

September 26, 2013

Via Email and Fed Ex

Mr. Terrence Grindall
Community Development Director
37101 Newark Boulevard
Newark, CA 94560
Terrence.grindall@newark.org

RE: Draft General Plan Tune Up Program EIR

Dear Mr. Grindall;

This office represents Citizens Committee to Complete the Refuge (“Citizens”) and its members in regards to the City of Newark proposed revised General Plan and Draft EIR (“DEIR”). Attached hereto please find detailed comments about the Draft EIR and the Project’s compliance with CEQA. The DEIR violates CEQA, *inter alia*, through 1) the use of an improper baseline, 2) reliance on a void Specific Plan EIR for analysis of impacts and mitigations from the proposed General Plan, 3) failure to conduct adequate “project level” review where the General Plan includes the Specific Plan details, 4) a flawed cumulative impact analysis, and 5) a flawed alternatives analysis.

Because the Draft EIR is fundamentally and basically inadequate, meaningful public review and comment are precluded. Once the Draft EIR is fixed it must be recirculated for public review and comment. Prior to the City Council’s decision, if ever, that the EIR complies with CEQA and therefore may be certified, no action in furtherance of the Project should be permitted.

Thank you for your attention to this matter.

Sincerely,


Brian Gaffney

cc: Citizens Committee to Complete the Refuge

Attachment: CD by Fed Ex delivery by September 27, 2013

I. The Proposed General Plan and DEIR Fail to Use a Proper Environmental Baseline by Employing Hypothetical Conditions Based on a Void Areas 3 and 4 Specific Plan.

A. The Proposed General Plan Uses an Improper Baseline.

The proposed General Plan falsely and improperly assumes that the Areas 3 and 4 Specific Plan has been adopted and is in effect.¹ “A Specific Plan for the 636-acre [Areas 3 and 4] was adopted in 2010.” (Proposed General Plan, pp. PF-14, PF-15, LU-21, LU 24.) The Areas 3 and 4 Specific Plan has “been formally adopted by the City of Newark, but [is] not part of the General Plan per se.” (Proposed General Plan, I-4.)

This error is also found in the Land Use Background Report. “Two major development projects were approved in 2010 and 2011, Areas 3 and 4, and Dumbarton Transit Oriented Development (TOD) Specific Plans.” (Land Use Background Report, p. 4-6.) Under the heading “Existing Conditions,” the Land Use Background Report states that “The [Areas 3 and 4] Specific Plan and final Environmental Impact Report, along with a statement of overriding considerations, Mitigation Monitoring Report, and map amendment to title 17 of the Newark Municipal Code (zoning) were adopted in 2010.” (Land Use Background Report, p. 4-31.)

These assertions in the General Plan are false and misleading to the public. The City of Newark has not properly adopted the Areas 3 and 4 Specific Plan nor properly certified the Areas 3 and 4 Specific Plan EIR. On November 20, 2012, the Alameda Superior Court issued its Order (1) Issuing Interlocutory Remand; and (2) Suspending Resolutions. That Order is attached to these comments. “To ensure that the [Areas 3 and 4 Specific Plan] project does not proceed until the EIR is effective,” the court ordered the City to “SUSPEND Resolution 9745 (Certifying the EIR) and Resolution 9746 (adopting the Newark Areas 3 and 4 Specific Plan Project and the related General Plan Amendment” pending resolution of the case or further order of the court. That suspension was in effect when this DEIR was released to the public, and is in effect at the time of filing these comments.²

Moreover, as a matter of law the Areas 3 and 4 Specific Plan cannot be deemed “approved” in the absence of a valid certified EIR. “CEQA requires the completion of an EIR before a specific plan can become effective.” (*3570 East Foothill Blvd., Inc. v. City of Pasadena*, 980 F.Supp. 329, 333 (C.D.Cal. 1997). Before approving a specific plan the decision makers must be informed of the intended impacts and if that impact is adverse how it will be addressed. (*Vineyard Area Citizens for*

¹ “Areas 3 and 4 Specific Plan” and the “Southwest Newark Residential and Recreational Project” are two names for the exact same project. (Proposed General Plan, p. I-4, fn. 1.)

² Pursuant to Pub. Res. Code § 21168.9, the Areas 3 and 4 Specific Plan approvals and Areas 3 and 4 Specific Plan EIR certification must be considered void. Pub. Res. Code § 21168.9, subd. (a)(1) provides that if a court finds that any determination, finding, or decision of an agency has been made without CEQA compliance, the court shall enter an order that includes a mandate that the determination, finding, or decision be voided by the agency. Citizens has consistently maintained that under 21168.9 the approvals and certification must be set aside.

Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal. 4th 412, 429 citing *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 206.) Thus, the Areas 3 and 4 Specific Plan is not in effect, and it was error for the proposed General Plan to represent it as approved. (*Deltakeeper v. Oakdale Irrigation Dist.* (2001)94 Cal.App.4th 1092, 1009 ["The ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an [EIR] that does not provide the decision-makers, and the public, with the information about the project that is required by [CEQA]."].)

B. The Draft General Plan EIR Uses an Improper Baseline.

In addition, the Draft EIR, in describing the “Southwest Newark Residential and Recreational Focus Project” repeatedly asserts that the Areas 3 and 4 Specific Plan has been “adopted” by the City of Newark. (GP DEIR, pp. 3-20 to 3-21 (“ The proposed Plan does not include any additional land use changes over and above those already incorporated into the existing General Plan at the time the Areas 3 and 4 Specific Plan was adopted by Newark City Council in 2010.) “In June 2010, the City of Newark adopted the Areas 3 and 4 Specific Plan” (GP DEIR, p. 3-8.)

