CITIZENS COMMITTEE TO COMPLETE THE REFUGE

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Re: Draft Environmental Impact Report (DEIR) Newark Areas 3 and 4 Specific Plan Project

This responds to the DEIR for the proposed specific plan for Areas 3 & 4 in Newark, CA. Areas 3 and 4 comprise approximately 850 acres of land (estimates vary from 850 acres to 856 acres within the DEIR and Specific Plan) located at the western edge of the City of Newark and bounded on the north by Mowry Avenue, to the east by Cherry Street, to the south by Stevenson Boulevard, and to the west by Mowry Slough.

The Citizens Committee to Complete the Refuge (CCCR) thanks you for the opportunity to review and comment on the DEIR for the Area 3 and 4 Specific Plan Project DEIR. Consultants Richard Grassetti of Grassetti Environmental Consulting and Carol Beahan of Wildscape Engineering Services have prepared substantive comments on behalf of CCCR and submitted letters under separate cover. Based upon our review of the DEIR we find it contains serious omissions, inaccuracies, and flaws that must be rectified to comply with California Environmental Quality Act (CEQA) requirements. For these reasons, as well as those articulated in the letters submitted by Mr. Grassetti and Ms. Beahan we urge the City to correct the fatal flaws of this DEIR and re-circulate the revised document.

Project Areas: Area 3 is approximately 296 acres and the portion of land bounded by Mowry Avenue, Cherry Street, Stevenson Boulevard, and the Union Pacific Railroad tracks. The current general plan for this portion of the specific plan is Special Business Park, Public Open Space, and Public Institutional. The current Specific Plan proposal only addresses re-designation of 77 or 78 acres (both numbers are used) located in the southeastern-most corner of the site.

Area 4 is approximately 560 acres (552 and 559 acres also used) of land surrounded by Mowry Avenue, the Union Pacific Railroad tracks, Stevenson Boulevard and the border between the City of Newark and the City of Fremont, and Mowry Slough. The general plan states Area 4 is planned for high-quality low-density residential use, and 18-hole golf course, and open space. The General Plan notes "if a golf course is found unfeasible then another recreation use that is acceptable to the City shall be provided as a condition of development."

Introduction: The DEIR concisely and adequately describes the requirement of the California Environmental Quality Act (CEQA) to prepare and EIR and the function of an EIR – that it is an "informational document, which will inform public agency decision makers, and the public of the significant environmental effects of a project, identify possible ways to minimize the significant effects, and describe reasonable alternatives to the project" §15121(a). Also that certain types of "projects" such as those pertaining to the adoption or amendment of a

comprehensive zoning ordinance or local general plan, don't require an EIR be as detailed as an EIR on a specific project that might follow §15146 (b). And that:

> An EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enable them to make a decision *which intelligently considers environmental consequences*. An evaluation of the environmental effects of the proposed project need not be exhaustive, but the *sufficiency of an EIR is to be reviewed in light of what is reasonably feasible*. Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts. The courts have looked not for perfection, but *for adequacy, completeness, and a good-faith effort at full disclosure*. [emphasis added]

The DEIR fails to meet these requirements as we will discuss in sections to follow.

Uses of this EIR: While it appears the intent is that this DEIR serve as a "program" level DEIR, the City has not clearly defined what types of subsequent actions would trigger the requirement of preparing a "project" level EIR.

- Would changing the use of Sub Area D from "golf course" to some other form of recreation e.g. active sports fields trigger the preparation of an EIR? p. 12 of the DEIR states, "A conditional use permit will also be issued to allow the construction of a golf course *or another recreational use in Area C.* Other uses, depending on the type of recreation, could introduce different types and magnitudes of environmental impacts and should require the preparation of a "project" level EIR.
- Would a residential development proposal within the Specific Plan area that would fill 39 acres of wetlands trigger the necessity to prepare an EIR? The responsibility for submitting mitigation and monitoring plans is deferred to future developers – not only does this piece-mealing of the review of impacts versus mitigation, it also prevents meaningful public review and comment unless additional CEQA review is triggered.
- Would alignment of the Bay Trail along the Mowry Slough levee trigger preparation of a supplemental EIR?

Please provide some clarification.

Also under this section is the statement: "Acceptance and maintenance/access easements along levees and/or permit to move tide gate(s)," by Alameda County Flood Control and Water Conservation District (ACFC&WCD).

- What levees does this statement refer to? All levees both internal to the project site and along Mowry Slough? Please clarify what is meant by this statement. Who would be performing the "maintenance," what tide gates are being referred to, and who would be responsible for moving them? It is our understanding that an agreement was reached between the owners of one of the parcels (Peery and Arrillaga) and the State of California and State Lands Commission in 1994 regarding the ownership of the tidal lands immediately adjacent to their property, whereupon Peery and Arrillaga quit claimed all their right, title, and interest in the waterways and lands lying westerly of the outer toe of the existing levee adjacent to Mowry Slough. In return, the State granted specific

easements for drainage (this does not remove the requirement for CWA authorization) in very specific locations. If tide gates are to be moved outside the areas defined in the 1994 agreement, permits may be required from State Lands Commission.

Project Description:

2.4.1.2 Area 3 – General Plan Amendment and Rezoning: In response to the Notice of Preparation (NOP) for this EIR, Regis Homes submitted comments dated May 23, 2007. In their comment letter, Regis Homes specifically requested the City consider allowing a Medium Density Residential (MR) General Plan designation for their property that is currently zoned industrial and has been vacant since 2001. The 8.75 acre parcel is situated between the Silliman Center and the Ohlone College campus and across the street from existing residential housing and Newark Memorial High School. Other sites not owned by the New Technology Park Associates are included within the proposed specific plan that would require rezoning.

- Why has this site been left out when the property owners have submitted a specific request to be included? The site could provide additional housing capacity for the City and should be considered for rezoning to residential or residential mixed use.

2.4.2.1 Area 4 – Vehicular and Pedestrian Access: An Emergency Vehicle Access (EVA) road will be provided to access development in Area 4 via Mowry Avenue through a locked gate.

- We assume all emergency personnel will have access to the key to the gate, but how would residents gain access through the gate in the event of an emergency?

