(s) will utilize a combination of on-site wetland creation and enhancement, and/or acquisition of existing wetlands located off site. The on-site component of the mitigation shall include creation of wetland and aquatic habitat within upland habitat that is currently disked and graded within Area 4 and will enhance portions of the remaining areas of agricultural field/seasonal wetland habitat within Area 4, as described below.

Compensatory mitigation for impacts to these habitats shall consist of two parts: (1) creation of high quality wetland and aquatic habitat within Area 4 within upland habitat at an acreage ratio of 1:1 (habitat created/enhanced:habitat impacted) to prevent any net loss of habitat functions or values, and (2) enhancement of existing seasonal wetland habitat that is currently within agricultural production (mapped as agricultural field/seasonal wetland habitat) at an acreage ratio of 0.5:1 (such enhancement will include cessation of farming activities, seeding with appropriate seasonal wetland plant seeds, and may include minor earth moving activities). In summary, any impacts to seasonal wetlands, freshwater marsh, brackish marsh, detention basin, and aquatic habitat will be mitigated at a total acreage ratio of 1.5:1 (habitat created and enhanced: habitat impacted).

The *San Francisco Bay Area Wetlands Ecosystem Habitat Goals Project* recommended that the tidal marsh/upland transition zone of Area 4 be protected and enhanced, including the tidal marsh/upland transition at the upper end of Mowry Slough and in the area of the Pintail Duck Club (all located in Area 4). In addition, the Don Edwards San Francisco Bay National Wildlife Refuge (Refuge) has expressed strong interest in acquiring Area 4, because of its significance as habitat for endangered species and location adjacent to the Refuge, and the Bay Conservation and Development Commission (BCDC) has expressed interest in restoring the diked historic baylands in Area 4 to tidal action and enhancing the wildlife values of the onsite wetlands.

The proposed mitigation quantities appear to be insufficient to compensate for the impacts associated with the fill of wetlands in Area 4. **Since Area 4 is one of the largest remaining areas of open space along the baylands, provides habitat for endangered species, and is adjacent to the Refuge, impacts to Area 4 will be regionally significant and mitigation for any impacts that are allowed to occur at Area 4 should reflect the significance of the lost habitat.** In order to protect the Beneficial Uses of preservation of rare and endangered species and wildlife habitat, the Water Board is not likely to authorize fill of wetlands at Area 4, **unless mitigation was demonstrably capable of providing equal habitat benefit for listed species. The proposal to convert some areas of uplands in Area 4 to wetlands is also problematic, since a combination of wetlands and associated uplands are essential to high habitat value.**

**At present, the DEIR does not demonstrate that adequate mitigation is available.** Onsite mitigation will be compromised by its proximity to the development envelope of the site, which will introduce noise pollution, light pollution, and domestic animals into the vicinity of preserved or enhanced habitats. **The DEIR does not identify any feasible locations for offsite mitigation.** There are very few parcels of undeveloped land in private ownership that are available for use as mitigation wetlands, and are in proximity to protected lands that currently provide habitat for listed species.

Proposed mitigation measures should be presented in sufficient detail for readers of the CEQA document to evaluate the likelihood that the proposed remedy will actually reduce impacts to a less than significant level. CEQA requires that mitigation measures for each significant environmental effect be adequate, timely, and resolved by the lead agency. In an adequate CEQA document, mitigation measures must be feasible and fully enforceable through permit conditions, agreements, or other legally binding instruments (CEQA Guidelines Section 15126.4). Mitigation measures to be identified at some future time are not acceptable. It has been determined by court ruling that such mitigation measures would be improperly exempted from the process of public and governmental scrutiny which is required under the California Environmental Quality Act.

**The current DEIR does not demonstrate that it is feasible to mitigate all of the potentially significant biological impacts of the Project to a less than significant level. Although the current CEQA document covers a Specific Plan, it should contain proposed mitigation measures at a sufficient level of detail to allow an assessment of the feasibility of the proposed mitigation.** Such proposed mitigation measures should be presented in sufficient detail for readers of the CEQA document to evaluate the likelihood that the proposed remedy will actually reduce impacts to a less than significant level. Such a demonstration could include the identification of available land for mitigation actions and the measures that would be necessary to establish mitigation wetlands on those properties. We encourage the City of Newark to revise the DEIR to include specific mitigation proposals for major impacts to wetlands and marsh habitats. In the project-level DEIRs, mitigation proposals should be provided in even greater detail.

