



## CITIZENS COMMITTEE TO COMPLETE THE REFUGE

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Via Email

September 27, 2013

Mr. Terrence Grindall  
Community Development Director  
37101 Newark Boulevard  
Newark, CA 94560  
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Re: Draft General Plan Tuneup (GPT) and GPT DEIR

Dear Mr. Grindall,

This responds to the Draft General Plan Tuneup (GPT) and GPT Draft Program environmental impact report (DEIR). The Citizens Committee to Complete the Refuge (CCCR) thanks you for the opportunity to review and provide comment. Based upon our review of the DEIR, we find that it contains serious omissions, inaccuracies, and flaws that must be rectified to comply with the California Environmental Quality Act (CEQA) requirements. For these reasons, as well as those articulated by our attorneys, Lippe Gaffney Wagner LLP, and Richard Grasseti of Grasseti Environmental Consulting, the DEIR must be corrected and re-circulated.

### **Newark General Plan "Tuneup"**

The city held public workshops in late 2011 and early 2012, facilitated by graduate students from California Polytechnic State University San Luis Obispo. The City also held joint study sessions between the city council and planning commission, though these do not appear to have been widely advertised. Members of CCCR only found out about these joint workshops by perusing the planning commission and city council agendas.

Public participation is a required component of the general plan process California Government Code §65351, and public participation can:

- Educate the public about community issues.
- Increase the public's ability and desire to participate in the community.
- Enhance trust in government by strengthening the relationship between elected officials, government staff, and the public.
- Encourage working towards community consensus and creating a vision for the future.
- Lay the groundwork for community revitalization and increased investment in the community.
- Allow decision makers to obtain public input regarding plan policies and community issues and objectives.
- Provide the public with opportunities to evaluate alternative plans and to participate in developing and choose a plan that works for their community.
- Inform decision-makers about public opinion.

The characterization of this general plan update as a "tuneup" conveys to the public that there is actually little need for the public to participate in the process. That the purpose of this "tuneup" is to merely tie up a few loose ends. This impression is solidified with the following text:

The effort leading to the adoption of a new General Plan in 2013 was referred to as a General Plan “Tune Up” rather than a major revision. This is because the values represented by the 1992 Plan remained valid and appropriate at the time of Plan adoption. By 2011, however, the 1992 Plan’s data and maps were becoming dated and the absence of a discussion of recent planning efforts was becoming more apparent. The 1992 Plan did not reference regional planning initiatives and legislative changes, nor did it address emerging issues such as climate change and sustainability. The intent of the “Tune-Up” was to update baseline data and projections, refresh the narrative text which describes planning issues, and move the planning horizon forward by 20 to 25 years. [emphasis added]

And:

The basic vision established by the 1992 Plan continues to guide this General Plan. This vision seeks to sustain Newark as a high quality community with attractive neighborhoods, great shopping, diverse workplaces, excellent public services and parks, and a healthy natural environment. Many of the areas identified for development by the 1992 Plan continue to be identified for development today—this General Plan provides greater detail on the types of uses and the issues to be addressed as such development takes place. [emphasis added]

It has been over twenty years since the crafting of the existing general plan. The Draft GP acknowledges that it carries forward many of the concepts of 1992 GP, including development of the city's western edge. However, significant new information has come to light since the early 1990's. As the general plan update indicates, new policies and strategies have developed over the intervening years, with different visions of how we should interact with the landscape, especially in low lying areas close to the edges of the bay. The general plan update process is an appropriate time to re-evaluate the long-term sustainability of the existing general plan's vision of land use.

As an example, the GPT carries forward the concept of a golf course and upscale housing on Area 4, the former Whistling Wings and Pintail duck clubs. A 2012 Wall Street Journal article<sup>1</sup> reported the financial woes of golf communities, describing how private golf course communities are "repurposing" golf courses by reducing the number of holes from 18 to 9 and then selling off the excess land. Property values in a number of golf course communities have plummeted. In South Carolina, lots that previously sold for \$150,000, were on sale in 2012 for \$1. In Florida, a lakefront home associated with an Arnold Palmer golf course sold for \$795,000 in 2011, but had sold in 2007 for \$1.6 million. In Bend, Oregon, a couple paid \$500,000 for a lot in 2006. A similar-sized lot sold for \$10,000 in early 2012. As of 2011, 2,000 golf courses of a total of 16,000 courses were in financial distress, and it was estimated an additional 4,000 to 5,000 would find themselves in a similar situation if their model of operation remained unchanged.

Jonathan Lansner<sup>2</sup> of the Orange County Register reports, during the period between 2005-2011, golf as a sport, lost 4.3 million golfers, and there were 37 million fewer rounds of golf were played in the period from 2005-2011. Lansner writes:

Today, golf is largely out as a housing theme because developers have learned that golf courses are an expensive and narrow way to keep a new housing community green.

"Lakes, walking paths and central amenities are used by all residents, as opposed to only about 15 percent to 20 percent of residents" for golfing, Boud says.

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<sup>1</sup> Keates, Nancy. "Fore Sale." July 24, 2012. Wall Street Journal.

<sup>2</sup>Lansner, Jonathan. "Golf courses hit rough economics." April 13, 2012. Orange County Register. <http://www.ocregister.com/articles/golf-349198-says-courses.html> Accessed 9-26-13

While builders could sell golf-course view homes at a steep premium, Boud says that "when costs are considered, open spaces and trails often overtake golf in terms of benefiting the master plan, and a lake -- which is relatively cheap and easy to maintain -- beats golf in view premiums. Though obviously, fewer homes tend to benefit from the view because a lake is generally much smaller than a course."

Lastly, Alicia Robinson<sup>3</sup> of the Press Enterprise exposes the difficulties the City of Riverside has encountered when operators who held contracts to run two of three golf courses in the city stopped paying their city leases.

The 1992 general plan, was its vision of a golf course and upscale housing was developed during an unprecedented boom in the construction of high end golf courses. The period of the 1990's to early 2000 was a period of rapid growth for golf course construction. But as described above, there has been a sharp course correction as the popularity of the sport has decreased. The evidence above, suggests a golf course would be anything but an asset to the city. Why does the city continue to incorporate the vision of a golf course in Area 4?

This is just one example of an instance where carrying forward the visions of the 1992 plan may be out of synch with reality, and an indication that more than a tuneup is warranted. Other more pressing issues, such as adaptive planning for sea level rise, have not adequately been incorporated into the vision of land use promoted by the draft general plan.

**The GPT and the GPT DEIR are not user friendly:**

The draft general plan and general plan DEIR are not user friendly, they do not encourage public participation in formulating a vision of growth for the city. Terms such as FAR (floor area ratio) have little meaning to the general public and housing unit densities are difficult to visualize. The Fremont general plan includes figures that help the reader visualize how the various housing densities or floor area ratios impact the landscape. Why can't the Newark GPT include similar figures?

The DEIR is inconsistent in providing information necessary to evaluate the adequacy of impact identification, identification of indirect impacts, mitigation and monitoring measures, etc. Impact assessment and mitigation and monitoring requirements are spread amongst at least four different documents - this DEIR, the HEU EIR, the Area 2 EIR, and the Area 3 and 4 EIR (refer to earlier comment regarding the inclusion of the suspended EIR). Rather than providing the actual wording of the mitigation measures from these other documents, the GPT DEIR provides one sentence summaries of the mitigation measure(s) in question.

p. 2-3 states: Whenever existing environmental documentation or previously-prepared documents and studies are used in the preparation of this Draft EIR, the information is summarized for the convenience of the reader and incorporated by reference.