2.4.4.1 Area 3 and 4 Street Standards and Improvements: Stevenson Boulevard: The information provided in the DEIR is inadequate to assess the potential impacts of this component of the Specific Plan on existing wetlands, aquatic habitat, and listed species.

- Will all construction of the proposed flyover fully avoid any impacts to the Pacific Commons/Don Edwards San Francisco Bay National Wildlife Refuge (Refuge) mitigation area immediately southeast of Stevenson Blvd.? If not impacts to the biotic resources of this area must be clearly stated and mitigation measures proposed.
- The EIR states "No seasonal wetland, aquatic freshwater marsh, brackish marsh, or detention basin habitat occurs within the 78-acre project footprint of Area 3. Therefore, proposed development in Area 3 will have no impacts to these habitat types." Does this include the wetland mitigation area to the northwest of Stevenson Blvd.? If not, what impact will the Stevenson Boulevard flyover have on the existing wetland mitigation site? Impacts and mitigation measures must be provided.
- If no impacts within these existing wetland mitigation areas, the boundaries of the construction area much be clearly delineated to avoid adverse impacts to the mitigation areas on either side of Stevenson Blvd.

2.4.5 PG & E Towers and Lines: Please note if "crane access" is required for the use of a vertical cage or waist cage to raise the 230 kV tower (Number 0/5) adverse impacts to endangered species habitat may occur and consultation with the U.S. Fish and Wildlife Service

must occur in advance of any work in the area. In addition, seasonal prohibition of work may be required to avoid "take" of listed species.

Stockpiling of fill and construction of fill pad: The EIR does not adequately describe:

- where fill will be stockpiled (a generalized stockpile envelope could suffice),
- whether New Technology Park Associates will begin stockpiling material immediately (grading permit required),
- a more definitive period of time the stockpiled material might be stored than "for longer periods of time",
- whether wetlands fill will be necessary to access the stockpile site(s)
- who will be responsible for regularly inspecting the efficacy of mitigation measures to prevent mobilization of stockpiled soils into adjacent (?) wetlands
- at what point filled to be stockpiled will be tested for "quality" (this information will need to be made available to the USACE and RWQCB prior to placement in wetlands)
- sources of fill other than the Irvington BART station (and e.g. whether soil from the undergrounding of the Hetch Hetchy pipeline would even be suitable)
- What happens with the remaining fill if all the parcels in Area 4 aren't developed? Does it remain on-site in stockpiles forever or would it eventually be sold? Impacts of removing the fill on the newly developed and surrounding neighborhoods would require environmental review and mitigation measures.

The DEIR also fails to give any indication of how introduction of fill to the site might occur.

- Will it be all at once over the entirety of Sub Areas B and C in advance of the sale of land to developers of residential housing?
- Will it be in phases and if so, will the fill begin at the Union Pacific Railroad tracks and move out towards Mowry Slough as developers purchase the lands?
- Or will it occur in a more haphazard fashion and is there any possibility the western edges of Sub Area B could be developed prior to Sub Area c?

Answers to questions inform decision makers and the public about how undeveloped lands may be conserved or fragmented, which in turn influences the viability and value of any mitigation.

3.1.3.1 Newark General Plan – The General Plan (GP) dates back to 1992. The Land Use Goals and Policies must be updated to reflect current and developing recommendations for mitigating impacts of climate change, e.g. the siting of new development closer to existing transportation hubs to reduce vehicle miles traveled, embracing and incorporating the recommendations of the 2009 California Climate Change Strategy, etc. The GP goals and policies do not reflect new information regarding site geology, hydrology, or extent of wetlands.

Transportation Goals and Policies:

Goal 1: Provide for a quality environment with *smooth, convenient*, and *safe* vehicular travel throughout Newark.

The proposed project is located at the southernmost boundary of the City. The project will introduce 5 million car trips per year. There is no convenient public transportation to Area 4 – Area 4 is at least ½ mile away from an existing bus stop, and close to a mile away from the nearest shops, etc. It is unlikely parents in Area 4 would walk their child to school in Area 3 or to the Silliman Center. There is a public safety issue of children crossing over an at grade railroad crossing at Mowry Avenue to access the playing fields or recreational facilities of the Silliman Center. There is only one access road in to the development with only two lanes of travel.

Open Space and Conservation Goals and Policies:

- **Goal 1:** Encourage the conservation and preservation of unique open space and conservation of resources that help to define the quality and character of the City.

Policy b. 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.

Policy b. Program 11: Avoid *development of any lands identified as having natural hazards* where potential risk cannot be reduced to acceptable levels through mitigation measures (e.g. flood hazards areas, lands with severe potential for earthquake shaking, liquefaction, etc.).

- Goal 2: *Acknowledge the San Francisco Bay National Wildlife Refuge acquisition and its value as a community resource*.
- Policy a: *Support actions to preserve and maintain the lands of the Refuge.*

The Specific Plan is in conflict with the City's Open Space and Conservation Goals and Policies. Development of over half of Area 4 is inconsistent with Goals 1 and 2. DESFBNRW – has identified most of Area 4 as a Priority 1 acquisition area because of the unique ability of the site to provide endangered species habitat, a diversity of habitats including pickleweed wetlands, seasonal wetlands, open water, transition zone to uplands and uplands. Proximity of the site to the Ohlone College campus provides a unique opportunity to incorporate the site into educational programs.

Proposed development would severely impact on site resources (human disturbance, use of chemicals, run-off from streets, nuisance species, light pollution, etc.) and resources on adjacent Refuge lands.

Environmental Safety Goals and Policies – Policy a. Program 4. Monitor information about the "greenhouse effect" and the possible resulting rising sea level and, when determined necessary, take or support actions to protect the Newark community from potential adverse impacts of such phenomenon.