While the Draft EIR acknowledges that the Areas 3 and 4 Specific Plan is in litigation and that there is a stay on any further action with respect to the Areas 3 and 4 Specific Plan, the EIR relies on the Specific Plan and mitigation measures created for that plan as background conditions:

After certification of the EIR, a lawsuit was filed challenging the adequacy of the EIR (Alameda Co. Sup. Ct. #RG10-530015). An order was issued in November 2012 suspending the City resolutions certifying the EIR and adopting the Areas 3 and 4 Specific Plan Project and the related General Plan Amendment, pending further order or resolution of the litigation. As of August 12, 2013, that litigation remains pending and that suspension remains in effect, however, the information and analysis in the Areas 3 and 4 Specific Plan, **EIR and associated mitigation measures are assumed as part of the background condition for purposes of analysis in this EIR.**

(GP DEIR, 3-11 (emphasis added).) It is entirely inappropriate for the City to discuss the Areas 3 and 4 Specific Plan as though it is approved and its mitigation measures are adopted and enforceable, and then treat them as “background conditions” for purposes of the 2013 General Plan EIR.

Under CEQA, impacts must be measured against real conditions on the ground – not against what may potentially occur pursuant to a planning document. The Supreme Court’s discussion in *Communities for a Better Environment* points out this DEIR’s fundamental error:

By comparing the proposed project to what could happen, rather than to what was actually happening, the [agency] set the baseline not according to “established levels of a particular use,” but by “merely hypothetical conditions allowable” under the permits. (*San Joaquin Raptor Rescue Center v. County of Merced, supra*, 149 Cal.App.4th at p. 658, 57 Cal.Rptr.3d 663.) Like an **EIR**, an initial study or negative declaration “**must focus on impacts to the existing environment, not hypothetical situations.**” (*County of Amador v. El Dorado*

County Water Agency, supra, 76 Cal.App.4th at p. 955, 91 Cal.Rptr.2d 66.) **An approach using hypothetical allowable conditions as the baseline results in “illusory” comparisons that “can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts,” a result at direct odds with CEQA’s intent.** (*Environmental Planning Information Council v. County of El Dorado, supra*, 131 Cal.App.3d at p. 358, 182 Cal.Rptr. 317.)
Communities For A Better Env’t v. S. Coast Air Quality Mgmt. Dist., (2010) 48 Cal. 4th 310, 322.

Recently, the California Supreme Court affirmed that “the baseline for an agency’s primary environmental analysis under CEQA must ordinarily be the *actually* existing physical conditions rather than *hypothetical* conditions that could have existed under applicable permits or regulations. (*Neighbors for Smart Rail v. Exposition Metro Line Const. Auth.* (2013) 57 Cal. 4th 439, 448 (emphasis in original) citing *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 320–322.)

So here, this DEIR uses the hypothetically approved Areas 3 and 4 Specific Plan as the background condition. The Areas 3 and 4 Specific “EIR and associated mitigation measures are assumed as part of the background condition for purposes of analysis in this EIR.” (GP DEIR, 3-11 to -12.) “This Draft EIR compares the buildout potential for the proposed Plan with the existing baseline condition.” (GP DEIR, p. 3-3.) Because the Specific Plan adoption and EIR certification have been not been properly adopted and certified, this DEIR can only mislead the public as to the true General Plan impacts and subvert full consideration of the actual environmental impacts, contrary to CEQA’s intent.

II. The DEIR Improperly Relies On the Areas 3 and 4 Specific Plan EIR for Analysis of the Proposed General Plan’s Impacts and Mitigations.

The DEIR improperly relies heavily on the Areas 3 and 4 Specific Plan EIR for its analysis of impacts and mitigations.³ For example, regarding riparian impacts, the DEIR states:

The Areas 3 and 4 Specific Plan EIR identifies Impacts BIO-1 associated with impacts to riparian habitat. This impact would be mitigated to a less-than-significant level with the implementation of Mitigation Measures BIO-1.1 through BIO-1.2B, which require wetland and habitat avoidance to the maximum extent feasible and either on-site wetland creation (at a ratio of 1:1) and enhancement (at a ratio of 0.5:1) or off-site mitigation banking at a ratio of 1.5:1. Additionally, Impact BIO-2, related to substantial adverse impacts on wetlands and associated species due to altered

³ The proposed General Plan likewise incorrectly states that the EIR for the Areas 3 and 4 Specific Plan is valid and assumes, based thereon, that the impacts of the Southwest Newark Project will be mitigated. For instance, it asserts that “future noise environment in Newark will be impacted not only by changes in traffic volumes, but also by changes in land use.... The environmental impact reports (EIRs) prepared for approved development in these areas included measures to mitigate potential noise impacts. Likewise, future EIRs will include such measures, as appropriate.” (Proposed General Plan, EH-31 (emphasis added).)

hydrology, and Impact BIO-3, regarding significant impacts to marsh habitat and associated special-status species due to an increase in freshwater flows, would be mitigated to less-than-significant levels with the implementation of mitigation measures MM BIO-2.1 through 2.5 from the Areas 3 and 4 Specific Plan EIR. Further, Impact BIO-10, regarding indirect impacts to waterbirds associated with the loss of wetlands, would be mitigated to less-than-significant levels with the implementation of Mitigation Measure BIO-10.1, requiring a mitigation plan for creation or enhancement of replacement wetlands.