As an example:

4.3-33 -

Additionally, previous environmental review conducted for the Dumbarton TOD Specific Plan, the Area 3 and 4 Specific Plan, and the 2009-2014 Housing Element identified the following mitigation measures to address potential impacts to special-status plant and animal species. The Dumbarton TOD EIR identifies Impacts 4.3-1

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<sup>3</sup> Robinson, Alicia. "Riverside: Cities rarely fare well in golf business." July 19, 2013. The Press Enterprise. <http://www.pe.com/local-news/riverside-county/riverside/riverside-headlines-index/20130719-riverside-cities-rarely-fare-well-in-golf-business1.ece> Accessed 9-26-13.

through 4.3-5 associated with impacts to the salt marsh harvest mouse, nesting raptors, the western burrowing owl, the tricolored blackbird, saltmarsh common yellowthroat, and other nesting passerine birds, as well as special-status plant species. These impacts would be mitigated to less-than-significant levels through the implementation of various assessment, survey, avoidance, buffer, preservation, and protection, and replacement measures specified in Mitigation Measures 4.3-1 and 4.3-5 from the Dumbarton TOD Specific Plan EIR.

The information contained in this summary is insufficient to determine what type of impacts are anticipated and whether the mitigation measures referred to are adequate to reduce the impacts to a level that is less-than-significant. Furthermore, the HEU DEIR doesn't appear to be online, making review of the severity of the impacts proposed by the GPT DEIR nearly impossible for anyone who doesn't have a copy of the document.

The GPT DEIR incorporate all mitigation measures in one document, ensure the measures are consistent, and then re-circulate the information for public review and comment.

The statement on p. 2-5 that "the Mitigation Monitoring Program for the proposed Plan will be completed as part of the FEIR and will be completed prior to consideration of the Plan by the Newark City Council." The typical comment period for an FEIR is 10 days. This delay in providing the MMP perpetuates the impression that the GPT and GPT DEIR are done deals and comments made by the public will not be considered seriously.

**It is not possible to determine from the GPT DEIR the level of CEQA review or opportunities for public comment that will occur in the future.**

[Please refer to the letters of LGW and Richard Grassetti regarding why it is improper for the GPT DEIR to rely on conclusions, mitigation measures, etc. from the Area 3 and 4 DEIR and specific area plan. This statement should be inserted anywhere Area 3 and 4 is discussed henceforth.]

The GPT has been described during public meetings as being "self-mitigating." Please explain what that means and the ramifications for future CEQA review and public comment opportunities.

p. 1-3 of the DEIR states:

...this Draft EIR has been prepared as a Program EIR for the General Plan Tune Up project, pursuant to Section 15168 of the CEQA Guidelines. As a Program EIR, it is not project-specific, and does not evaluate the impacts of specific projects that may be proposed under the Plan. Such subsequent projects will require a separate environmental review to secure the necessary development permits. While subsequent environmental review may be tiered off this EIR, this EIR is not intended to address impacts of individual projects. [emphasis added]

However, if the Program EIR addresses the program's effects as specifically and comprehensively as possible, many subsequent activities could be found to be within the Program EIR scope and additional environmental documents may not be required (CEQA Guidelines Section 15168[c]). When a Program EIR is relied on for a subsequent activity, the lead agency must incorporate feasible mitigation measures and alternatives developed in the Program EIR into the subsequent activities (CEQA Guidelines Section 15168[c][3]). If a subsequent activity would have effects not within the scope of the Program EIR, the lead agency must prepare a new Initial Study leading to a Negative Declaration, Mitigated Negative Declaration, or an EIR. In this case, the Program EIR still serves a valuable purpose as the first-tier environmental analysis. [emphasis added]

This passage describes the process normal process of tiering following the preparation of a program EIR. The GPT DEIR is confusing however, because it states that it incorporates by reference the analyses and mitigation measure

reporting programs of previously conducted EIRs. This makes it nearly impossible for the public to comprehend what will trigger future environmental review for the Area 2 (DTOD) and parcels covered by the HEU EIR (and Area 3 and 4 though that environmental review process is currently suspended). As an example:

p. 4.1-13:

Furthermore, there are provisions in place to address light impacts from development located at the northwestern edge of the urbanized portion of Newark, where such impacts could potentially be most pronounced. Mitigation Measure 4.1-1 from the Newark Housing Element EIR requires that lighting plans containing specific measures to reduce the adverse impacts of additional light sources to less-than-significant levels for development in areas adjacent to the Don Edwards National Wildlife Refuge. Additionally, the proposed Plan incorporates a policy from the Dumbarton TOD Specific Plan requiring the incorporation of types of lighting and illumination that reduce glare and over-lighting impacts in the vicinity of the Dumbarton TOD Focus Area. [emphasis added]

What if any, additional CEQA and public review of aesthetics can be expected within the sphere of the Newark Housing Element and the DTOD? Does the determination that the adverse impacts of additional light sources are reduced to a level that the city has determined to be less-than-significant for development in areas adjacent to the Refuge, mean that light impacts will not be reviewed further, even at the project level? What about other aesthetics impacts? If further environmental review will occur will there be any opportunity for public comment?

What are the anticipated triggers and what elements of the statement the GPT DEIR has incorporated by reference previous EIRs for the Dumbarton Transit Oriented Development (DTOD), the Area 3 and 4, and the Housing Element Update.

The incorporation of those EIRs and in particular, their mitigation measures into the existing baseline is improper.

#### **Inconsistencies:**

Comparisons of the GPT and GPT DEIR are difficult because the two documents do not use consistent language. GPT CS-18 Newark does not allow development within the 100-year flood zone and requires development to be elevated at least 8 feet above mean high tide (11 feet for residential development).

GPT DEIR p.4.8-32: Furthermore, any development within the Plan Area would be subject to the City's flood elevation standards for lands within Special Flood Hazard Areas (SFHAs), as defined by FEMA (Section 15.40.51 of the Newark Municipal Code). These standards require building pads of all residential structures to be a minimum of 11.25 feet elevation National Geodetic Vertical Datum (NGVD). In addition, the City requires the top of curb grades for residential streets to be no less than ten feet above mean sea level throughout the City (Section 16.08.06 of the Newark Municipal Code).

#### **Aesthetics:**

4.1-4 - This section discusses visual character of Newark and includes the views of Coyote Hills, the east bay hills, and low-lying wetlands fronting San Francisco Bay, but does not mention the views of the hills across the bay. Shouldn't that view be part of the existing conditions?

4.1-6 - Shouldn't the views across the bay be mentioned under the discussion of Area 4?

AES-1 - The proposed Plan would not have a substantial adverse effect on a scenic vista. Once Area 3 is constructed, you will no longer be able to see across the bay while driving along Cherry. The sense of openness will also be lost as there will be medium density development on both sides of the street.

Policy LU-4.13 - How is Newark's Bayfront Identity reinforced by building high density housing in Area 2 and importing 2.1 million cubic yards of fill into Area 4?

Policy LU-4.14- Views of the Peninsula Hills and San Francisco Bay will be obscured by development in Area 3 and 4 and in Area 2. One might have a view of the bay however, if one is perched in a high density housing unit?