This Specific Plan is inconsistent with the 2009 California Climate Adaptation Strategy – it is at best reactive, as opposed to the recommendation:

Consider project alternatives that avoid significant new development in areas that *cannot be adequately protected* (planning, permitting, development, and building) from *flooding*, wildfire and erosion *due to climate change*. The most risk-averse approach for minimizing the adverse effects of sea level rise and storm activities is *to carefully consider new development within areas vulnerable to inundation* and erosion. *State agencies should generally not plan, develop, or build any* ***new significant structure*** *in a place where that structure will require significant protection from sea level rise, storm surges, or coastal erosion during the expected life of the structure*. However, vulnerable shoreline areas containing **existing** development that have regionally significant economic, cultural, or social value may have to be protected, and in-fill development in these areas may be accommodated. State agencies should incorporate this policy into their decisions and other levels of government are also encouraged to do so. (CS-2; OCR-1 and 2; W-4 and 9; TEI -2 and 7)."[emphasis added]

3.1.4 Land Use Impacts:

3.1.4.1 Thresholds of Significance:

For the purposes of this EIR, based upon Appendix G of the CEQA Guidelines, a land use impact is considered significant if the project will:

- conflict with any applicable habitat conservation plan or natural community conservation plan; or
- 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;

The Specific Plan is inconsistent with Public Law 100-56, the recommendations of the Goals Project, and the recommendations of the 2009 California Climate Adaptation Strategy.

Public Law 100-556 the "Land Protection Plan, Potential Additions to San Francisco Bay National Wildlife Refuge, Alameda, San Mateo, and Santa Clara Counties, September 1990." The congressionally approved Refuge Expansion Boundary expressly identified large portions of Area 4 as Priority One for acquisition because of the ability of these lands to provide for the preservation and enhancement of highly significant wildlife habitat and for the protection of waterfowl and sensitive and rare wildlife species, including species known to be threatened with extinction.

The Baylands Ecosystem Habitat Goals Report is described as "The concept to develop regional wetlands goals is recommended by the Governor's "California Wetlands Conservation Policy" and by the Comprehensive Conservation and Management Plan (CCMP) of the U.S. Environmental Protection Agency's San Francisco Estuary Project. It is also supported by most of the agencies and non-governmental groups with major planning, operational, or regulatory interests in Bay Area wetlands."

The Goals Project Report (June 2000) states in the section of "Unique Restoration Opportunities," "…There are opportunities to restore historic tidal marsh/upland transitional

habitat and associated vernal pool habitat at the upper ends of Newark, Plummer, Mowry, and Albrae Sloughs." Under the "Recommendations" section the report states, "…Protect and enhance the tidal marsh/upland transition at the upper end of Mowry Slough and in the area of the Pintail duck club. The report also recommends that tidal influence be restored on this site and that seasonal wetlands be improved.

The 2009 California Climate Change Strategy states:

> p. 51 Wetland habitats from the Sacramento Valley southward to the Salton Sea and the tidal marshes of San Francisco Bay also provide essential wintering habitat for hundreds of thousands of birds as they migrate north and south along the Pacific Flyway.
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> p. 52 Moreover, *inland migration is frequently hindered by development* such as bulkheads, seawalls, roads, and buildings. Continued growth and development in coastal areas will only *increase the direct pressure on remaining habitats and make inland migration more difficult*. Sea-level rise, especially at the increasing rates projected for the 21st century, may result in the loss of substantial areas of critical habitat for a variety of coastal species.
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> p. 74 Habitat Protection **–** The state should identify priority conservation areas and recommend lands that should be considered for acquisition and preservation. The state should *consider prohibiting projects that would place development in undeveloped areas already containing critical habitat, and those containing opportunities for tidal wetland restoration, habitat migration, or buffer zones.*
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> The strategy should likewise encourage projects that protect critical habitats, fish, wildlife and other aquatic organisms and connections between coastal habitats. The state should pursue activities that can increase natural resiliency, such as restoring tidal wetlands, living shoreline, and related habitats; managing sediment for marsh accretion and natural flood protection; and maintaining upland buffer areas around tidal wetlands. *For these priory conservation areas, impacts from nearby development should be minimized, such as secondary impacts from impaired water quality or hard protection devices.*

The public law, policy, and strategy listed above emphasize the importance of Area 4 from a regional perspective. The mixture of wetlands, aquatic, and other habitats including uplands are important for sustaining current populations of waterfowl and listed and sensitive plant and wildlife species, as well as providing a hedge for these species and habitats in the face of sea level rise.

The Land Use Impacts proposed in Area 4 by the Specific Area plan are in conflict with regional, in fact State, policies and strategies, and the adverse impacts are significant.

San Francisco Bay Trail: ""The future Specific Plan developer(s) of Area 4 will be required to provide an easement for the Bay Trail to run along the top of the levees that form the western edge of the project, if that ultimately is the preferred alignment. The Specific Plan is consistent with the Bay Trail and does not conflict with efforts to complete the Bay Trail."

- We have repeatedly requested this alternative route be abandoned. We have done this in writing during the scoping period for the DEIR; we have made these comments publicly during community meetings. This will have a significant adverse impact on Biological Resources e.g. significant increase in human disturbance, noise, nuisance species on listed species and wetlands. Please refer to the discussion of Biological Resources for additional comments. If this alternative is proposed for implementation a "project" level EIR should be required, any necessary "improvements" to the privately owned levees described, and all environmental impacts identified.

3.2 Transportation: Were vehicle trips associated with the transport of school-aged children to and from school included in the traffic calculations? For all school levels? Were vehicle trips associated with transporting students to school from Area 4 included in the calculations? Were calculations done to account for parents driving their students from the Specific Plan area to other elementary schools should an elementary school not be constructed in Area 3? This could have a significant impact on congestion on surface streets during the morning commute.

Footnote 24, page 49, "The traffic counts that comprise the basis of the traffic analysis were taken in 2006-2007, when vehicle traffic was heavier than under current 2009 conditions. No major development has occurred in Newark since the traffic counts were taken, so the analysis is still considered valid and a conservative estimate of traffic impacts of the project."

The numbers used as background should reflect current traffic counts – 2009 conditions. Utilizing the 2006-2007 data when traffic was heavier would tend to make the projected impacts of the proposed Specific Plan, almost 5 ½ million car trips per year appear less significant.