The revised DEIR should be re-issued for public review. Including specific mitigation measures in a Final EIR is inappropriate, since this information would not have been subject to public review before the Final EIR was adopted. **Since the DEIR does not even include a conceptual mitigation plan, we are not able to assess whether or not it is possible to provide sufficient mitigation to reduce Project impacts to a less than significant level.** We encourage the City of Newark to revise the DEIR to include conceptual mitigation plan(s).

**The conceptual mitigation plan(s) should include factors to account for potential distances between the areas of impact and the mitigation sites, temporal losses of habitat, and the uncertainty of success associated with any mitigation project.** When mitigation is constructed, enhanced, or preserved offsite, the amount of mitigation should be increased to account for the distance between the impact site and the mitigation site. We also encourage project proponents to construct mitigation projects before impacting waters of the State. When impacts occur prior to the full functioning of mitigation sites, mitigation is required for the temporal loss of habitat between the time that habitat is impacted and the time that the mitigation site has developed sufficiently to be fully functioning as habitat. The amount of proposed mitigation should also account for the uncertainty associated with the successful creation of any wetland mitigation site.

**The conceptual mitigation plan(s) should contain sufficient detail to demonstrate that proposed mitigation project(s) are hydrologically feasible and accessible to impacted wildlife species.** Mitigation should also be “in kind” as much as is feasible. When mitigation is not “in-kind”, then the amount of mitigation must be increased to compensate for the disparity. (emphasis added)

The City of Newark’s response is to merely refer to the inadequate master response regarding mitigation.

#### **Master Response 2:**

There are potential mitigation sites within the 10 mile radius the Draft EIR proposed, which extends approximately from Hayward to Milpitas. The commenters are correct in stating that at present no formal mitigation bank is approved to sell wetland credits; however, as an example, there is a proposed bank very near the project site, called the Newark Slough Mitigation Bank, that is currently going through the approval process; that bank advertises 20+ acres of wetlands available for mitigation. Also, for clarification, the mitigation in the Draft EIR states “or other private lands” thus, off-site mitigation is not limited to formal mitigation banks.

If one looks along the shoreline from Hayward to Milpitas there are few privately-owned parcels remaining...the mitigation bank that is mentioned has been “in the works” for approximately five years and has not gone forward, moreover as mentioned by the RWQCB comment all the lands of that mitigation bank are existing wetlands that would be enhanced...there is no acreage available for creation in the amount required by this project. As a result the project could not achieve a “no net loss of wetlands” within the 10 miles noted in the EIR/FEIR as is required by the State.

The RWQCB in a comment letter responding to the FEIR states:

While the Water Board and the City of Newark appear to be in basic disagreement over the level of detail necessary for the discussion of proposed mitigation measures in the FEIR, we would like to point out that the City itself set the parameters for off-site mitigation by specifying that “off-site locations

shall currently support wetlands of sufficient quantity and quality to satisfy mitigation requirements,” and “wetland mitigation shall occur on lands located within 10 air miles of the current project site and shall be located along the eastern shore of south San Francisco Bay within the same geographic watershed.” The FEIR fails to demonstrate that the City can achieve its own objectives for offsite mitigation, using either mitigation banks or other private lands. At most, the FEIR refers to a potential mitigation bank that may be capable of providing less than half of the mitigation necessary for impacts proposed to wetlands at Area 4 (RWQCB, June 23, 2010).

The RWQCB goes on to further state that:

We would like to point out that the resource agencies have not concurred with this assessment. When the City of Newark teams with individual developers to implement the Specific Plan, the City and developers should be aware that mitigation as proposed in the FEIR would appear to be far short of the mitigation that will be necessary to secure permits from the resource agencies for the impacts proposed to wetlands in Area 4. Therefore, project-level CEQA documents will likely be necessary to support permitting of Specific Plan implementation projects.

We would also like to reiterate that, by certifying the FEIR as written, the City should not assume that the Water Board or other resource agencies will allow the fill of the wetlands at Area 4 as proposed. Since Area 4 is one of the largest remaining areas of open space along the baylands, provides habitat for endangered species, and is adjacent to the Refuge, impacts to Area 4 will be regionally significant, and mitigation for any impacts that are allowed to occur at Area 4 should reflect the significance of the lost habitat. In order to protect the Beneficial Uses of preservation of rare and endangered species and wildlife habitat, the Water Board is not likely to authorize fill of wetlands at Area 4, unless mitigation is demonstrably capable of providing equal habitat benefit for listed species.