AES-3 The proposed Plan would result in a significant impact to the visual character of the Southwest Newark Residential and Recreational Focus Area, as determined in previous environmental review. We concur that the proposed plan will have a significant adverse impact on the visual character of Area 3 and 4.

AES-4 States, "The Plan would not create a new source of substantial light or glare which would adversely affect day or nighttime views in the area." and rationalizes the conclusion with "future development under the proposed Plan would create new sources of light and glare; however, in the urbanized context of Newark this increase would not substantially and adversely affect daytime or nighttime views. Area 4 is isolated from development and in an area where there is no light at night. The introduction of lighting in this area will likely be visible from other parts of town.

AES-5 The proposed Plan, in combination with past, present, and reasonably foreseeable projects, would result in less than significant cumulative impacts with respect to aesthetics.

How is it possible to reach this conclusion? High density housing is proposed in Area 2, a large area of existing open space will be built out in Area 3, 2.1 million cubic yards of fill will be imported into Area 4 raising the elevation 10'-14', taller buildings are proposed in the New Park Mall area, and high density housing is proposed at the site of the library and city hall. How can the Plan buildout not visually alter the character of Newark?

#### **Air Quality:**

p. 4.2-13 - Existing Ambient Air Quality - The DEIR states the air quality monitoring station closest to the City is the Hayward Monitoring Station. Why wasn't the monitoring station in Fremont on Chapel Way utilized? That station in air miles is only 3.32 miles away? The site is reported to have sensors for O3, PM2.5, PM10, CO, NOx, HC, and Tox.

p. 4.2-15 - The DEIR refers to recent case law and states: "...the Guidelines language in thresholds d and e (exposure of sensitive receptors to substantial pollutant concentrations and creation of objectionable odors), as they relate to the placement of sensitive receptors under the proposed plan, above are not examples of an environmental effect caused by the development, but instead is an example of an effect on the Project caused by the environment (and therefore according to bad case law, are not required to be analyzed under CEQA). From a public health and safety perspective, it would seem irresponsible not to analyze and mitigate these impacts.

p. 4.2-18. - The City of Newark is already largely developed. Future growth under the proposed Plan would be accommodated in infill sites and redevelopment of existing sites. [emphasis added] This description of proposed development under the draft general plan is inaccurate as development is proposed on Area 4. The statement is inconsistent with other portions of the DEIR and GPT:

page 3-8 - Area 4 is one of the last undeveloped sectors of the city and is largely in agricultural use today.

Page 4.8-21 - However, future housing sites will be primarily located on underutilized land, infill sites, and along transit corridors, most of which (excepting Area 4) have already been developed and currently have a high percentage of impervious surfaces.

Page 4.4-10: Additionally, the Southwest Newark Residential and Recreational Focus Area contains a large area of undeveloped land, some of which would be developed with buildout of the Plan.

GP EH-31 - In particular, [...] residential development in Southwest Newark will result in a larger population in areas that are presently vacant.

GPT LU- 23-26: This is the largest area proposed for future development in Newark, comprising 636 acres [emphasis added]

p. 4.2-35: BAAQMD's CEQA Air Quality Guidelines do not require an evaluation of emissions from program-level planning activities such as the proposed Plan. Given the programmatic nature of the proposed Plan, specific operational information individual projects that would operate under the Plan is not known, and furthermore, subsequent environmental review of development projects would be required to assess potential impacts under BAAQMD's

project-level thresholds. Please clarify what additional environmental review would be required and would there be an opportunity to provide public comment?

p. 4.2-39 - States: Implementation of the above-listed policies would reduce operational emissions from development projects under the proposed Plan to the maximum extent practicable. Additionally, as noted above, future development projects under the proposed Plan would be subject to subsequent environmental review pursuant to CEQA and would be required to assess potential impacts under BAAQMD's project-level thresholds. Therefore, impacts associated with operational emissions of criteria air pollutant from the proposed Plan would be less than significant.

It is not possible to reach a conclusion of a less-than-significant impact. The policies are predominately advisory and there is no assurance they will be implemented. How is it possible to state impacts will be less-than-significant merely based on the requirement of future environmental review? As an example, what if significant impacts are identified, but there is a determination of "significant" followed by statements of over-riding concern? How would the adverse impacts of the project be less-than-significant? This same problem pertains to most of the impacts and mitigation measures discussed under the Air Quality section, e.g. AIR-3. With respect to AIR-3, it is unclear how a determination of less-than-significant before mitigation can be reached when there has been non-attainment for some constituents in previous years.

Action HW-1.F - Why locate sensitive receptors in areas of known "major sources" of air pollution at all?

p. 4.2-44 - New land uses in the City of Newark that are permitted under the proposed Plan that use trucks, including trucks with TRUs, could generate an increase in DPM that would contribute to cancer and non-cancer health risk in the SFBAAB. As identified in Table 4.2-6, impacts could occur at facilities that permit 100 or more truck trips per day or 40 or more trucks with TRUs within 1,000 feet of a sensitive land use. These new land uses could be near existing sensitive receptors within and outside the City of Newark. In addition, trucks would travel on regional transportation routes through the SFBAAB contributing to near-roadway DPM concentrations.

With implementation of Action EH-1.C, projects that would generate new sources of TACs would be required to reduce emissions to the BAAQMD's performance levels. Impacts would be less than significant.

The proposed development of Area 4 and the commiserate need for transport of fill to the site would require up to 100 trucks per day and this impact was not analyzed, nor mitigation proposed in the Area 3 and 4 EIR.

Please describe Policy EH-1.6 and Action EH-1.C. They do not appear in the DEIR or the GPT.

p. 4.2-45 - AIR-5 - "The Plan would not create or expose a substantial number of people to objectionable odors." "There are two types of odor impacts: 1) siting sensitive receptors near nuisance odors, and 2) siting new sources of nuisance odors near sensitive receptors."

p. 4.2-46 -

Sensitive receptors, such as the residential uses associated with planned development under the Proposed Plan, may be placed within the distances to these sources specified in Table 4.2-7. Additionally, sensitive receptors could be located in the vicinity of the salt ponds operated by Cargill Corporation, which produce odors due to the natural decay of organic matter such as algae that they contain. In general, the City's land use plan designates residential areas and commercial/industrial areas of the City to prevent potential mixing of incompatible land use types, with the exception of mixed-use areas that combine commercial with residential. BAAQMD Regulation 7, Odorous Substances, requires abatement of any nuisance generated by an odor complaint. Because existing sources of odors are required to comply with BAAQMD Regulation 7, impacts to siting of new sensitive land uses would be *less than significant*. [emphasis added]

Please clarify how the impacts of locating housing units and recreational facilities in proximity to the Cargill salt ponds was determined to be less than significant. There is no classification for the odors generated by the salt ponds or

appropriate distances to these sources on Table 4.2-7. Odors generated by the salt ponds can be particularly strong, but it is not clear how Cargill could be expected to abate the odor nuisance generated by the natural decay of algae, or by anaerobic mud. Additionally, wetlands can sometimes release the strong odor of rotten eggs due to the reducing conditions of the soils. There is nothing that can abate the smell, except for distance.

**Biological Resources:**

Figure 4.3-2 - Vegetation and Habitat Types - This figure grossly mischaracterizes the conditions on Area 3 and 4. Area 4 has a mosaic of uplands and wetlands across the site. Islands of uplands are surrounded by wetlands. To our knowledge the 78 undeveloped acres of Area 3 do not support wetlands habitat, yet nearly half the site is depicted as having wetlands. The area abutting the southeastern portion of Area 4, east of the railroad tracks is not cropland, but a vernal pool mitigation site, and should be depicted as a complex of grasslands and vernal pools. This figure needs to be amended to correctly reflect the habitats of Area 4.

p. 4.3-9 - Vegetation, Habitat Types, and Wetlands.