3.3 Air Quality: The assumptions made when analyzing the impacts of haul trucks bringing fill to the project site are seriously flawed. If it is assumed 2.1 million cubic yards of fill will be delivered to the site with only 100 truck trips per day, then trucks with 20 cy yard capacity, working only 5 days per week would require four years to bring that amount of fill to the site, and that time frame may be conservative if two-feet of freeboard are required to reduce air quality impacts.

The EIR fails to address the fundamental flaw of the Specific Plan that is locating a large development at the edges of the city, away from city services and amenities, and away from major public transportation hubs. Rather than attempting to reduce vehicle miles traveled a true indicator of public transit-pedestrian-bicycle friendly development, the DEIR proposes mitigation measures that either still focus on automobile travel as the main mode of transportation (reducing LOS by widening streets, including dedicated turn lanes, etc.) while proposing public transit mitigation measures that are may not result in reduction in Greenhouse Gas Emissions (GGEs) because they do not provide for actual public transportation, rather the facilities associated with public transit (e.g. bus stop shelters, etc.).

> The Specific Plan shall incorporate the following measures, which would reduce transportation-related emissions. The measures listed in below are expected to include implementation of appropriate TCMs. Incorporation of these measures would reduce the impact to a less-than-significant level.

• Improve existing or construct new bus pullouts and transit stops at convenient locations along Cherry Street and Stevenson Boulevard. Pullouts shall be designed so that normal traffic flow on arterial roadways would not be impeded when buses are pulled over to serve riders. Bus stops shall include shelters, benches and posting of transit information;
• Appropriate bicycle amenities shall be included. This would include bike lane connections throughout the project site. Off-site bicycle lane improvements shall be considered for roadways that would serve the project;
• The City and project proponents shall *explore* and *implement feasible* means to bring transit or shuttle service to Area 4; [emphasis added]

These mitigation measures, while they may sound good on paper, have little value in reducing the GGEs of the Specific Area plan when it is estimated only 3% of the residents will ride bicycles, and only 12 people from the neighborhoods ride a bus during peak hours, if buses continue to be available. Nor does "exploring" or "implementing *feasible*" transit or shuttle service to Area 4 ensure this will actually occur.

Therefore, implementation of these mitigation measures cannot be assumed to reduce the GGE contributions of the Specific Area plan to a level that is less than significant.

3.4 Noise: The DEIR fails to identify, analyze or mitigate the impacts of noise or vibration on wildlife. Construction and post-construction activities may "harass" sensitive wildlife species, as well as migratory, and nesting birds by disrupting normal roosting, feeding, breeding, or nesting behaviors. Studies have revealed noise can impact a species ability to communicate with potential mates or can increase an individual's susceptibility to predation.
This analysis should be prepared and the results circulated for public review and comment.

Vibration – The DEIR fails to discuss construction impacts of soil compaction, whether vibration impacts will result from compaction activities, and how adverse impacts of the vibration generated on wildlife will be mitigated.

3.5 Biological Resources: We would like to commend the level of effort that went into identifying on-site resources.

Land Use Goals and Policies:

GOAL 2, Policy d. Support preservation of the lands of the San Francisco Bay National Wildlife Refuge, and protection of San Francisco Bay and bay lands.

Program 7. Support the activities of Federal, State, and regional agencies to preserve the existing lands of the San Francisco Bay National Wildlife Refuge.

Open Space and Conservation Goals and Priorities

GOAL 2 Acknowledge the San Francisco Bay National Wildlife Refuge acquisition, and its value as a community resource.

Policy a. Support actions to preserve and maintain the lands of the San Francisco Bay National Wildlife Refuge (SFBNWR).

The Specific Plan area is in conflict with the above cited goals and policies. The plan does not support the goals of preserving and maintaining the lands of the Refuge.

The Specific Plan 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 the few places 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. Upland habitats provide a buffer or transition area upslope from wetlands and marshes. Where such upland transition zones are located adjacent to tidal marsh, they provide important refugia for tidal marsh species during high tides that inundate most of the marsh plain. Even in nontidal areas, such upland habitat can provide refugia for wetland species during periods of flooding. (Appendix A, p. 16)
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> And
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> ...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.

We concur with this assessment. Lands such as those identified for acquisition were included within the Refuge Expansion Boundary because of the scarcity of this habitat within the acreage of the original Refuge acquisition and its importance in preserving the biodiversity of the bay ecosystem. The Specific Plan proposal would consume most of the uplands habitat present within Area 4. Depending upon what figures one uses, either the information from the body of the text of the DEIR or the information from the Specific Plan there could be approximately only 53.5 acres of uplands habitat remaining if all of Sub Areas B, C, and D are developed. That is a mere 21% of the total undeveloped uplands in Area 4. Wetland creation is proposed in this upland area to off-set the losses of up to 85.6 acres of wetlands/waters habitat. Lastly, the remaining uplands in Area 4 would be located between the levees along Mowry Slough and the wetlands to be preserved and/or the development envelope leaving this area vulnerable to human disturbance, nuisance species, light and noise pollution, etc. thereby reducing its habitat value for species attempting to move upslope away from rising sea levels.

Thus, the Specific Plan will not support actions to preserve and maintain the lands of the [Don Edwards] San Francisco Bay National Wildlife Refuge and is in conflict with the Land Use Goals and Policies of the General Plan.

p. 117 – We concur that land management practices of frequent and ongoing disturbance has resulted in reduced habitat values. This is an artificial condition and habitat values would improve if agricultural habitats in particular seasonal wetlands were not frequently disced.

We also question whether (p.120) discing within the past three years of areas that have supported pickleweed cover isn't a violation of the Clean Water Act and Endangered Species Act, as areas that support pickleweed clearly are not in agricultural production and therefore should not qualify for agricultural exemptions. We are also extremely concerned that areas that were previously dominated by pickleweed but have been disced have been subsequently invaded by Russian thistle.

3.5.2.4 Jurisdictional Waters of the U.S./Waters of the State

We concur a Section 404 Clean Water Act permit from the U.S. Army Corps of Engineers (USACE) will be required for the placement of fill in wetlands/other waters of the U.S. In addition, certification or waiver will be required from the San Francisco Bay Regional Water Quality Control Board (RWQCB) under Section 401 of the Clean Water Act.