Previous environmental review has determined that impacts to wetlands, riparian habitat, and sensitive natural communities in the ...Southwest Newark Residential and Recreational Focus Area could be mitigated to less-than-significant levels with the implementation of the mitigation measures described above. The proposed Plan would incorporate the development envisioned in the ...Areas 3 and 4 Specific Plan ... and would not include any additional development in the ... Southwest Newark Residential and Recreational Focus Area over and above that which has already been analyzed in previous EIRs. As such, the implementation of the proposed Plan would not result in significant, new environmental impacts to wetlands, riparian habitat, and sensitive natural communities in the ... Southwest Newark Residential and Recreational Focus Area.

(DEIR, pp. 4.3-36 to -37.)

Regarding impacts to wetlands/ marsh/aquatic habitat, the DEIR states:

The Areas 3 and 4 Specific Plan EIR concluded that Specific Plan implementation would result in the loss of up to 85.6 acres of wetland/marsh/aquatic habitat in the Southwest Newark Residential and Recreational Focus Area. 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. It was determined that implementation of the following measures would reduce associated impacts to a less-than-significant level: Mitigation Measure Bio-1.1 requiring grading plans designed to avoid permanent impacts to wetland and aquatic habitat; Mitigation Measure Bio-1.2A, requiring a detailed mitigation plan shall be developed by a qualified biologist and incorporating a combination of on-site wetland creation and enhancement, and/or acquisition of existing wetlands located off-site; and Mitigation Measure Bio-1.2B, requiring, as an alternative to Measure Bio-1.2A, the acquisition and permanent preservation of existing wetlands at a ratio 1.5:1 (existing habitat: habitat impacted) at an approved wetland mitigation bank or other private lands within 10 air miles of the affected area and along the eastern shore of south San Francisco Bay within the same geographic watershed.

Previous environmental review has determined that impacts to waters of the US in the Dumbarton TOD Focus Area and in the Southwest Newark Residential and Recreational Focus Area could be mitigated to less-than-significant levels with the implementation of the mitigation measures described above. The proposed Plan

would incorporate the development envisioned in the Dumbarton TOD Specific Plan, the Areas 3 and 4 Specific Plan, and the 2009-2014 Housing Element and would not include any additional development in the Dumbarton TOD Focus Area or the Southwest Newark Residential and Recreational Focus Area over and above that which has already been analyzed in previous EIRs. As such, the implementation of the proposed Plan would not result in significant, new environmental impacts to waters of the US in the Dumbarton TOD Focus Area or the Southwest Newark Residential and Recreational Focus Area.

(DEIR, p. 4.3-40.)

Regarding cumulative losses of seasonal wetland habitat, the DEIR states:

The Dumbarton TOD Focus Area and the Southwest Newark Residential and Recreational Focus Area are the largest remaining tracts of relatively undeveloped land in the Plan Area. In the absence of project-specific mitigation measures identified in previous environmental review conducted by the City of Newark, potentially significant impacts related to special-status plants and animal species, wetlands, riparian habitat, and sensitive natural communities would all contribute to cumulatively significant impacts in the South Bay. 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 Areas 3 and 4 Specific Plan and the Dumbarton TOD Specific Plan would be significant without mitigation. **However, as determined in previous environmental review conducted by the City, the mitigation measures prescribed for all of these impacts would adequately mitigate the project's contribution to these cumulative impacts. Buildout of the proposed Plan would not include any additional development in these areas over and above that which has already been analyzed in previous EIRs.**" (DEIR, p. 4.3-48, emphasis added.)

Regarding growth inducing impacts, the DEIR states "the extension of existing utility lines and the construction of new roadways would be required, **and associated impacts have been analyzed and mitigated in previous EIRs prepared by the City of Newark for the respective specific plans.**" (DEIR, p. 7-6, emphasis added.)

This approach of relying on a previous EIR which was not properly certified, as well as a Specific Plan whose adoption has been set aside, is clearly illegal. First, the Alameda Superior Court found that the Areas 3 and 4 Specific Plan EIR is materially deficient and that the "court cannot meaningfully evaluate whether the City's findings and conclusions in the EIR are supported by substantial evidence." (November 2012 Order at p. 19.) Second, to the extent that this DEIR is attempting to "tier" off the analysis of impacts and mitigations in the Areas 3 and 4 Specific Plan EIR, such tiering violates CEQA as the prior EIR's certification is void. (Pub. Res. Code § 21094, subd. (a)(1).) CEQA authorizes tiering only where the previous EIR was properly certified. (*Friends of the Santa Clara River v. Castaic Lake Water Agency* (2002) 95 Cal.App.4th 1373, 1384-1387.) The instant General Plan DEIR should not be certified based on this CEQA violation alone. (*California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1229.) Third, this DEIR does not state where a copy of the prior EIR may be examined (Pub. Res. Code § 21094, subd. (f)), and the General Plan Tune Up initial study - if one was even prepared - did not analyze

whether the revise General Plan may cause significant impacts not examined in the prior EIR. (Pub. Res. Code § 21094, subd. (c).)⁴ For these reasons, the DEIR improperly relies on the analysis, conclusions, and mitigation measures of the invalid Areas 3 and 4 Specific Plan EIR.