This section significantly downplays the significance of the mosaic of wetlands, waters and uplands that occur on Area 4. The tremendous potential to preserve and restore ecological functions on this site is of great significance. The Bay Goals Project<sup>4</sup> observed:

Historically, moist grasslands existed in large expanses near Suisun Marsh, in the upper reaches of Sonoma Creek and the Petaluma River, and adjacent to much of the baylands in South Bay. Today, examples of large areas of this habitat exist near Fairfield and in the Petaluma River area. Smaller areas of moist grasslands with seasonal wetlands are in Marin at St. Vincent's/Silveira Ranch. In South Bay, development has destroyed most of the historical moist grasslands; notable exceptions exist east of Coyote Hills in the Ardenwood area and near the upper reach of Mowry Slough in Newark. [emphasis added]

The Bay Goals Project had the following recommendation for Area 4, "Protect and enhance the tidal marsh/upland transition at the upper end of Mowry Slough and in the area of the Pintail duck club. Similar habitat can be protected and restored at the upper ends of Newark, Plummer, and Albrae sloughs."

p. 4.3-10 - The DEIR states the Corps and CDFW generally exercise authority over the various wetland habitat types. The San Francisco Bay Regional Water Quality Control Board would also have authority over wetlands and waters of the state.

p. 4.3-11 -

*Salt Ponds*

The commercial salt ponds are large, open water areas ranging in salinity from similar to sea water at 32 parts per million to 135 parts per million, or more than four times more salty than sea water.<sup>22</sup> These ranges of salinities allow for certain macro- and micro-organisms to thrive, resulting in brightly colored water. Salt ponds provide important habitat for a wide variety of bird species. Much of this use occurs as foraging habitat along the shorelines of ponds, but there is particularly high value of nesting and roosting habitat provided by remote or undisturbed locations along dikes between ponds and on islands. At least 19 different species of shorebirds use the Bay's commercial salt ponds for feeding, roosting, and breeding. These include long-billed curlew, Wilson's phalarope, American avocet, and black-necked stilt.<sup>23</sup> Additionally, the area provides perches for raptors, which have special status, including peregrine falcon, northern harrier, and merlin.<sup>24</sup> Threatened and endangered species using salt ponds include sites include the federally threatened snowy plover, federally endangered California clapper rail, and federally endangered California least tern.<sup>25</sup>

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<sup>4</sup> Goals Project. 1999. Baylands Ecosystem Habitat Goals. A report of habitat recommendations prepared by the San Francisco Bay Area Wetlands Ecosystem Goals Project. U.S. Environmental Protection Agency, San Francisco, Calif./S.F. Bay Regional Water Quality Control Board, Oakland, CA



This description should be added to the description of salt ponds on page CS-6 of the GPT.

Figure 4.3-3 Special Status Plant Species and Sensitive Natural Communities - The figure neglects to include Point Reyes bird's beak that occurs in the LaRiviere Marsh of the Don Edwards San Francisco Bay National Wildlife Refuge (Refuge).

Figure 4.3-4 Special Status Animal Species -

- Burrowing owl have been reported to occur within Area 4.
- Loggerhead shrike is listed as having been observed in Area 4 but does not appear on the map.

Table 4.3-1 Special Status Plant Species in the Newark Vicinity:

- Contra Costa goldfields - amend the table - confirmed occurrence in Area 2, refer to EIR.
- Point Reyes bird's-beak - amend the table - confirmed occurrence in the LaRiviere Marsh of the Refuge

Table 4.3-2 - Special Status Animal Species in the Newark Vicinity:

- Snowy egret - amend the table this species has been observed numerous times on the mitigation pond just east of Area 4 within Area 3. observations entered on eBird - (<http://ebird.org/ebird/GuideMe?src=changeDate&getLocations=hotspots&hotspots=L827703&parentState=US> - [CA&reportType=location&monthRadio=on&bMonth=01&eMonth=12&bYear=2000&eYear=2013&continue.x=69&continue.y=8&continue=Continue](#))
- Western snowy plover - observed immediately adjacent to Area 2 (DTOD) (data from the Western Snowy Plover Pacific Coast Population Recovery Plan Volume 2 (Appendices)
- white-tailed kite - several observations at the Stevenson Blvd mitigation pond. See eBird link above
- salt marsh harvest mouse - has been trapped within Area 4 (letters provided in attachments). Many occurrences within Mayhews Landing close to Area 2. (map provided in attachments)

p. 4.3-31 - Please explain why Congdon's tarplant is not expected to remain for another five years. Does it have anything to do with how the site is currently managed?

p. 4.3-31 - Wildlife Corridors - The DEIR fails to recognize that levees provide movement corridors.

BIO-1 - Buildout of the proposed Plan would result in less-than-significant impacts to special status plant and animal species in the Plan Area.

As was mentioned above, the mitigation and monitoring requirements need to be condensed into one stand alone document, rather than expecting decision makers and the public to hunt down all the mitigation measures, and the public needs to be given adequate time to review all of the detailed mitigation measures in their entirety. Furthermore, the mitigation measures need to be reviewed holistically to ensure that while the individual impacts of the various focus areas may appear to be less-than-significant, adequate mitigation measures exist for the entirety of the "Project."

The Policies listed under BIO-1 are inadequate to protect biological resources within the City of Newark and on lands adjacent to the City of Newark.

- Policy CS-1.1: Ensure that development minimizes its impacts on Newark's environment and natural resources through sound planning, design, and management. The proposal to fill up to 86 acres of wetlands that have been deemed by the Bay Goals Project, the Refuge Expansion Boundary, etc. is not an example of "minimizing" impacts on natural resources.
- Policy CS-1.2: Support the conservation of environmentally sensitive areas and unique natural resources in the city. Refer to the comments above and the excerpts from the Bay Goals Project cited above.

- Policy CS-2.1: Preserve and protect Newark's plant and animal species and habitats, including wetlands, salt marshes, creeks and lakes. Ensure that land use decisions consider potential impacts on wildlife habitat. It is one thing to "consider" potential impacts on wildlife habitat and an entirely different thing to "avoid" impacts on wildlife habitat. The City of Newark has taken the former approach and then approved filling of wetlands. How is approval of a development that will fill up to 86 acres of wetlands without knowing where mitigation for those losses might occur protective?
- Policy CS2.2: Special status species - requiring mitigation "as development takes place" is not protective of special status species due to temporal losses of habitat and the uncertainty of whether the proposed mitigation will actually be successful. Requiring mitigation be completed prior to the initiation of impacts, is protective of special status species. Habitat is not lost before successful replacement habitat is provided.
- Policy CS-2.3: DESFBNWR - placing a transit center and medium density housing next to lands that might eventually become part of the Refuge (Hickory Street parcel, Plummer Creek parcel) is not protective of the Refuge.
- Policy CS-2.5: Development near wetlands - Placing housing and all the human disturbance factors including trash, invasive plants, nuisance species attracted to the housing, domestic pets, next to wetlands is not protective of wetlands. There are also concerns about accompanying changes to the wetland hydrological regime, siltation, etc.
- Policy CS-2.7: Coordination with agencies is already required. Coordination in advance of any proposed development so that the development can be designed to avoid or minimize impacts is a worthwhile effort.
- Action CS1.A - Use the development review and CEQA processes to ensure that sensitive natural areas are set aside as open space and are managed to ensure their long-term conservation. This certainly sounds good on paper, would that it were actually taken to heart. This has not been the practice to date. How would the approval of filling up to 86 acres of wetlands be considered consistent with this Action?
- Action CS-2C - The Action should be explicit that coordination with regulatory and resource agencies is necessary to ensure any measures undertaken will be effective and sufficiently protective.