The City should recognize that large expanses of undeveloped uplands immediately adjacent to tidal sloughs are extremely rare in the south and central San Francisco Bay. Area 4 represents a rare opportunity to restore this complex of habitats in continuum with the bay, provide connectivity with the Refuge, and provide an area for tidal marsh species to transgress (move up slope) in response to sea level rise. The U.S. Fish and Wildlife Service (USFWS), California Department of Fish and Game (CDFG), the Bay Conservation and Development Commission (BCDC), and the Water Board have all expressed strong reservations about the potential fill of wetlands in Area 4...

In summary, the FEIR as written does not demonstrate that impacts associated with the proposed fill of wetlands in Area 4 can be successfully mitigated to a less than significant level. Therefore, the FEIR is not likely to support the issuance of future permits from the Water Board for fill of waters of the State under the Specific Plan. We encourage the City of Newark to request an inter-agency meeting with the Army Corps, BCDC, CDFG, USFWS, and the Water Board (RWQCB, June 23, 2010).

#### **Infeasibility of Mitigation Measures for Indirect Impacts to Wildlife Species:**

The FEIR states:

According to the professional opinion of the City’s project biologist, *H.T. Harvey & Associates*, development of the golf course or residential areas on Area 3 will not result in substantial increases in the numbers of potential predators in natural habitats on Area 4, as the golf course will not provide substantially increased or improved resources for such species and Area 3 will be separated from on-site

conservation areas by distance and existing and new development. The increase in potential predators as a result of residential development on Area 4 is not expected to be so great as to require trapping, predator-proof fences, or other such intensive measures, primarily due to the relatively limited number of new residences proposed on Area 4.

Nevertheless, the Draft EIR acknowledged that an increase in predation by domestic and urban-adapted species may occur and could potentially affect burrowing owls, salt marsh harvest mice, salt marsh wandering shrews, and other sensitive species. In response to the suggestion that a predator management program be developed, the EIR has been revised to incorporate **Mitigation Measure BIO-4.7**, which requires the development and implementation of such a management program for new residential development in both Area 3 and Area 4. The program will **prohibit**, at a minimum, feeding pets outdoors so that pet food does not attract or subsidize the diets of nuisance species and **off-leash dogs in conservation areas** and **no free-roaming outdoor cats**, to prevent their entry into sensitive species habitat. Refer to Section 4.0 *Revisions to the Text of the Draft EIR*. This management program is being required as a mitigation measure to reduce impacts to burrowing owls, but it would potentially benefit other sensitive species such as salt marsh harvest mice, salt marsh wandering shrews, waterbirds, and other species as well.

The proposed mitigation sounds good on paper, but the City proposes “neighborhood associations” would be responsible for education and enforcement of this mitigation measure. There is no provision to ensure this measure will be enforced and frankly, how will the neighborhood association realistically ensure there are no free-roaming cats? This mitigation measure is therefore unenforceable and infeasible.

#### **Additional “Feasibility” Concerns:**

p. iii, Appendix E proposes the following mitigation measures:

4) incorporating design features to **minimize runoff** from the golf course and residential areas to natural habitats **during the summer months** to maintain seasonal patterns, 5) **limiting nuisance flows** generated by the project development **by conserving water**, and 6) **retaining any remaining dry-season nuisance flows** within the development footprint.

How is it possible to alter dry season flows without impacting flows that would normally be delivered to the wetland areas during the rainy season? How would “conserving water” be enforced within the residential development and who would be responsible?

#### **Open Space and Conservation Goals and Policies:**

Proposed specific plan is in conflict with the General Plan.

*Policy b. Encourage private property owners to preserve unique open space areas and natural features on their lands.*

*Program 10: Evaluate every land development proposal for potential contributions to the Newark open space system. **Identified unique open space, vegetation, animal habitat or natural resource areas should be protected where possible and appropriate.***

In contrast to this policy and program the FEIR Responds:

A-1 - The Boundary Expansion Area does not impose any restrictions on the use or development of Area 4. Instead, it merely identifies lands which the U.S. Fish and Wildlife Service could acquire and readily incorporate into the existing Refuge if it chose to do so. However, in the 20 years since this expansion area was identified, the USFWS has not pursued any such expansion onto Area 4 lands.”