In addition, by relying on the Areas 3 and 4 Specific Plan EIR, this DEIR necessarily incorporates many of the CEQA errors in that document. Citizens challenged the Areas 3 and 4 Specific Plan EIR for 1) use of improper "baseline" for CEQA analysis and mitigation, particularly regarding traffic, 2) failure to adequately disclose or analyze cumulative impacts, 3) improper deferral of mitigations of impacts to trees and also habitats and special status species, 4) failure to use or apply the Areas 3 and 4 Specific Plan EIR's thresholds of significance to cumulative land use impacts, cumulative biological resource impacts, and cumulative hydrology, water quality and water supply impact, and 5) the Areas 3 and 4 Specific Plan EIR is inadequate to serve as project level CEQA review. Citizens renews each of these objections in regards to the adequacy of the instant DEIR, particularly given that the DEIR's project description states that "the information and analysis in the Areas 3 and 4 Specific Plan, EIR and associated mitigation measures are assumed as part of the background condition for purposes of analysis in this EIR."⁵ (GP DEIR, p. 3-11.)

Citizens is submitting as part of these DEIR comments a CD that includes its pleadings and briefings challenging the Areas 3 and 4 Specific Plan EIR, as well as the administrative record in that prior litigation - which includes Citizens and others administrative comments on the Areas 3 and 4 Specific Plan EIR. Please include each of the documents on the attached CD as part of the administrative record for this General Plan Tune Up Program EIR.

III. The DEIR Improperly Fails to Conduct Adequate "Project Level" Review Where the General Plan Includes the Specific Plan Details.

The General Plan EIR erroneously states that "regardless of whether the Areas 3 and 4 EIR is upheld or not, this Program EIR fully addresses the environmental impacts of the proposed General Plan." (GP DEIR, 3-11--12.)

This statement is wrong for the reasons stated above, and further because the proposed General Plan does more than change the land use designation for a portion of [former] Area 3. As noted above, the proposed General Plan obligates the City to implement the Areas 3 and 4 Specific

⁴ It would also be improper for the City of Newark to incorporate by reference any Areas 3 and 4 Specific Plan statement of overriding considerations because the Areas 3 and 4 Specific Plan approvals and EIR are void (Pub. Res. Code § 21094, subd. (a)(2)) and because the prior EIR was certified more than three years ago. (Pub. Res. Code §§ 21094, subd. (a)(2)(D).)

⁵ See also GP DEIR, p. 4.13-23, fn. 3 which states: "The sources for threshold of acceptable LOS in Newark are the ... Southwest Newark Residential and Recreational Focus Area Specific Plan (July 2011)." While CCCR is unaware of what document constitutes the "Southwest Newark Residential and Recreational Focus Area Specific Plan (July 2011)," to the extent the DEIR is referencing the Areas 3 and 4 Specific Plan EIR, CCCR objects for the reasons stated herein and in previous comments (attached on CD) about the Areas 3 and 4 Specific Plan EIR adequacy.

Plan.

Because the proposed General Plan incorporates and requires implementation of this Specific Plan, it is not a standard General Plan -- it includes the same level of detail (if not more, in some instances) as the Areas 3 and 4 Specific Plan as proposed in 2010. Therefore, under CEQA this DEIR must subject this portion of the proposed General Plan to project-level environmental review. Herein, we first note many of the specifics incorporated into the proposed General Plan, and thereafter the CEQA provisions requiring greater environmental review.

Numerous General Plan “Policies” require implementation consistent with the Areas 3 and 4 Specific Plan⁶:

Policy LU-7.1 Southwest Newark Residential and Recreational Project (Area 3 and 4 Development). Facilitate the development of the 637 acres formerly known as "The Area 3 and 4 project" consistent with previously approved plans for this area. The residential holding capacity of this area shall be 1,260 units.

Policy LU-7.6 The preferred open space use is an 18-hole golf course with clubhouse.

Policy LU-7.9 Address inclusionary housing requirements consistent with the Area 3 and 4 Development Agreement.

Several proposed General Plan “actions” also direct the City to implement the Southwest Newark Project as proposed in the Areas 3 and 4 Specific Plan.⁷ For example, Action LU-7.D (Design Standards) specifies implementation of “the standards in previously approved plans for this area addressing lot size, height, setback, lot coverage, open space, patios, and balconies, and parking.” Action LU-7.E (Grading and Fill) “require[s] grading and fill plans which ensure long-term mitigation of flood hazards, consistent with previously approved plans for the Southwest Newark Residential and Recreational Project area. Building pad and curb elevations shall conform to previously adopted standards.” So also, Action LU-7 (A Street and Path Network) and Action LU-7.B (Railroad Overcrossing) requires actions consistent with previously approved plans.

The Land Use Element of the proposed General Plan provides the following specificity regarding the Southwest Newark Residential and Recreational Project

⁶ “A policy expresses the City's commitment and intent on a topic area related to the goal.” (Proposed General Plan, I-4.) “A goal is a general, overall and ultimate purpose, aim or end toward which the City will direct its efforts.” (*Ibid*, underscore added.) The word “will” indicates that this provision is mandatory. (Proposed General Plan, I-5 [“Must’, ‘shall,’ or ‘will’ identify provisions which are mandatory. Verbs such as “require” reflect similar obligatory directives.”].) This provides further evidence that the proposed General Plan will implement the specifics of the Areas 3 and 4 Specific Plan.

⁷ “An action is a specific program to be carried out in response to an adopted policy... .” (Proposed General Plan, I-4.)

This is the largest area proposed for future development in Newark, comprising 636 acres in the area bordered by Mowry Avenue on the west, Stevenson Boulevard on the east, Cherry Street on the north, and Mowry Slough on the south. The Union Pacific Railroad bisects the area.