The impacts of BIO-1 cannot be determined to be less than significant without comprehensive review of the mitigation measures the City plans to incorporate into the mitigation and monitoring program. Also, the policies and actions listed above are of no value unless they are actually implemented.

BIO-2 - Buildout of the proposed Plan would result in less than significant impacts to wetlands, riparian habitat, and sensitive natural communities in the Plan Area.

BIO-2 as currently worded, does not adequately capture the significant and adverse impacts that will result from buildout of the Plan. As mentioned earlier, restoration scientists, resource agencies, and regulatory agencies, regard the tremendous opportunities for restoration of the wetland/upland mosaic of Area 4 as extremely rare along the edges of the San Francisco Bay ecosystem. This is a site of regional significance. The uplands and seasonal wetlands, though continually degraded by manipulation of the land, have incredible restoration potential. In addition, the site is known to support the endangered salt marsh harvest mouse, burrowing owl, migratory and resident waterbirds, and birds that forage in uplands and seasonal wetlands. Not only will the filling of up to 86 acres of wetlands result in significant environmental harm, but the mitigations necessary to stabilize and 2.1 million cubic yards of fill could irreparably alter the hydrologic regime of existing wetlands. The adjacent development will expose the remaining habitat to all the negative impacts associated with human disturbance, and the wetland mitigation required to offset the filling of wetlands may result in the conversion of any undeveloped uplands to wetland mitigation.

86 acres is an unprecedented amount of wetlands fill. The developer of Area 4 will need to demonstrate that wetlands cannot be avoided, or impacts cannot be minimized. The City of Newark would be doing its residents a disservice if off-site mitigation (outside the City's boundaries) occurs, as the functions and values that wetlands provide will benefit another community and not Newark residents.

Policy CS-4 - Wetlands Delineation. This policy sounds good on paper - the question is whether there are any other remaining large potentially developable properties with wetlands other than Area 4? Have wetland delineations yet to be done for any other area of Area 4 not currently proposed for development (i.e. besides sub areas, b, c, d, and e?)

(4)(a) - The City should take into consideration that allowing the purchase of mitigation credits elsewhere (e.g. within 10 air miles of Newark) means that another community benefits from the functions and values wetlands provide, flood protection, erosion control, flood desynchronization, water quality aspects, groundwater recharge, etc. and not Newark residents.

(5) - The length of required monitoring should be dependent upon the habitat being mitigated. Also, the City should include language that would provide for additional monitoring should contingency measures be required. Usually the extension for monitoring is at least two years beyond any human intervention and the requirement for monitoring ceases only after success criteria have been met.

BIO-3 Buildout of the proposed Plan would result in less-than-significant impacts to as-yet undelineated waters of the U.S. in the Plan Area.

How can this determination be reached??? How does the performance of a wetland delineation, and verification that wetlands exist, help reduce the impacts of buildout to less than significant?

Delineating wetlands informs a property owner if they have a resource they need to deal with. However, the reduction of impacts occurs if wetland impacts are avoided or minimized to the maximum extent possible. Then, and only after an earnest attempt has been made to redesign a project to avoid and minimize impacts, should compensatory mitigation be considered.

The mitigation measures described under BIO-2 will not and cannot reduce the adverse impacts of Plan buildout in Area 4 to a level that is less than significant!

One of the mitigation measures for Area 4 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 mosaic of wetlands and upland habitats that provide habitat resiliency and preserve regional biodiversity.

A conceptual mitigation plan still does not exist that would indicate the locations of proposed mitigation areas and their relationship to the existing mosaic of wetlands and transitional uplands scattered across Area 4. No attempt was ever made to offer this level of detail or even indicate conceptually what areas would be 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.

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.

To date there is no way of knowing how this Area 4 will be developed, where mitigation will occur onsite and what its 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.

Goal CS-2 - Conserve Newark's wetlands and baylands. Well this sounds good on paper. Please explain how this is actually reflected in the GPT.

Action CS-E - Support acquisition of wetlands and other environmentally sensitive areas by land trusts and other environmental organizations for the purpose of mitigation banking and wetlands restoration, provided there are no other conflicts with other General Plan goals and objectives.

In general, we do not support the use of mitigation banks, particularly for waters of the U.S. as the wetlands functions and values are lost to the community in which the filling is occurring, and instead benefit some other community, often far from the impact site. Other than the Plummer Creek site, please explain where this policy is being implemented.

There should be a (1)(a) inserted between the requirement of a wetland delineation and requiring authorization from the Corps or the RWQCB, that requires the land owner to avoid filling of the wetlands. If that is not completely possible, then wetland fill should be minimized. The 404 (b)(1) Guidelines require avoidance and minimization before compensatory mitigation is even considered.

BIO-4 - We do not concur that the Plan will not interfere substantially with the movement of any native resident or migratory fish or wildlife species, or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites. The Plan will in fact build to the edge of Newark's "bayfront" and could disrupt the movement of species along the western edges of the city. The Plan could discourage the use of the duck pond on that remains on Area 4 by resident, migratory and nesting birds due to human and domestic pet disturbance.

BIO-5 - The proposed Plan would not conflict with the City of Newark tree preservation ordinance. It is impossible to determine if this is true or not as we do not know the footprint of the Plan buildout. Therefore, the City cannot conclude that the impacts are less than significant.

BIO -6 - The proposed Plan would result in significant impacts related to conflict with the Basin Plan and Habitat Goals. We have already described Bay Goals recommendation that the area at the head of Mowry Slough be preserved and restored. This area represents a unique opportunity at a regional level. The DEIR mentions the Bay Goals recommendations to protect and enhance marsh transition zones. Please note, there are exceedingly few locations along the edges of the bay where this could be accomplished so quickly and easily.

Regarding the Basin Plan - The SFBRWQCB responded to the Area 4 DEIR and FEIR. Their DEIR comments regarding the development proposal and Basin Plan:

Section 3.5, Biological Resources, 3.5.3.2, Impacts and Mitigation Measures for Biological Impacts, Page 134 The DEIR states that:

Most of the seasonal wetlands, aquatic habitats, and muted tidal salt marsh that would be directly filled by the implementation of the Specific Plan were determined to be of poor or marginal quality, primarily due to intensive and ongoing agricultural disturbance and the resulting effects on plant communities and wildlife use.

The condition of these wetlands would be easily improved by discontinuing the agricultural disturbances in Area 4. The Basin Plan directs the Water Board to protect both existing and potential Beneficial Uses of waters of the State. In Area 4, the habitat value could be greatly enhanced by simply discontinuing agricultural disturbances. If these wetlands are filled under the proposed Specific Plan, then the potential for enhancing or restoring the wetlands will be lost. Mitigation for such an impact will require addressing the lost potential value of these wetlands. [emphasis added]

And:

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.

... 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.

