

November 8, 2013

**Via Email and Fed Ex**

City of Newark Planning Commission  
City Administration Building  
37101 Newark Blvd.  
Newark, CA 94560

Mr. Terrence Grindall  
Community Development Director  
37101 Newark Boulevard  
Newark, CA 94560  
[Terrence.grindall@newark.org](mailto:Terrence.grindall@newark.org)

**RE: General Plan Tune Up Final EIR**

Dear Newark Planning Commissioners and Mr. Grindall,

This office submitted comments regarding the proposed General Plan amendments and General Plan Tune Up Draft Program EIR on behalf of Citizens Committee to Complete the Refuge (“Citizens”) and its members. Despite having timely submitted comments on the Draft EIR, this office never received a copy of the Final EIR nor notice that the Final EIR had been released. Citizens advised that the Final EIR was available on the City of Newark’s website as of October 28, 2013.

We write now to address some additional issues raised by the City’s responses (RTC) in the Final EIR to LGW’s September 2013 comments.

Thank you for your attention to this matter.

Sincerely,

  
Brian Gaffney

cc: Citizens Committee to Complete the Refuge

**I. The Proposed General Plan and EIR Use an Improper Environmental Baseline by Employing Hypothetical Conditions.**

This office commented that the proposed General Plan and the General Plan Tune Up Draft Program EIR used an improper environmental baseline by employing hypothetical conditions.

1. The Tune Up Draft EIR 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 [Tune Up] EIR.” (GP DEIR, p. 3-11, emphasis added.)<sup>1</sup> The RTC does not contest LGW’s citations to the General Plan and the General Plan Tune Up Draft Program EIR, and thus we assume that the Draft EIR statement at page 3-11 is true. If there is any doubt, the RTC reiterates that “land use changes proposed in the Specific Plan and assumed as part of the [Tune Up EIR’s] No Project Alternative.” (RTC, p. 3-11.)

2. The RTC states that build out projections “used” baseline population, housing, and employment data from the most current version of the Alameda County Transportation Commission Countywide Travel Demand Model (August 2011), reviewed and “adjusted” by City of Newark staff in order to ensure an accurate representation of existing conditions in 2012. (Master Response #1 at RTC, p. 5-4.) We assume, consistent with the statement at DEIR page 3-11, that the City adjusted the Travel Model to include the Areas 3 and 4 Specific Plan as a background condition, and that this environmental baseline flaw infects all the EIR’s impacts analyses.

3. RTC Master Response #1 seems to confuse build out “projections” and the required baseline of existing physical conditions. The RTC to prove it used existing conditions points to Draft EIR section 3.3.2.5, entitled “Buildout Projections.” Moreover, the RTC clarifies that:

The resulting buildout **projections were used as the basis** for the analysis of environmental impacts throughout the Draft EIR, including as the basis for the technical modeling done to assess impacts related to air quality, GHG emissions, noise, and transportation and traffic.

(RTC, p. 5-4, emphasis added.) As there seems to be confusion, we clarify that under CEQA the projections of project impacts are not existing conditions, and using growth projections to work back to existing conditions is the reverse of how CEQA should work.

4. We were unaware that the EIR used “technical modeling.” That term does not appear in

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<sup>1</sup> The Draft EIR’s project description (p. 3-25) likewise states: “The Southwest Newark Residential and Recreational Focus Area is located in TAZs 939 and 940 and growth projections from the Specific Plan EIR were divided between these TAZs in accordance with the land use designations in the proposed Plan. It was assumed that Low-Medium Density Residential (LMR) would develop at an intensity of 12 du/acre and that Medium Density Residential (MDR) would develop at an intensity of 22du/acre.” But for the Specific Plan, however, there is no low density residential on Areas 3 and 4. Thus, the Specific Plan has been used as the Tune Up EIR’s baseline.

the Draft EIR. Modeling has inherent risks and thus should ordinarily not be used for generating an EIR's environmental baseline:

existing environmental conditions have the advantage that they can generally be directly measured and need not be projected through a predictive model.

**However sophisticated and well-designed a model is, its product carries the inherent uncertainty of every long-term prediction**, uncertainty that tends to increase with the period of projection. For example, if future population in the project area is projected using an annual growth multiplier, a small error in that multiplier will itself be multiplied and compounded as the projection is pushed further into the future. **The public and decision makers are entitled to the most accurate information on project impacts practically possible**, and the choice of a baseline must reflect that goal.