The proposed project is clearly not "water dependent," therefore, under the 404 (b) (1) Guidelines (40 C.F.R. 230.10) the applicants must rebut the presumption that a practicable alternative exists that is less environmentally damaging. The preamble to the Guidelines states that it is the applicant's responsibility to rebut this presumption. The Memorandum of Agreement between EPA and the Corps concerning mitigation under the CWA 404 (b)(1) Guidelines (Mitigation MOA) states:

1. Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative. The thrust of this section on alternatives is avoidance of impacts. Section 230.10(a)(1) requires that to be permittable, an alternative must be the least environmentally damaging practicable alternative *(LEDPA)*. In addition, Section 230.10(a)(3) sets forth rebuttable presumptions that 1) alternatives for non-water dependent activities that do not involve special aquatic sites are available…

2. Minimization. Section 230.10(d) states that appropriate and practicable steps to minimize the adverse impacts will be required through project modifications and permit conditions.

Sequencing requires the applicant must first *avoid* impacts to wetlands, next *minimize* those impacts, and only after avoidance and minimization of impacts has occurred, compensate for any unavoidable impacts. However, as wetlands are considered "Special aquatic sites" and it is presumed a less damaging practicable upland alternative to placing fill in wetlands exists.

USACE Permit Authorization: p. 73 of Appendix E, Biological Resources Technical Report states, "A permit from the USACE (*either a Nationwide Permit* or an Individual Permit,

depending on the impact) will be required from the USACE for any *Project-related impacts* to jurisdictional Waters of the U.S."[emphasis added]

Due to the regional environmental importance of Area 4, the complexity of issues that must be balanced (e.g. wetlands vs. uplands, endangered species and their habitats, etc.) it would be appropriate to submit an application to the USACE for the entirety of Area 4. We recognize that phasing will pose a problem, but clearly all of the development within the boundaries of Area 4 is inter-related. Certainly a precedent exists as both the San Francisco and Sacramento Districts have processed Clean Water Act authorizations for specific area plans.

Piece-mealing of project impacts is prohibited under the Clean Water Act and the National Environmental Policy Act (NEPA). The USACE definition of "Independent utility can be found in the Nationwide Permit definitions, "A test to determine what constitutes a single and complete project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility." All projects within Area 4 will be dependent upon the establishment of a fill pad and utility infrastructure ranging from the establishment of the Stevenson Blvd. flyover to the installation and hook up of the storm drain system, electrical, etc. As such submittal of individual permit applications including nationwide permit authorization requests would be considered piece-mealing and should be prohibited.

Similarly it is not possible to determine if adverse impacts to listed species (USFWS) or wetlands and waters (USACE and Environmental Protection Agency – EPA) are adequately mitigated if the review is piece-mealed.

Furthermore, due to the regional significance of the site, the large amount of wetlands fill proposed, and the complexity of competing resource needs, it would be appropriate for the Corps to prepare an Environmental Impact Statement (EIS) for the Specific Area plan.

Thresholds of significance: Please refer to the discussion under 3.1.4.1 Thresholds of Significance under Land Use Impacts. As we stated earlier, we believe the Specific Plan conflicts with established regional planning for maintaining habitat diversity as well as recent State strategies for preserving biodiversity in anticipation of sea level rise impacts. The impacts of the Specific Plan on buffer areas adjacent to tidal wetlands, i.e. seasonal wetlands and uplands transition zones and uplands is significant and unmitigated.

The EIR is fatally flawed – Inadequate information provided:

Indirect Impacts:

Impacts of Alteration of Site Hydrology on Avoided Wetlands and Associated Species
The DEIR discusses some impacts to the hydrological regime of the site that might alter the extent and quality of unfilled wetlands. For example, p. 91 of the DEIR states:

> The Project is expected to affect hydrology by 1) increasing impervious surfaces and thereby increasing the rate and amount of runoff entering undeveloped areas, 2) decreasing the amount of water entering undeveloped areas with the addition of the golf course features that will most likely retain additional water through the evapotranspiration of large expanses of grass, and 3) adding nuisance flows into undeveloped areas during the dry summer months. These hydrologic alterations could affect the wetland and marsh habitats that will not be directly filled during site development.

However, the DEIR fails to discuss the impacts of groundwater pumping for the golf course on existing wetlands of high value. Page 11 of Appendix G – Hydrology states:

> Recharge of the seasonal wetland and marsh habitats near the Pintail Duck Club from groundwater seeps occurs in mid-to late-summer. Evidence of this recharge from groundwater seeps includes bubbling water and the presence of a greater extent of surface water and hydrophytic vegetation in areas near the former Pintail Duck Club during the late summer months as compared to water levels in the early spring or summer, as observed in the summers of 2006, 2007, and 2008.

And page 14, of that appendix states:

> Before reclaimed water is available, the golf course will be irrigated using an existing onsite well with an estimated demand of 490 acre-feet per year. This well will draw from ACWD's managed groundwater resources in the Niles Cone without placing a burden on the District's potable water production facilities.1 Therefore, the project will have a ***less-than-significant*** impact on groundwater supplies or areas of groundwater recharge.

But provides no assessment of what if any impacts groundwater pumping will have on Area 4 seasonal wetland and marsh habitats near the Pintail Duck Club.

The DEIR must also give some indication of the areal extent of indirect impacts, the number may be conservative, but based upon a "worst case scenario" what is the areal extent of indirect impacts that would require mitigation?

Nuisance species: The DEIR provides a section that describes some of the potential impacts of invasive plants species and preserved, created, and enhanced wetlands, but provides no such discussion of nuisance species. The DEIR admits nuisance species such as domestic pets and feral cats may pose problems for existing wildlife populations, but fails to identify the suite of likely nuisance species or to suggest mitigation measures to reduce their negative impacts on wildlife species in general and listed and sensitive species in particular. For example, the Specific Plan depicts picnic areas overlooking wetlands habitat, but the DEIR fails to discuss the attractiveness of trash cans to nuisance species like raccoons, gulls, corvids, etc. or what measures will be implemented to prevent access to garbage, etc.