Previous General Plans for Newark referred to the land north of the railroad as "Area 3" and the land south of the Railroad as "Area 4." Area 3 was originally 298 acres, but 221 acres of this total has been committed to other land uses, including the Newark campus of Ohlone College, Sportsfield Park, and the Stevenson Point Technology Park. The remaining 77 acres, which is located along the south side of Cherry Street west of Stevenson Boulevard, was vacant as of 2013.

A Specific Plan for the 636-acre area was adopted in 2010. The Plan calls for the development of up to 1,260 housing units, a major recreational facility such as an 18-hole golf course, and the dedication of conservation open space on some of the low-lying areas south of the railroad tracks. An area facing Cherry Street just east of Ohlone College has been set aside for a new 600-student elementary school and a new neighborhood park. The rest of former Area "3" has been designated for Low-Medium Density Residential uses on the General Plan Map. The Specific Plan envisions single-family lots ranging from 3,150 square feet to 4,800 square feet, although the flexibility exists to transfer the allowable density within this area to facilitate multi-family housing construction on a portion of the site.

Development of single-family lots is planned south of the railroad tracks. Some of the area designated as "Low Density Residential" on the Map will be conserved as wetland habitat and some will be improved with recreational facilities. The Specific Plan divides the area south of the tracks into four lettered sub-areas (B, C, D, and E). Of these four areas, Area B (125 acres) is planned for housing, Area D (100 acres) may be used for a golf course or similar recreational amenity, Area E (244 acres) is to be conserved as open space, and Area C (90 acres) may be used for either recreation or housing.

In the event a golf course is developed, it is envisioned as an 18-hole public course. A golf course could provide an amenity that is lacking in Newark today and would round out the range of recreational opportunities available to those who live and work in the city. It could also be an economic development asset that can attract businesses, executive housing, and higher quality retail uses nearby. Ancillary facilities such as a clubhouse, banquet facility, driving range, and maintenance buildings, could potentially complement such a facility. Construction of a golf course is contingent on its fiscal feasibility, market demand, and other factors. In the event a golf course is not developed, another citywide recreational amenity should be provided here.

The Specific Plan includes residential street and intersection standards, along with plans for a railroad overpass at Stevenson Boulevard. The Stevenson Avenue Bridge should include a 12-foot travel lane in each direction, adjacent to 5-foot bike lanes. One side of the bridge will have a sidewalk for pedestrians. A pedestrian and bicycle bridge across the Alameda County Flood Control Channel is also planned, connecting the site to Ohlone College. A multi-use trail is also proposed across the southern part of the site, providing a component of the Bay Trail.

A grading and fill plan for this area has been prepared. ... Building pads of occupied structures will be at least 11.25 feet above mean sea level (msl), with the finished floor at least six inches above the building pad. The top of curb grades for residential streets will be

no less than 10 feet above msl. Detailed grading and stockpile management plans will be required before construction is approved and stormwater management plans will be required to contain runoff. A new network of water, sewer, and storm drain lines will be constructed to serve the development, supplemented by related infrastructure such as pump stations.

(Proposed General Plan, pp. LU-23 to LU-26.)

Similarly, the Parks, Recreation, and Open Space section states:

The Southwest Newark Residential and Recreational Development includes plans for a golf course or major public recreational facility. A golf course would likely be 120 acres or larger and could potentially double the City's total park acreage. The Specific Plan for Southwest Newark (formerly Areas 3 and 4) also includes an approximately 5-acre neighborhood park, to be co-located with an elementary school on the south side of Cherry Street east of Ohlone College. The park will not only serve new residents, it will remedy a park access deficiency in the residential area on the north side of Cherry Street in this area.

(Proposed General Plan, p. PR-11.)

Likewise, the Draft EIR provides specificity regarding the Southwest Newark Residential and Recreational Focus Project. This Draft EIR is unequivocal that “The proposed Plan would incorporate the development envisioned in the ...Areas 3 and 4 Specific Plan” (DEIR, pp. 4.3-36 to -37.). The EIR’s project description (at DEIR, p. 3-11) lays out in specific detail that:

The Area 3 and 4 Specific Plan amended 1992 General Plan Land Use designations to allow for development of up to 1,260 single- and multi-family housing units, a new elementary school capable of accommodating 600 students, a golf course, and additional recreational open space areas. The Specific Plan envisions the preservation of approximately 200 acres of open space in Area 4 and the, retention of existing light industrial and institutional uses in most of Area 3, Key components of the Area 3 and 4 Specific Plan, shown in Figure 3-4, include:

- A new 78-acre residential neighborhood in Subarea A composed of single-family detached homes and multifamily residential units, including up to 189 multi-family units at below market rate. (Note: Below-market-rate (BMR) housing units are priced to be affordable to households with moderate income or below.)
- Single-family detached homes in Subarea B and C;
- A new elementary school in Subarea A, capable of accommodating 600 students;
- An 18-hole golf course in either Subarea C or D, configured to optimize habitat areas and limit disturbance to wildlife and wetlands to the extent feasible;
- Improvements to the circulation network, including:
 - A public street extension of Stevenson Boulevard with a structural overpass providing vehicular and pedestrian access into Area 4 over the Union Pacific railroad tracks. Modifications to two Pacific Gas & Electric (PG&E) transmission towers to accommodate the overpass.
 - A new driveway providing access from Cherry Street into Subarea A. A new traffic signal and pedestrian crosswalk are planned at this intersection;

- A new driveway providing access to Subarea A from Stevenson Boulevard, midway between Cherry Street and the existing industrial uses;
- A paved trail and pedestrian bridge over the flood control channel in Area 3, providing connection between the new residential neighborhood, Ohlone College, and the George M. Silliman Recreation Complex;
- A multi-use trail at Mowry Avenue in Area 4, providing east-west access for emergency vehicles, pedestrians, and cyclists; and
- Utilities infrastructure, including a new public water distribution system within the residential streets of Area 4, new sewer mains within public residential streets in Area 3, and a new pump station to discharge wastewater generated by new uses in Area 4.