*(Neighbors for Smart Rail v. Exposition Metro Line Const. Authority (2013) 57 Cal.4th 439, 455, emphasis added.)*

The RTC reveals that baseline data was only used for "population, housing, and employment" environmental settings, but that at a minimum air quality, GHG emissions, noise, transportation and traffic setting were derived from technical modeling. Even in regards to Newark population and employment, this data "was derived" from the land use assumptions from the Alameda County Travel Demand Forecast (TDF) model." (DEIR, p. 3-23.)

5. The Draft EIR states baseline population and employment was derived from the "land use" assumptions from the Alameda County Travel Demand Forecast (TDF) model, but doesn't state what those assumptions were. **At your upcoming Planning Commission meeting please provide the public with the Travel Demand Model data; the data does not appear to be in the Draft EIR.**

6. We assume that these TDF model land use assumptions are consistent with the General Plan Tune Up Land Use Background Report, which expressly states that the Areas 3 and 4 "existing conditions" are as stated in the Specific Plan and Final EIR adopted in 2010. (Land Use Background Report, p. 4-31.)

7. The Tune Up EIR misrepresents the Areas 3 and 4 Specific Plan in claiming that "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'." (GP DEIR, p. 3-20.) Actually, the Specific Plan (which divided Areas 3 and 4 into subareas A through F) not only amended Sub Area A (77 acres) from Special Industrial to *Low Density Residential*, but also rezoned Sub Area A from MT-1 High Technology Park to R Residential. Further, the Specific Plan rezoned Sub Area B (125 acres) and Sub Area C (90 acres) from Agricultural to Residential. In addition, the Specific Plan specified lot sizes, infrastructure changes and significant quantities of fill material to raise elevations.

8. Assuming that these hundreds of acres of these sub areas have already been rezoned from agricultural to residential, the Tune Up EIR does not even discuss the agricultural change as a

potential significant impact.<sup>2</sup> See Tune UP Draft EIR, p. 2.2.

9. The analytical flaw in the Tune Up EIR's baseline approach is apparent in regards to cumulative aesthetic impacts. The Areas 3 and 4 Specific Plan EIR reasoned that there would be a **cumulatively unavoidable significant visual / aesthetic impact from the Specific Plan** in combination with other projects as a result of conversion of "large areas of open space to a developed environment," and new buildings creating "a substantial change in the visual character." (Specific Plan Draft EIR, p. 307 [Impact C-VIS-6].) In contrast, the Tune Up EIR claims [Impact AES-5] that the proposed General Plan Tune Up, in combination with past, present, and reasonably foreseeable projects, would result in **less than significant** cumulative aesthetic impacts.

10. The RTC is further confusing as it claims that

the land use changes proposed in the Specific Plan and assumed as part of the No Project Alternative ... are consistent with the City's adopted Housing Element. **Policy 2.2a of the Housing Element, adopted in 2008**, calls for the development of 'specific plans and zoning amendments for Areas 2, 3 and 4 to provide significant amounts of land for new residential development.' Specifically, the Housing Element and its EIR anticipate a total of 1,260 housing units in Area 3 and 4.

(RTC , Master Response #1) The statements of the 2008 adopted Housing Element are irrelevant to the adequacy of the proposed Tune Up EIR. The Tune Up EIR refers to a 2009-2014 Housing Element, but not a 2008 Housing Element.

11. The City's website for the proposed General Plan Tune Up includes a link only to a 2010 adopted Housing Element, not the 2008 adopted Housing Element. The City's website includes a link to only a Draft EIR, thus making it unclear if Final EIR for this Housing Element was ever certified. Please clarify why the City has not posted the correct documents for review by the commenting public.

12. The Housing Element (February 2010) does not include a Policy 2.2a. The Housing Element (February 2010) does not state what that General Plan designation or zoning should be for Areas 3 and 4, nor commit the City to a particular number of homes. The Policy 2a goal is only vaguely "developing specific plans and zoning amendments for Areas 2, 3 and 4 to provide significant amounts of land for new residential development."

13. Even if the Housing Element did project a goal of 1,260 housing units in Area 3 and 4, this would not justify using this as the baseline condition for this Tune Up EIR as those houses don't exist today. The RTC continues to demonstrate the City's use of improper baseline

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<sup>2</sup> The Tune Up also proposes a reorganization of agricultural and open space designations. The Agriculture/Resource Production designation is renamed Salt Harvesting (Tune Up EIR p. 3.17.) The Tune Up EIR does not properly analyze the impacts of this change.

conditions.