The DEIR mentions a mitigation measure requiring dogs to be on leash along the levees, but does not mention how this issue will be addressed for other areas of the development, nor how it will be enforced.

Page 141 of the DEIR states:

> Domestic pets, cats in particular, may stray from the project's residential areas and may depredate these potentially breeding special-status species or their nests. Non-native mammals are likely to increase on the project site following development. These species may compete with or prey on some of these special-status species. As discussed below under *Impacts to Sensitive Habitats and Species from Recreational Disturbance*, golfers and visitors may go beyond established recreational areas and access the ACFC&WCD and Mowry Slough levees which may disturb, crush, or degrade habitat for these species. Planting of trees within the golf course or residential areas will provide additional perches and nesting sites for raptors that may prey on these special-status species.
>
> If on-site mitigation for impacts to wetlands, waterbird foraging habitat, and special-status species habitat is provided per measures to mitigate other project impacts, such mitigation will increase the extent and quality of nesting and/or foraging habitat for these special-status species, restoring the project's adverse effects to some extent.

There is no mention of specific mitigation measures dealing with feral cats, gulls, corvids, Canada geese on the golf course, etc. Rather the DEIR concludes that because additional high quality habitat will be provided through mitigation and enhancement these significant adverse impacts will be less than significant.

See the discussion below regarding compensatory mitigation that explains why such a determination cannot be made.

Please add a section to the DEIR identifying nuisance species that are likely to occur and mitigation measures that are enforceable and effective to ensure nuisance will not have a significant adverse impact on wildlife species in general and listed and sensitive species in particular.

Compensatory mitigation – wetlands, waters, species:

Pursuant to §15121(a) and §15146(b) of CEQA, the DEIR does not provide decision-makers or the public a clear understanding of the location or acreages of habitat in which compensatory mitigation could be implemented for wetlands and species. Thus decision makers and the public are unable to determine if the mitigation measures purported to reduce significant adverse impacts to a level that is less than significant are realistic and capable of being implemented.

The DEIR proposes 1.5:1 replacement of seasonal wetlands that may be created/enhanced on-site, off-site, mitigated through the purchase of mitigation credits, etc. Mitigation ratios cannot be ascertained to be appropriate without understanding the opportunity to evaluate the:

- likelihood of success of implementation (e.g. does sufficient hydrology to maintain the created wetlands without detriment to existing habitats, etc.),
- the landscape context in which the habitat would be created (e.g. for salt marsh harvest mouse habitat is upslope escape habitat available free from human disturbance and nuisance species impacts and in an area that wouldn't make the mouse susceptible to predation?),
- the surrounding land uses (e.g. open space or residential? isolated or corridors available? Etc.)
- nature of habitats that might be converted from one type to another
- proximity of off-site mitigation to project site

- in-kind vs. out-of-kind mitigation
- whether mitigation is being proposed for more than one type of impact in the same area (double-dipping mitigating for more than one impact in the same acreage is not acceptable – e.g. expecting seasonal wetlands to provide 50% burrowing owl foraging habitat)

The DEIR should clearly indicate the area and acreage available in which to create wetland habitat, where wetland enhancement might occur on-site given the current development envelopes, and how indirect impacts would be prevented from degrading the value of the mitigation creation and enhancement activities. Based on calculations from information provided in Appendix H, Part 1 and from the Specific Plan, it appears the amount of uplands available in which wetlands and sensitive species (e.g. burrowing owl) mitigation could occur would be approximately 53.5 to 59 acres.

Clearly this is not enough area in which to create 1.5:1 mitigation for loss of wetlands. The DEIR must provide more definitive and realistic mitigation measures, given the "worst case scenario" of up to 85.6 acres of wetlands fill and a currently unknown figure of indirect impacts:

- how much mitigation can occur on-site,
- where will it be located on-site (Mitigation squeezed between the development envelope and the outboard Mowry Slough levee may not provide adequate escape habitat for the salt marsh harvest mouse, may become inundated over time, may be subject to constant disturbance, etc.)
- how much will need to occur off-site,
- does land that could be acquired to mitigate the impacts of Specific Plan implementation actually exist within 10 miles of the project site along the eastern shoreline? It is our impression that most of the land from San Leandro down to Alviso are in some form of public ownership. Thus is this even a viable mitigation measure?
- Where would mitigation credits be purchased and for what habitat and species?

These are issues that are critical in determining the efficacy, long-term viability, and feasibility of the proposed mitigation measures in actually lowering the significant impacts of the project to levels that are less than significant. Without this information the DEIR cannot assert the adverse biological impacts are less than significant.

Proposed mitigation measures are unenforceable or ineffective:

Page 141 of the DEIR states:

> Maintenance activities around the golf course and residential areas, or golfers and residents, who enter natural areas, may unintentionally disturb or destroy nests. Although the project does not include the establishment or improvement of any formal trails along Mowry Slough, the number of people and domestic animals expected to access the levee along Mowry Slough will be greater following project development, subjecting pairs of these species nesting along Mowry Slough to more disturbance.
>
> And

The DEIR mentions that implementation of the Specific Plan may result in more people accessing the levees and walking their dogs in these areas, more specifically that levee users may "bring dogs to these areas that may harass or prey on sensitive bird and mammal species." (p.154)

The DEIR proposes mitigation measures as follows:

> Incorporation of the following measures will reduce special status species and sensitive habitat impacts to a less than significant level:
>
> **MM BIO-9.1:** As the design of the golf course progresses disturbance by golfers of adjacent sensitive habitats and species shall be minimized. For example, high-use areas such as tees and greens shall be set back from the edge of the golf course, and broad rough/out-of-bounds areas shall occur along the interface between the golf course and sensitive habitats.
>
> **MM BIO-9.2:** On the golf course, areas that are "out of bounds" (which will include the artificial burrowing owl burrow complexes and all natural areas that are not directly filled during golf course construction) shall be clearly marked as such, explaining the importance of preserving the ecological integrity of the adjacent natural areas. Signs will be erected along the ACFC&WCD levees and along Mowry Slough describing the ecological value of adjacent wetland areas and instructing users to stay on the ACFC&WCD levee tops, stay out of sensitive habitats, and keep dogs on leashes. **(Less Than Significant Impact with Mitigation)**

Human disturbance of nesting birds can result in abandonment of nests and chicks, resulting in decreased reproductive success (Rodgers and Smith 1995, Carney and Sydeman 1999, USFWS 2001, Ruhlen and others 2003, Lafferty and others 2006). Disturbance can also lead to decreased abundance or behavioral alteration of non-breeding birds (Burger and Gochfeld 1991, Schummer and Eddleman 2000, Lafferty 2001, Burger and others 2004).