Further at DEIR, pp. 3-20--3-21, the project description states:

The Southwest Newark Residential and Recreational Focus Area is made up of two non-contiguous sectors in the southwest of the city, as shown in Figure 3-7. Together, these two sectors cover an area of 637 acres. The boundaries of the larger of the two sectors correspond to the boundaries of Area 4, as delineated in the Areas 3 and 4 Specific Plan adopted by the City in 2010 and described earlier in this chapter. The boundaries of the smaller sector correspond to the vacant, undeveloped portion of Area 3, bounded by Ohlone College to the north, Cherry Street to the west, Stevenson Boulevard to the south, and the Stevenson Point Technology Park to the west. The vision for the Southwest Newark Residential and Recreational Focus Area contained in the proposed Plan is consistent with the vision outlined in the Areas 3 and 4 Specific Plan. The proposed Plan does not include any additional land use changes over and above those already incorporated into the existing General Plan at the time the Areas 3 and 4 Specific Plan was adopted by Newark City Council in 2010. At the time the Specific Plan was adopted the land use designation in the 78-acre portion of the focus area formerly known as Area 3 was changed from Special Industrial to Medium Density Residential. The land use designation for the larger portion formerly known as Area 4 was already Low Density Residential in the 1992 General Plan and no changes were made at the time the Specific Plan was adopted.

As described in the proposed Plan, the Southwest Newark Residential and Recreational Focus Area is envisioned as one of Silicon Valley's premier new neighborhoods, with executive housing and high quality recreational opportunities. Proposed Plan land use designations applicable to this Focus Area would allow for the development of 1,260 single and multi-family housing units, a new elementary school capable of accommodating 600 students, a golf course, and additional recreational open space areas as envisioned in the Areas 3 and 4 Specific Plan. Additionally, the proposed Plan contains policies that support development envisioned in the Areas 3 and 4 Specific Plan, including the 1,260 housing units, the golf course, an interior street and path network, and an overpass crossing the Union Pacific Railroad tracks at Stevenson Boulevard. The proposed Plan also includes policies intended to protect and enhance sensitive natural resources in the Southwest Newark Residential and Recreational focus area, including wetland and aquatic habitat, natural hydrological features, and other biological resources.

CEQA requires that given the specifics involved in the proposed General Plan, that this

DEIR correspondingly provide detailed analysis of potential impacts. “The degree of specificity required in an EIR will correspond to the degree of specificity involved in the underlying activity which is described in the EIR.” (CEQA Guidelines 15146.) In addition, an EIR on a project such as the adoption or amendment of a general plan “should focus on the secondary effects that can be expected to follow from the adoption or amendment.” (CEQA Guidelines 15146, subd. (b).)

The sufficiency of the information contained in an EIR is reviewed in light of what is reasonably feasible. (Guidelines, § 15151; *Kings County Farm Bureau v. City of Hanford*, supra, 221 Cal.App.3d at p. 733.) At minimum, an EIR “must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.” (*Laurel Heights*, supra, 47 Cal.3d at p. 405.)

(*Rio Vista Farm Bureau Ctr. v. Cnty. of Solano* (1992) 5 Cal. App. 4th 351, 375.) Here, given the great specificity known about the “Southwest Newark Residential and Recreational Project,” this DEIR is required, but failed to, more detailed analysis. Simply calling it a program EIR will not suffice under CEQA given that is reasonably feasible to provide greater specificity.

IV. The DEIR's Cumulative Impacts Analysis Is Deeply Flawed.

A. It Is Improper for the DEIR's Cumulative Impacts Analysis to Rely on the Areas 3 and 4 Specific Plan and Areas 3 and 4 Specific Plan EIR

CEQA provides that “[p]reviously approved land use documents, including ... specific plans ..., may be used in cumulative impact analysis.” (Pub. Res. Code § 21100, subd. (e) (emphasis added).) The CEQA Guidelines further provide that a “pertinent discussion of cumulative impacts contained in one or more previously certified EIRs may be incorporated by reference pursuant to the provisions for tiering and program EIRs.” (CEQA Guideline 15130, subd. (d) (emphasis added).) The Areas 3 and 4 Specific Plan has not been properly approved and the Areas 3 and 4 Specific Plan EIR has not been properly certified. As argued above, to the extent that this DEIR is attempting to “tier” off the analysis of impacts and mitigations in the Areas 3 and 4 Specific Plan EIR, such tiering violates CEQA as the prior EIR was not properly certified. (Pub. Res. Code § 21094, subd. (a)(1).)