In addition, the SFBRWQCB submitted comments to the FEIR:

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. The mitigation quantities proposed in the FEIR appear to be insufficient to compensate for the impacts associated with the proposed fill of wetlands in Area 4. The mitigation proposed in the FEIR relies on a combination of onsite wetland creation/enhancement and offsite wetland preservation. Onsite mitigation, which is only proposed at a 1:1 ratio, would 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. With respect to off-site mitigation, the FEIR does not provide sufficient detail to demonstrate that feasible locations exist for offsite mitigation.

On page 12 of the FEIR, the following statement is made:

The proposed mitigation measures for impacts to wetlands described in the Draft EIR treat wetlands as biological habitats and not State or Jurisdictional features. The City has determined based on extensive analysis by its biological experts that the mitigation requirements for wetland impacts (both in terms of amount and location of mitigation) described in the Draft EIR are more than adequate to mitigate the described impacts to a less than significant level.

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. [emphasis added]

Based on these comments it is unclear how the City thinks the significant adverse impacts of the Plan could be reduced to a level that is less than significant even with mitigation.

Bio-7 - The proposed Plan will not result in less-than-significant cumulative impacts related to biological resources. Please refer to all of the statements above.

The GPT DEIR itself acknowledges:

In particular, the cumulative losses of seasonal wetland habitat around the South Bay are significant, and both direct and indirect impacts resulting from the development of the Area 3 and 4 Specific Plan and the Dumbarton TOD Specific Plan would be significant without mitigation.

But rather than heeding the strong language of the SFBRWQCB's comment letters, and those of the Refuge and CDFW, the DEIR erroneously concludes the mitigation it has proposed is sufficient to reduce the impacts of the Plan buildout.

The DEIR also makes the interesting statement: "Additionally, future development under the proposed Plan would be subject to separate project-level environmental review to identify and mitigate specific impacts to biological resources in these areas." Once again raising the question of what would trigger additional environmental review and will there be additional opportunities for public comment.

### **Geology:**

According to California Geological Survey's 2003 seismic hazard report, the entire Plan Area has been mapped as a liquefaction hazard zone. Most of the soils that have been mapped within the Plan Area have a high shrink swell potential which can lead to heaving and cracking of concrete foundations or flatwork built on top of the soils. The western part of the Plan Area may contain unstable geologic units, which can lead to differential settlement.

The DEIR once again references two recent court cases that hold CEQA analyzes the impacts of the project on the environment and not the environment on the project. Once again we state, that bad case law aside, if a city approves development in an area prone to seismic hazard then it should do due diligence to ensure the public is not put in harm's way.

GEO-1 The proposed Plan would not expose people or structures to potential substantial adverse effects, including the risk of loss, injury, or death involving surface rupture along a known active fault; strong seismic ground shaking; seismic-related ground failure, including liquefaction; and landslides.

Policy EH-1.1: Development Regulations and Code Requirements.

Policy EH-1.2: Considering Hazards in Project Location and Design. Policy EH-1.2: Considering Hazards in Project Location and Design. Prohibit development in any area where it is determined that the potential risk from natural hazards cannot be mitigated to acceptable levels.

Action EH-1.A: Development Review. Review all development applications to ensure their compliance with all relevant building and safety codes, including those related to fire, flooding, soil, and geologic hazards.

Action EH-1.B: Code Updates.

Goal EH-2: Reduce risks to life and property associated with geologic hazards.

Policy EH-2.1: Earthquake Safety in New Construction.

Policy EH-2.2: Seismic Retrofits. Encourage the retrofitting

Policy EH-2.3: Earthquake Awareness. Inform Newark residents

Policy EH-2.4: Infrastructure Resilience. Maintain standards

Action EH-2.A: Geotechnical Studies. At the discretion of the Director of Public Works, require detailed investigations of ground shaking, liquefaction, soil stability, and other geologic hazards as specific development projects are proposed

Action EH-2.B: Geotechnical Staff Assistance. As needed, retain outside consulting

Action EH-2.C: Mandatory Seismic Upgrades. If feasible and appropriate

Action EH-2.D: Homeowner Education on Earthquake Safety

Action EH-2.E: Seismic Safety at Schools. Work with

Action EH-2.F: Earthquake Hazard Maps. Periodically update maps

With the exception of Policy EH-1.1, and Action EH-1.A and EH-1.2, there seems to be a lot of discretion in the degree to which these policies and action items are applied.

GEO-2 Implementation of the proposed Plan would not result in substantial soil erosion or the loss of topsoil.

This section mentions methods of erosion control and discusses Newark's Municipal Code. Isn't a Construction Activities Stormwater General Permit from the SFBRWQCB required for sites where more than an acre of land is being graded?

GEO-3 Development under the proposed Plan would not result in a significant impact related to development on unstable geologic units and soils or result in on- or off-site landslide, lateral spreading, subsidence, liquefaction, or collapse.

- Action EH-2.A: Geotechnical Studies. At the discretion of the Director of Public Works, require detailed investigations of ground shaking, liquefaction, soil stability, and other geologic hazards as specific development projects are proposed. Such investigations shall be prepared by a qualified geologist or soils engineer, with appropriate mitigation measures identified and implemented.
- Additionally, Mitigation Measure 4.5-1, from the Dumbarton TOD EIR, requires future developers within the Dumbarton TOD area to perform a design-level geotechnical engineering investigation for their individual property or properties prior to development and as a condition for grading permit approval.

Since Newark is in a liquefaction hazard zone, why is the requirement for detailed investigations of ground shaking, etc. discretionary? Why isn't it mandatory for any development? How often are detailed investigations required? Are the detailed investigations of Action EH-2.A required prior to the issuance of a grading permit? One would certainly hope so. It should be so stated in the language of the Action.

Are detailed design-level studies required for Area 3 and 4? According to this DEIR Area 3 sits atop sand deposits that could be susceptible to liquefaction.

GEO-4 Development under the proposed Plan would not create substantial risks to life or property as a result of its location on expansive soil, as defined in Table 18-1-b of the Uniform Building Code (1994).

"Development within the Plan Area in almost all instances would be preceded by suitably detailed geotechnical evaluations, the scope of which would include tests to determine and quantify the presence of expansive soils. The need for such geotechnical evaluations are triggered by CGS-determined liquefaction hazard zones that embrace all of the Plan area, as well provisions of the CBC and related City of Newark building and grading permit requirements." What are the situations under which such plans would not be required? Why not require detailed geotechnical evaluations for all development in Newark since the entire city appears to be within a liquefaction hazard zone? And why are there no mitigation requirements for Area 3 and 4? Especially since a school site is proposed within Area 3?



GEO-6 The proposed Plan, in combination with past, present, and reasonably foreseeable projects, would result in less than significant cumulative impacts with respect to geology and soils.

Once again the discussion mentions additional mitigation measures for the DTOD and HEU, but not Area 3 and 4. Why?

Also, the discussion of impacts and mitigation measures never touch on the types of soil stabilization techniques that might be utilized. This information is critical as the City should consider whether there could be any direct or indirect impacts to any of the other elements of the DEIR and GPT. For example, dynamic deep compaction could require mitigation measures for noise or vibration impacts to sensitive receptors. Could any of the GEO mitigation measures have adverse impacts to groundwater, mobilization of toxic groundwater plumes, dewatering of wetlands, adverse impacts to levees, adverse impacts to biological resources, etc.