Signage has been demonstrated to be completely ineffectual in reducing trespass into areas supporting populations of sensitive or listed species. Recent studies by USGS scientist Kevin Lafferty at the Coal Oil Point U.S. Reserve in Santa Barbara (*2005 Final Report on the Western Snowy Plovers; Restoration of breeding by snowy plovers following protection from disturbance, Biodiversity and Conservation 92006) 15:2217-2230)* concerning human impacts to shorebirds on a beach showed that after a year of very adequate signage there was no improvement in the public's adherence to staying out of restricted areas. However, once a steward/docent program was in place on the beach, the public's compliance with restricted zones increased exponentially.
While a docent program may not be possible, monitoring of public compliance with signage and an enforcement program must be implemented.

Refuge staff have extensive experience with the issue of people along levee trails failing to comply with leash requirements. At Bair Island signage was posted regarding leash laws and the consequences should dog walkers fail to comply. A required % of compliance was posted, in addition volunteers provided information, consequences of non-compliance was advertised – no dogs allowed, and non-compliance was monitored. In the end, even with an extension of the monitoring period, the public failed to comply with the leash requirement, and dog walking may be prohibited once trails are reopened to the public (currently shut down for restoration work).

Unless some regular enforcement program is funded and implemented on a regular and frequent basis, access to the Mowry Slough levees should be prohibited.

Similarly, unless an enforcement program is funded and implemented for sensitive habitat areas on the golf course and elsewhere in the development, a determination cannot be made that the impacts of human disturbance have been reduced to less than significant levels cannot be made.

3.5 Biological Resources additional comments:

Mitigation measures for nesting peregrine falcons, raptors, loggerhead shrike, tri-colored blackbirds and bats do not provide for replacement of lost nesting/maternity roost habitat.

Buffer zones around sensitive species should be reviewed and approved by the California Department of Fish and Game (CDFG) and USFWS.

Environmentally Sensitive Area and exclusion fencing for the salt marsh harvest mouse and salt marsh wandering shrew should include installed and inspected daily by a qualified mammalogist. Use of weed whackers should be prohibited in areas where hand removal of vegetation is required … *hand removal*…

Mitigation ratios will be determined during Section 7 consultation (Biological Opinion process) with the USFWS for impacts to habitat of salt marsh harvest mouse and salt marsh wandering shrew. The mitigation and monitoring plan will require the approval of the USFWS, CDFG, USACE, and RWQCB.

If trucks must cross wetland areas, measures must be taken to reduce soil compaction, and before and after topography should be provided to the USACE and RWQCB to ensure flow of water across the landscape is not adversely impacted.

No night lighting should occur during construction.

p. 163 – Who will bear the responsibility of enforcing MM-BIO2.1 AND MM-BIO-2.2 to ensure stockpile soils do not migrate into adjacent wetland areas? Inspections of the stockpile mitigation measures should be conducted on a daily basis and should be monitored during and after rain events to ensure they are effective.

3.7 Geology and Soils:

3.8 HYDROLOGY, Flooding, and Water Quality: Please refer to the letter submitted on behalf of CCCR by Carol Beahan.

3.8 Hazards and Hazardous Material:

3.10 Aesthetics and Visual Resources: The DEIR fails to address the impacts of light pollution on wildlife species – the only mention of the biotic habitat is "No night lighting would be directed towards the undisturbed wetland areas." This single sentence fails to acknowledge significant levels of light pollution will be introduced by the neighborhoods, development infrastructure, and golf course facilities to an area that currently has low levels of artificial light.

Light pollution is documented to have serious adverse impacts for a wide range of wildlife ranging from invertebrates to mammals. It disrupts migratory patterns, foraging capabilities, predation, nesting, breeding, etc. (Longcore and Rich, "Ecological Light Pollution" Front Ecol Environ 2004, 2(4): 191-198). Longcore and Rich report the findings of Buchanan (1998 "Low-illumination prey detection by squirrel treefrogs," J Herpetology 32: 270-74) in which three different species of amphibians forage at different illumination intensities. As an example the squirrel treefrog (*Hyla* squirrela) forages only between 10^{-5} lux and 10^{-3} lux under natural conditions, while the western toad (*Bufo boreas*) only forages at illuminations between 10^{-1} and 10^{-5} lux.
Evidence suggests light pollution affects the choice of nesting sites in the black-tailed godwit, with choice locations being the farther away from roadway lighting (De Molenaar et al 2000, in Longcore and Rich). Buchanan found frogs he was studying stopped their mating calls when the lights of a nearby stadium were turned on.

Sufficient evidence exists that demonstrates artificial lights have adverse impacts on wildlife. The DEIR must estimate the increase in light levels that could occur as a result of the Specific Area Plan and propose mitigation measures that will reduce adverse impacts to on-site and adjacent wildlife populations.

The assessment of visual and aesthetic resources impacts fails to assess the impacts to the viewshed that will be experienced by pedestrians, bicyclists, and drivers along Cherry Street. While existing development does partially block some of the views, the installation of sound barriers along Cherry Street will prohibit any remaining views across the bay.