It is also inappropriate to rely on the mitigation analysis in the Areas 3 and 4 Specific Plan EIR and any measures “adopted” as part of the Areas 3 and 4 Specific Plan. Areas 3 and 4 Specific Plan has not been properly approved and the Areas 3 and 4 Specific Plan EIR has not been properly certified. These approvals have been set aside by court order since November 2012, months before the Notice of Preparation for the General Plan Update Draft EIR was issued on January 18, 2013. Further, Citizens challenged the Areas 3 and 4 Specific Plan EIR for, *inter alia*, failure to adequately disclose or analyze cumulative impacts, and improper deferral of mitigations of impacts. Citizens renews each these objections in regards to the adequacy of the instant DEIR, particularly given that the DEIR's project description states that “the information and analysis in the Areas 3 and 4 Specific Plan, EIR and associated mitigation measures are assumed as part of the background condition for purposes of analysis in this EIR.” (DEIR, p. 3-11.)

B. It Is Improper to Conclude That The General Plan Update's Cumulative

Impacts Will Be Less Than Significant Based Simply On Mitigation Measures for Specific Plans or Other Projects.

The DEIR violates CEQA by concluding that the General Plan's cumulative impacts will be less than significant simply because the impacts of an individual plan or project will be mitigated. Under CEQA, significant cumulative impacts may occur even if individual projects mitigate the impacts of that project to a level of insignificance.

The DEIR assumes, for many resource areas, that cumulative impacts will be less than significant simply because individual projects will be required to mitigate the impacts of that project to a level of insignificance. For instance, the DEIR concludes that the General Plan's cumulative biological impacts will be less than significant before mitigation as follows:

This section analyzes potential impacts to biological resources that could result from a combination of the proposed Plan and other past, present, and reasonably foreseeable development in the South Bay. Such development includes infill development in the adjacent City of Fremont as well as the South Bay Salt Ponds restoration project, which will provide habitat for a number of tidal habitat-associated species, including the salt marsh harvest mouse, salt marsh wandering shrew, and will include enhancement of managed ponds specifically for use by waterbirds.

The Dumbarton TOD Focus Area and the Southwest Newark Residential and Recreational Focus Area are the largest remaining tracts of relatively undeveloped land in the Plan Area. In the absence of project-specific mitigation measures identified in previous environmental review conducted by the City of Newark, potentially significant impacts related to special-status plants and animal species, wetlands, riparian habitat, and sensitive natural communities would all contribute to cumulatively significant impacts in the South Bay. 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 Areas 3 and 4 Specific Plan and the Dumbarton TOD Specific Plan would be significant without mitigation. However, as determined in previous environmental review conducted by the City, the mitigation measures prescribed for all of these impacts would adequately mitigate the project's contribution to these cumulative impacts. Buildout of the proposed Plan would not include any additional development in these areas over and above that which has already been analyzed in previous EIRs. Proposed Plan policies and actions detailed above provide a framework that promotes context-sensitive development and seeks to minimize impacts on sensitive natural resources. 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. Therefore, with adherence to applicable federal, State, and local regulations and implementation of mitigation measures identified in previous environmental review and adopted by the City of Newark, the proposed Plan would result in less-than-significant cumulative impacts to biological resources in the South Bay.

(DEIR, p. 4.3-48.)

This repeats the flaws in the Areas 3 and 4 Specific Plan EIR (which Citizens renews its prior objections to) and ignores the very purpose of cumulative impacts analyses. The biological impact mitigation measures for the Specific Plan will only “minimize” impacts, not eliminate them, and because these impacts are minimized, but not avoided, an EIR can not avoid considering such impacts as part of its cumulative impacts analysis.⁸

The courts have long recognized that even individually “minimized” impacts can still be cumulatively significant when considered in connection with past, present and future projects. As explained in *EPIC v. Johnson*:

CDF then stated that timber operations in general had to substantially lessen significant adverse impacts on the environment, and closed with this comment: "To address the cumulative effect issue the Department has taken the tact [sic] that if the adverse effects are minimized to the maximum on each individual operation, then the total effect in the surrounding area will also be minimized to an acceptable level."

This statement is at odds with the concept of cumulative effect, which assesses cumulative damage as a whole greater than the sum of its parts.

⁸ For example, the Areas 3 and 4 Specific Plan EIR states that “Impact BIO-2” is significant because “Development within Area 4 would result in substantial adverse effects on federally protected wetlands (seasonal wetlands) and associated special status species due to altering the hydrology on the project site.” (AR 466.) The Areas 3 and 4 Specific Plan EIR proposes Mitigation Measures BIO-2.1 through 2.5, which it finds will reduce this significant incremental impacts to less-than-significant. (AR 466-468.) One of these, Mitigation Measures BIO-2.4, provides that “[t]he following measures shall be implemented to minimize any perennial ponding within the existing seasonal wetlands.... Nuisance runoff from the proposed residential and golf course uses shall be minimized and controlled to reduce their input into the remaining natural habitat during the dry season.” (AR 467 (emphasis added).) Similarly, the Areas 3 and 4 Specific Plan EIR states that “Impact BIO-8” is significant because “Project development would result in significant impacts due to the loss of federally and state listed endangered salt marsh harvest mouse and California species of special concern salt marsh wandering shrew individuals and habitat.” (AR 480.) The Areas 3 and 4 Specific Plan EIR proposes Mitigation Measures BIO-8.1 through 8.4, which it finds will reduce this significant incremental impacts to less-than-significant. (AR 481-482.) Mitigation Measures BIO-8.1 provides: “Temporary disturbance to and permanent loss of salt marsh harvest mouse and salt marsh wandering shrew habitat shall be avoided to the maximum extent practicable.” (AR 481 (emphasis added).) Mitigation Measures BIO-8.3 provides: “Mitigation Measure MM BIO-8.2 will minimize the probability of salt marsh harvest mice and salt marsh wandering shrews entering the site but in addition, any individuals already in the impact areas shall be salvaged and translocated to the exterior of the construction exclusion area. Although detecting every individual on a site is not feasible due to these species’ secretive habits” (AR 481 (emphasis added).) In other words, the measures in question acknowledge that these impacts will not or cannot be entirely avoided.