The Refuge Expansion Boundary identifies lands that are important to maintenance of bay biodiversity, lands that should be acquired and preserved because of their rarity and ecological value. The fact that the Refuge has not acquired these lands speaks to issues of costs of acquisition – not the ecological value of preserving these lands.

**Inconsistencies in Describing the Biological Resources of the Site:**

Page 81 of the EIR states:

Depending on the ultimate Project design, the **majority of the upland agriculture, ruderal herbaceous field, developed habitats, and portions of the coastal scrub habitat could be lost through grading and construction of proposed Project elements, including housing and/or the golf course.** These habitat types are grouped together for the purpose of this impact discussion because **these upland habitats are not considered sensitive or regulated habitats** as are the wetland, aquatic, and marsh habitats, and because they are relatively abundant regionally. The development and construction of the Project components (which may include a golf course, housing, and associated infrastructure) could result in the loss of nesting, foraging, roosting, burrowing, and breeding habitat for a variety of wildlife species and the loss of habitat for many plant species and their associated plant communities. Due to the level of existing disturbance from agricultural use, these habitat types represent low-quality habitat for most native plants and wildlife. Few native plants are generally found in these non-sensitive habitats. Likewise, the lack of contiguity between these habitats in Areas 3 and 4 and undisturbed habitat elsewhere diminishes their value to native plants and rare wildlife species. **Wildlife that use these habitats, described previously under *Biotic Habitats*, are mostly relatively common, widespread species.** (emphasis added)

In contrast p. 12 of the same appendix states:

While the City of Newark General Plan has identified development that is projected to occur within Area 4, **this area has also been identified for its ecological value by regional planning efforts.** The southern and western portions of Area 4 were included in the approved 1990 Refuge Boundary Expansion area of the Don Edwards San Francisco Bay National Wildlife Refuge (SFBNWR), indicating that these lands were pre-approved for addition to the Refuge in the future. The Baylands Habitat Goals Project (1999) includes recommendations to “protect and enhance the tidal marsh/upland transition at the upper end of Mowry Slough and in the area of the [former] Pintail Duck Club.” Being situated between existing salt production ponds that were formerly tidal wetlands and vernal pool habitat east of the site, Area 4 **provides one of few areas in the South Bay with upland habitat transitioning between tidal wetlands and vernal pools, and the Goals Project identified the site’s potential value in providing upland transition zones adjacent to tidal wetlands.** (emphasis added)

This language appropriately acknowledges the regional value of the former duck clubs site. Cumulatively the loss of upland diked baylands in proximity to tidal waters are extremely rare in the south bay and of great value in protecting species such as the endangered salt marsh harvest mouse and imperiled (but not listed) salt marsh wandering shrew. Upland areas will be of increasing importance to species such as these in the face of sea level rise. The assumption that these areas are “mostly relatively common, widespread” is not consistent with the

latest language from the State of California regarding the importance of preserving low-lying areas for wildlife escape habitat as sea level rises, or the Draft Tidal Marsh Ecosystem Recovery Plan that identifies upland transition ecotones as important habitat for the recovery of high marsh species.

It is evident the EIR for the Area 3 & 4 Specific Plan Project is fatally flawed.

- Inadequate information is provided at even the most conceptual level on how impacts to wetlands will be mitigated on-site
- the acreages of impacts are internally inconsistent between varying sections and appendices of the document
- there are inconsistencies in the statement of the values of the lands that will be impacted
- there is no mitigation provided for impacts to regionally significant upland habitat
- some mitigation measures proposed are infeasible or unenforceable
- the review of project impacts and mitigation will be piece-mealed as we are unable to determine the full extent of direct and indirect impacts at this point in time
- there are no requirements imposed on future developers to submit mitigation plans to the standards required by regulatory agencies (no requirement for discussion of mitigation feasibility, etc.) though there are monitoring requirements
- there is no certainty the federally listed endangered salt marsh harvest mouse can be sustained in the long-term based upon the proposal to create wetlands out of the remaining uplands in Sub Area E

These are but a few of the flaws we have identified. We urge the City to NOT approve the EIR in its current form, to provide the additional information requested by the public and resource and regulatory agencies, and to recirculate the EIR.

Thank you for the opportunity to provide comments.

Sincerely,  
Carin High  
CCCR Vice-Chair