### Hydrology:

The analysis of flood hazard is focused solely on the FEMA 100-year flood plain and the only means of addressing the risk of flooding is the requirement to construct new development atop building pads, requiring the import of millions of cubic yards of fill (Area 4).

page 4.8-17 states:

Although some locations within the City are protected from flooding by levees, FEMA's policy is to disregard any flood protection benefit provided by a levee if that levee is not certified as meeting National Flood Insurance Program (NFIP) standards for freeboard and geotechnical stability.35 Most of the levees within the City of Newark are not certified. Therefore, the areas next to the levees are assumed to be subject to flooding should any of the levees fail during a large storm or high tide event. [emphasis added]

In other words, the majority of levees that currently provide some flood relief are not recognized as flood control levees. As an example, the levees on the bayward side of Area 4, are privately owned and maintained. The City is therefore, not relying on the existing levees to provide flood protection. Instead, the City has stated the requirement that new development be constructed atop building pads that are at minimum one foot above the 100-year flood elevation will be adequate to reduce potential flooding.

Conspicuously absent in the DEIR analysis of flood hazard, is any mention of the additive impacts of sea level rise on flood risk. Sea level rise inundation maps depict much of the Dumbarton TOD and Area 4 at risk of inundation with a 1 foot rise in sea level. See the attached map or visit <http://www.csc.noaa.gov/slr/viewer/#> to view inundation risk with just a 1-foot rise in sea level and under varying sea level rise scenarios.

The DEIR avoids meaningful analysis of the additive risk sea level rise may have on new development permitted within the existing 100-year flood plain (low lying areas along Newark's bayfront) with the following explanation:

**The City notes that the purpose of this EIR is to identify the significant effects of the Plan (which is considered a Project under CEQA) on the environment, not the significant effects of the environment on the Plan.** (*South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604, 1614-1618; *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 905.) While identifying the environmental effects of attracting development and people to an area is consistent with CEQA's legislative purpose and statutory requirements, identifying the effects on the Project and its users of locating the Project in a particular environmental setting is neither consistent with CEQA's legislative purpose nor required by the CEQA statutes.

Appendix G of the Guidelines is a sample checklist form that is suggested for use in preparing an initial study, and which the City has employed to assist in the preparation of this Draft EIR (see *Guidelines*, § 15063, subd. (f)). However, a few of the questions on the form concern the exposure of people or structures to environmental hazards and could be construed to refer to not only the Project's exacerbation of environmental hazards but also the effects on users of

the Project and structures in the Project of preexisting environmental hazards. **To the extent that such questions may encompass the latter effects, the questions do not relate to environmental impacts under CEQA and cannot support an argument that the effects of the environment on the Project must be analyzed in a Draft EIR.** (*Ballona Wetlands Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 473-474.) **Accordingly, a discussion of flooding impacts associated with future sea level rise is not an example of an environmental effect caused by development, but instead is an example of an effect on the Project caused by the environment and is not required under CEQA.**

The DEIR references the issue of sea level rise, but goes no further. The language of the draft policies requires assessments and consideration of possible impacts related to sea level rise, but is silent as to whether that information, once collected will be utilized to ensure flood risk is reduced.

P. 4.2-28:

- Policy CS-5.8: Planning for Sea Level Rise. Require developments below 10' above mean sea level to include an assessment of possible impacts related to sea level rise.
- Policy S-3.9: Sea Level Rise. Consider the effects of rising sea level on the potential for flooding in low-lying areas, and participate in regional adaptation efforts for these areas.

P. 4.8-28:

Furthermore, City goals and policies under the proposed Plan would further reduce potential impacts to the existing storm drain infrastructure:

- Policy CS-5.8: Planning for Sea Level Rise. Require proposed development close to the Newark bayfront or in low-lying areas to include an assessment of possible impacts related to sea level rise.

P.4.8-33:

- Policy EH-3.9: Sea Level Rise. Consider the effects of rising sea level on the potential for flooding in low-lying areas, and participate in regional adaptation efforts for these areas.
- Policy CS-5.8: Planning for Sea Level Rise. Require proposed development close to the Newark bayfront or in low-lying areas to include an assessment of possible impacts related to sea level rise.

P. 4.12-24:

- Policy PR-5.7 Trail Sustainability. Consider long-term sustainability issues, such as projected sea level rise, surface durability, and the condition of levees, in the design of shoreline and wetland trail facilities.

As stated above, while these policies give the impression that measures will be taken to reduce risk from sea level rise inundation, there is no language within the General Plan Goals, Policies, or Actions that require that such risk will be reduced. The rationale, is reliance on the court cases mentioned above, "flooding impacts associated with future sea level rise is not an example of an environmental effect caused by development, but instead is an example of an effect on the Project caused by the environment and is not required under CEQA." This is irresponsible in terms of disclosure of impacts of a project and from a planning perspective a failure to incorporate meaningful analysis that could in fact lead to the permitting of projects that will impact the environment if sea level rise adaptation is not incorporated into the development design. As an example, if the only requirement to reduce flood risk is that new development is constructed at minimum, one foot above existing mean sea level (mean sea level at the time of permitting), and does not include sea level rise adaptation (not providing for estimates of sea level rise that could place the proposed development at risk of inundation), then the project may well have impacts to the environment that include the need for construction of flood protection levees, filling of adjacent wetlands to construct flood protection or from erosion of building pads, the need to re-engineer storm drain facilities, transportation facilities, etc.

The "State of California Sea-Level Rise Guidance Document"<sup>5</sup> states:

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<sup>5</sup> "State of California Sea-Level Rise Guidance Document." March 2013 Update. Developed by the Coastal and Ocean Working Group of the California Climate Action Team (CO-CAT) with science support provided by the Ocean Protection Council's Science Advisory Team and the California Ocean Science Trust.

SLR potentially will cause many harmful economic, ecological, physical and social impacts and incorporating SLR into agency decisions can help mitigate some of these potential impacts. For example, SLR will threaten water supplies, coastal development, and infrastructure, but early integration of projected SLR into project designs will lessen these potential impacts.

*The Guidance also addresses the importance of incorporating sea level rise adaptation into project design:*

The consequences of failing to address SLR adequately for a particular project will depend on both adaptive capacity and the *potential* impacts of SLR to public health and safety, public investments, and the environment. Figure 1 in Appendix C illustrates how adaptive capacity and potential impacts combine to produce consequences.

*Adaptive capacity* is the ability of a system to respond to climate change, to moderate potential damages, to take advantage of opportunities, and to cope with the consequences.<sup>6</sup> In most situations, adaptive capacity must be front-loaded, or built into the initial project; it cannot be assumed that adaptive capacity can be developed when needed unless it has been planned for in advance. A project that has high adaptive capacity and/or low potential impacts will experience fewer consequences.

The DEIR mentions BCDC and its regulatory authority over portions of Plummer Creek, Mowry Slough and portions of Area 4:

p.4.8-7:

As a permitting authority along the San Francisco Bay shoreline, BCDC is responsible for granting or denying permits for any proposed fill, extraction of materials, or change in use of any water, land, or structure within the Commission's jurisdiction. The BCDC has jurisdiction for Mowry Slough ending at the culvert at the Mowry Avenue bridge crossing, at the bend of the channel near Plummer Creek, and jurisdiction over managed wetlands in the Southwest Newark Residential and Recreational Focus Area. Projects in BCDC jurisdiction that involve Bay fill must be consistent with the Bay Plan policies on the safety of fills and shoreline protection. These policies state that adequate flood protection should consider future relative sea level rise and all proposed development should be above the highest estimated tide level for the expected life of the project or sufficiently protected by levees.