(*Environmental Protection Information Center v. Johnson* (1985) 170 Cal.App.3d 604, 624-625 (emphasis added).)

Put simply: individual, incremental impacts that are “minimized” are still not reduced to zero; and, therefore, CEQA's independent, cumulative analysis procedures require that such minimized impacts must be considered in the context of similarly “minimized” impacts of “other closely related past, present, and reasonably foreseeable probable future projects” in order to assess whether the aggregated cumulative “change in the environment” may be significant. (CEQA Guideline 15355(b).) Again, the case law is clear: for purposes of determining the significance of a project's cumulative impacts, it is not enough to find that the project’s individual, incremental contributions are “minimized” (*EPIC v. Johnson, supra*, 170 Cal.App.3d at pp. 624-625), less-than-significant (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App. 3d 692, 729) or de minimis (i.e., negligible) (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal. App. 4th 98, 117-119.).

Proper cumulative impact analysis is vital “because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.” (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 114, 126 Cal.Rptr.2d 441, fns. omitted; see also *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1025, 68 Cal.Rptr.2d 367.) “[C]onsideration of the effects of a project or projects as if no others existed would encourage the piecemeal approval of several projects that, taken together, could overwhelm the natural environment and disastrously overburden the man-made infrastructure and vital community services. This would effectively defeat CEQA's mandate to review the actual effect of the projects upon the environment.” (*Las Virgenes Homeowners Federation, Inc. v. County of Los Angeles* (1986) 177 Cal.App.3d 300, 306, 223 Cal.Rptr. 18.)

(*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214-1215.)

C. The DEIR Fails to Properly Consider The Cumulative Biological Impacts of Development.

The DEIR states cumulative biological impacts could result from a “combination of the proposed Plan and other past, present, and reasonably foreseeable development in the South Bay.” (2013 GP DEIR, 4.3-48.) Yet, the DEIR’s cumulative impacts section only considers three “sources” of cumulative biological impacts: (1) the General Plan, (2) the Areas 3 and 4 Specific Plan, and (3) the Dumbarton TOD Specific Plan, and based on these three “projects” concludes that any cumulative biological impacts will be less than significant.

The DEIR improperly omits any consideration of any South Bay development beyond these three sources, and specifically omits consideration of the well documented losses of seasonal wetlands and uplands in the South Bay.⁹ This omission is particularly egregious given that the DEIR itself acknowledges that “the cumulative losses of seasonal wetland habitat around the South Bay are significant.” Despite this admission, the DEIR includes no discussion of the extent to which habitat will be lost due to other development, and no discussion of whether the cumulative impact will remain significant even if Newark’s plans are mitigated.

D. The Draft EIR Improperly Relies On Assumed Future Mitigation to Conclude that Cumulative Impacts Are Less Than Significant.

Another premise supporting the DEIR’s conclusion that cumulative biological impacts will be less than significant is that “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.” (DEIR, p. 4.3-48.) Courts have found similar analysis inadequate. For example, a quantitative cumulative impact analysis for groundwater cannot be avoided by simply assuming that impacts of future projects would be mitigated through water conservation efforts. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App. 3d 692, 729.)

For these reasons, the DEIR’s cumulative impacts analysis is flawed.

V. The DEIR Improperly Analyzes Alternatives.

The DEIR’s analysis of alternatives improperly used a baseline where the Areas 3 and 4 Specific Plan is considered part of the “existing built environment.” The Areas 3 and 4 Specific Plan is considered one of the “existing plans and policies” under the No Project Alternative (DEIR, p. 6-1) and the Areas 3 and 4 Specific Plan “would continue to be implemented.” (DEIR, p. 6-3.) The DEIR’s improper approach skews its analysis of other alternatives, including the preferred alternative, by comparing the proposed Project to a baseline where the Areas 3 and 4 Specific Plan already exist.

While analysis of the no project alternative must include a discussion of “what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services” (CEQA Guideline 15126.6, subd. (e)(2)), here the set aside Areas 3 and 4 Specific Plan is not a current plan nor can it reasonably be expected to occur in the foreseeable future if the General Plan were not approved.

⁹ The EPA/Regional Water Board’s “Baylands Ecosystem Habitat Goals Report” (1999) by Monroe et al. states that “since the mid-19th century, 80 percent of original tidal marsh as well as large amounts of mudflats, seasonal wetlands, and upland habitats in the San Francisco Bay have been lost due to human development,” that historically, moist grasslands existed in large expanses adjacent to much of the baylands in South Bay, and that in the South Bay “development has destroyed most of the historical moist grasslands” with notable exceptions including the “upper reach of Mowry Slough in Newark.”

VI. The EIR Will Need to Be Recirculated for Additional Responsible Agency and Public Comment

Because significant new information will need to be added to the EIR before certification, the City of Newark will be required to recirculate the DEIR. Such new information will include, *inter alia*, changes in the environmental setting, and additional specific information about the impacts and mitigations related to the Areas 3 and 4 specific plan. (CEQA Guideline 15088.5.) Recirculation will also be required because this draft EIR is so fundamentally and basically inadequate that meaningful public review and comment is precluded. (*Mountain Lion Coalition v. Fish & Game Com.*(1989) 214 Cal.App.3d 1043).