4.0 Cumulative Impacts: [Please refer to the Climate Change discussion in the letter submitted by Carol Beahan on behalf of CCCR]

Please note a previous request: The EIR should analyze the cumulative impacts of the loss of upper tidal marsh habitat, transition zones, and uplands in proximity to the bay on the federally listed species and special status species that have been identified on the site or immediately adjacent to the site (e.g. salt marsh harvest mouse, burrowing owl). Note this comment from the South Bay Salt Pond Restoration Project FEIS:

> The land within the Authorized Expansion Boundary reflects the diversity of wildlife habitats that could be restored to tidal wetlands, brackish marsh, managed ponds, seasonal wetlands, vernal pools, grasslands, riparian, freshwater marshes and *adjacent uplands*…
> … Some lands outside the SBSP Restoration Project Area are more suitable for certain types of restoration than lands within the Project Area…
> … Some of these privately owned lands also provide opportunities to restore locally rare habitats (*e.g.*, riparian, seasonal wetlands, former duck clubs) that *are limited when considering only the lands within the Project Area*. [emphasis added]

5.0 Alternatives Analysis: [Please note CEQA non-compliance issues in the letter submitted by Richard Grassetti on behalf of CCCR.] The DEIR states the "primary objective of the Areas 3 and 4 Specific Plan is to provide low density residential, a golf course, and/or recreational facilities, and land for a school for the current and future residents of Newark." And identifies the following specific project objectives:

- Through a General Plan amendment allow residential uses;
- Provide up to 1,260 units of low density residential uses (4.2 – 8.5 units per acre) in Areas 3 and 4;
- Provide high quality residential uses including a mix of executive housing types;
- Provide up to 189 below market rate housing units that are within the 1,260 total residential units;
- Provide land for an up to 600-student elementary school in Area 3 to serve both the Specific Plan development and neighboring residential;
- Provide vehicle access to Area 4 via a railroad overcrossing at Stevenson Boulevard;
- Provide and contribute toward community recreational facilities;
- Provide land for a golf course available to the public.
- *If a golf course is found unfeasible, then another recreation use that is acceptable to the City shall be provided as a condition of development*. (emphasis added)

The alternatives considered by the City include:

1. a "No Project Alternative" in which current conditions continue,
2. a "No Project Alternative" [perhaps more appropriately titled "Implementation of the Current General Plan"?] in which the existing General Plan would be implemented,
3. a "No Development in Area 4 and Higher Density Area 3 Alternative," in which an elementary school with a 600-student capacity and 1260 homes would be built within the 77-78 acres described in this DEIR,
4. a "Reduced Housing Alternative" in which the development of Area 3 would proceed as proposed in this DEIR, but no housing would be constructed in Area 4 – only a 120-acre golf course would be constructed designed to minimize impacts to wetlands,
5. a "No Golf Course Alternative" in which everything would be developed as proposed in this DEIR except that a passive park would replace the golf course and housing would not be condensed to minimize wetland fill and impacts to wildlife resources, but would remain as depicted,
6. and the "Location (Area 2) Alternative" that would presumably provide 1260 housing units but no golf course?

As was stated earlier, Regis Homes submitted comments dated May 23, 2007, in response to the Notice of Preparation (NOP) for this EIR. In their comment letter, Regis Homes specifically requested the City consider allowing a Medium Density Residential (MR) General Plan designation for their property that is currently zoned industrial and has been vacant since 2001. The 8.75 acre parcel is situated between the Silliman Center and the Ohlone College campus and across the street from existing residential housing and Newark Memorial High School. Other sites not owned by the New Technology Park Associates are included within the proposed specific plan that would require rezoning. It is inappropriate that this request received no response in the DEIR.

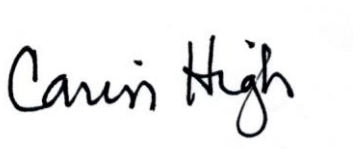
This site could be incorporated with the 77-78 acres already described in this DEIR into an alternative that slightly reduces the number of housing units, still provides for a 600-student

capacity elementary school, and has no development of Area 4. Some mixed-use component that would allow for development of a coffee shop/sandwich shop, laundromat, and other small scale amenities that could encourage pedestrian circulation within the neighborhoods, provide amenities for the Ohlone College Campus, while reducing most of the significant adverse impacts of the current Specific Plan. Portions of Area 4 might be suitable as passive recreation and Nature-Research Center that could benefit Ohlone College Campus and the Newark Unified School District. This would increase the recreational acres/resident ratio.

As mentioned in Richard Grassetti's letter the level of analysis provided reviewing the relative merits of the alternatives fails to comply with the Laurel Heights dictum and prevents decision makers and the public from understanding, evaluating, and substantively responding to the City's conclusions. Please provide a comparative discussion of the alternatives and including Alternative 7 "Reduced density in Area 3 – including the Regis Homes site, an elementary school, and some mixed-use amenities that would benefit the local community" as suggested above.

For all the numerous reasons we have cited above and for the reasons identified in the letters of Richard Grassetti and Carol Beahan, the DEIR as written contains numerous omissions, inaccuracies, and flaws and does not comply with the requirements of CEQA. We urge the City to address and correct these issues and to re-circulate the EIR. Thank you for the opportunity to provide comments.

Sincerely,



Carin High
CCCR Vice-Chair

cc: Mayor Dave Smith
Newark City Council Members
Newark Planning Commission
John Becker, City Manager
Mendel Stewart, Program Manager, USFWS
Eric Mruz, Refuge Manager, USFWS
Winnie Chan, USFWS
Joy Albertson, USFWS
James Browning, USFWS
Jane Hicks, Chief, Regulatory Branch, USACE
Cameron Johnson, South Section Chief, USACE
Mike Monroe, Environmental Protection Agency
Carl Wilcox, Chief, Water Branch, CDFG
Marcia Grefsrud, CDFG
Greg Martinelli, CDFG
Bruce Wolfe, San Francisco Bay Regional Water Quality Control Board
Brian Wines, San Francisco Bay Regional Water Quality Control Board

San Francisco Bay Air Quality Management District
Alameda County Flood Control and Water
Federal Emergency Management Agency
Native American Heritage Commission
Bob Doyle, Assistant General Manager of Land Acquisition, EBRPD
Mike Anderson, Assistant General Manager Planning and Stewardship, EBRPD
Stewardship Manager, EBRPD
Brad Olson, Environmental Programs Manager, EBRPD
Alameda County Flood Control District & Water Conservation District
Alameda Creek Alliance
California Native Plant Society
Friend of Coyote Hills
Greenbelt Alliance
Ohlone Audubon Society
Sierra Club
Transportation and Land Use Coalition (TransForm)