The DEIR should also note that BCDC's sea level rise policies, "Encourage preservation and habitat enhancement in undeveloped areas that are vulnerable to future flooding and contain significant habitats or species, or are especially suitable for ecosystem enhancement."<sup>6</sup>

The 2009 California Climate Change Strategy<sup>7</sup> 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.

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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<sup>6</sup> New Sea Level Rise Policies Fact Sheet. San Francisco Bay Conservation and Development Commission. [http://www.bcdc.ca.gov/planning/climate\\_change/SLRfactSheet.shtml](http://www.bcdc.ca.gov/planning/climate_change/SLRfactSheet.shtml) Accessed 9-26-13.

<sup>7</sup>

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.

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 priority 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.

This policy is pertinent to Area 4. The majority of Area 4 is within the Don Edwards San Francisco Bay National Wildlife Refuge expansion boundary. The site contains a rare mix of upland, seasonal wetland, muted tidal wetland, and a fresh water pond. The endangered salt marsh harvest mouse has been trapped on this site and the proposed development could fill up to 86 acres of seasonal wetlands.

#### **Traffic:**

Does the traffic analysis for account for the 600 student elementary school proposed in Area 3 or the truck traffic that will be required to transport 2.1 million cubic yards of fill to Area 4?

Are the dates of studies listed in the footnote on page 4.13-23 correct?

p. 4.13-24 states:

The traffic analysis assumed that the transportation network, including roadways and intersection lane configurations, would be the same in 2035 as that described above in section 4.13.1.2, Existing Conditions, of this chapter. New development projected within the Plan Area at buildout of the proposed Plan, including net increases over 2012 baseline conditions of 16,580 residents, 6,208 housing units, and 2,882 jobs, was input to the Alameda County Transportation Commission (ACTC) model in order to generate 2035 traffic forecasts. The resulting traffic volumes are shown on Figures 4.13-5a and 4.13-5b.

TRANS-1 With buildout of the proposed Plan, three signalized study intersections would operate at unacceptable LOS in 2035.

The analysis of TRANS-1 states:

With implementation of Action T-5.J from the proposed Plan, all seven impacted intersections would operate at acceptable LOS in 2035; however, the Cherry Street/Boyce Road and Stevenson Boulevard intersection and the Ardenwood Boulevard and SR 84 WB Ramps intersection are located in the City of Fremont, and additionally the Ardenwood Boulevard and SR 84 WB Ramps and Newark Boulevard and SR 84 EB Ramps intersections are under the jurisdiction of Caltrans. Therefore, implementation of improvements at these three intersections is outside the jurisdiction of the City of Newark, and as there is no implementation plan in place for improvements at these three intersections, it is not reasonably foreseeable at this time that impacts would be reduced to less-than significant levels with buildout of the proposed Plan in 2035. Consequently, impacts at these three intersections in 2035 would be significant prior to mitigation: Cherry Street/Boyce Road and Stevenson Boulevard; Ardenwood Boulevard and SR 84 WB Ramps; Newark Boulevard and SR 84 EB Ramps.

When will Newark begin coordinating with the City of Fremont and with Caltrans to implement the proposed mitigation measures at these three intersections?

It appears most of the policies and actions proposed to alleviate or reduce traffic congestion are purely volunteer, that is that they are totally dependent upon Newark residents altering their choices regarding transit. How will Newark determine if these policies are having any benefit and what will Newark do, if they are not?

TRANS-4 The proposed Plan would not substantially increase hazards due to a design feature (e.g., sharp curves or dangerous intersections) or incompatible uses (e.g., farm equipment).

Wouldn't pedestrian and bicycle at grade crossings be considered an incompatible use and why wasn't this issue analyzed under traffic? Especially since the traffic analysis includes a discussion of the Complete Streets Program?

Policy T-2.12: Trails Along Railroads and Utilities. Consider the use of railroad, flood control, and utility rights of way for jogging, biking, and walking trails, provided that safety and operational issues can be fully addressed.

Does this policy pertain to abandoned railroad right of ways? If not, it is difficult to understand how this would be compatible with biking, jogging, or walking trails.

TRANS-7 Implementation of the proposed Plan, in combination with past, present, and reasonably foreseeable projects, would not result in additional cumulatively considerable impacts.

"Cumulative impacts to transportation and traffic resulting from implementation of the proposed Plan are addressed locally, through specific road improvements, as well as through implementation of the goals, policies, and actions of the proposed Plan itself. These policies seek to reduce existing vehicle trips, minimize the addition of new vehicle trips, and lower per capita VMT. Additionally, the potential cumulative impacts of the proposed Plan at the regional level are examined through analysis related to the Alameda CTC Congestion Management Program."

It is difficult to imagine the policies proposed will result in an appreciable reduction in VMT.

The proposal to build upscale housing in an area that has no shopping, medical, dining, or other amenities within easy walking distance would seem to only encourage the continued use of automobiles as a mode of transportation. What are the current plans for providing mass transit in the DTOD? It seems any realization of Dumbarton Rail will be in the distant future if ever at all. What are the plans to provide a public transportation system for an area that is proposed to have an additional 2500 housing units?

### **Alternatives Analysis:**

The Alternatives Analysis Chapter is inconsistent with the requirements of CEQA. The DEIR correctly states:

The following discussion is intended to inform the public and decision makers of the feasible alternatives that would avoid or substantially lessen any significant effects of the Plan, and to compare such alternatives to the proposed Plan. Section 15126.6 of the CEQA Guidelines states that:

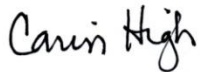
An EIR shall describe a range of reasonable alternatives to the project, or the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. An EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decision making and public participation.

The DEIR provides an alternative, the Restricted Growth Alternative, that would preserve Area 4, but also restricts any development of the Dumbarton Transit Oriented Development. This is an alternative that has been structured to fail. The Area 2 (DTOD) has already been identified by the Association of Bay Area Governments as a Priority Development Area, so it would seem that in spite of the reduction in environmental impacts, an alternative that prohibits any development is unrealistic. The city must provide an alternative that preserves Area 4, facilitates clean-up of contaminated sites and provides for sustainable development in Area 2.

**Conclusion:**

The GPT DEIR has significant flaws as identified in the letters submitted by LGW LLP and Richard Grassetti. Therefore, the GPT DEIR will need to be revised and re-circulated. Please keep us advised of any time tables pertaining to this review process.

Sincerely,



Carin High  
CCCR Vice Chair

*Attachments to follow*

cc: Mayor Nagy  
Newark City Council  
Newark Planning Commission  
John Becker, City Manager  
Anne Morkill, Project Leader, USFWS  
Eric Mruz, Refuge Manager, USFWS  
Cay Goude, Endangered Species Division, USFWS  
Jane Hicks, Chief, Regulatory Branch, USACE  
Cameron Johnson, South Section Chief, USACE  
Jason Brush, Environmental Protection Agency  
Marcia Grefsrud, CDFW  
Bruce Wolfe, San Francisco Bay Regional Water Quality Control Board  
San Francisco Bay Conservation and Development Commission  
Brian Gaffney  
Richard Grassetti  
Florence LaRiviere  
SF Baykeeper  
Save the Bay  
Ohlone Audubon Society  
Sierra Club