14. The RTC claims that the “EIR has consistently and correctly assessed the environmental impacts of the proposed Plan” “consistent with relevant case law.” Yet, the RTC does not dispute that under CEQA impacts must be measured against real conditions on the ground – not against what may potentially occur pursuant to a planning document. In *Communities for a Better Environment*, the California Supreme Court warned that by “comparing a 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. (*Communities For A Better Env't v. S. Coast Air Quality Mgmt. Dist.*, (2010) 48 Cal. 4th 310, 322.) An EIR “must focus on impacts to the existing environment, not hypothetical situations. 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.” (*Ibid*; see also *Neighbors for Smart Rail*, *supra*, 57 Cal. 4th at 448 [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].) There has been no justification for why an existing conditions analysis in this Tune Up EIR would be misleading or without informational value.

15. The Tune Up EIR ignores this instruction from the Supreme Court. The Area 3 and 4 Specific Plan EIR analyzes what *could* happen if the Specific Plan is prospectively adopted after certification of an adequate EIR. At this point, it is pure speculation as to whether the Area 3/4 Specific Plan EIR will be revised to comply with CEQA and whether the General Plan amendment and Specific Plan might be adopted thereafter by the Newark City Council. Thus, the Tune Up EIR is using a hypothetical condition as the baseline.

16. The RTC claims that the Tune Up EIR is in compliance with *Environmental Planning Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350. Examination of *Environmental Planning* leads to the opposite conclusion. There the court rejected an EIR which compared a proposed general plan amendment to an existing general plan rather than with actual conditions in the area. Likewise here, the Tune Up EIR compares the proposed project not to existing conditions, but to the previously adopted plans. “The proposed [Tune Up] 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.” (GP DEIR, p. 3-20, emphasis added.) Further, examples include biological impacts where the Tune Up EIR reasons:

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 Area 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.

(Tune Up Draft EIR, p. 4.3-40, emphasis added; see also p. 4.3-37 [impacts to wetlands, riparian habitat, and sensitive natural communities]; see also p.4.3-48 [cumulative biological impacts].) These examples further demonstrate that the proposed Tune Up EIR does not meet CEQA standards and that certification would be an abuse of discretion.

## **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.**

17. The RTC justifies reliance on the Areas 3 and 4 Specific Plan EIR as allowable “incorporation by reference,” citing CEQA Guideline 15150. However, the Tune Up EIR’s incorporation by reference is improper under CEQA because incorporation is appropriate for general background, but not as a substitute for direct analysis of the problem at hand. (CEQA Guideline 15150, subd. (f).) Courts will afford great weight to the CEQA Guidelines. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391.)

18. The RTC references CEQA section 21167.3. First, this provision applies to any “responsible agency,” which under CEQA is a public agency, *other than the lead agency*, which has responsibility for carrying out or approving a project. (Pub. Res. Code § 21069.) The Tune Up EIR identifies the City of Newark as the lead agency. (GP EIR, p. 8-1.) Second, the RTC fails to concede that where, as here, a stay is issued pending final determination of the issue of CEQA compliance, under CEQA section 21167.3 at most the responsible agency can only issue a conditional approval or disapproval until there is a finding of CEQA compliance. The Tune UP EIR does not condition its analysis of the proposed General Plan amendments upon the Specific Plan EIR being found legally valid, nor does it in any way acknowledge that the analysis may be invalid. By avoiding this disclosure, the EIR misleads the public and decision makers.

19. The RTC claims that “future development projects on specific sites, including sites in the Southwest Newark Residential and Recreational Focus Area ... will be subject to CEQA and, to the extent required by law, separate project-level environmental review will be necessary in order to secure the necessary development permits.” (RTC, p. 5-6.) This promise of future environmental review is contradicted by the Areas 3 and 4 Specific Plan and its EIR which claim that “[t]entative maps will be evaluated to determine if the proposed action is consistent with the Specific Plan and, therefore, exempt from further CEQA review.” (Areas 3 and 4 Specific Plan, Draft EIR, p. 2.) Likewise, “[s]ubdivisions conforming to the Specific Plan shall be approved and shall be deemed exempt from CEQA.” (Specific Plan Area 3 & 4 Final EIR, p. 333; see also Specific Plan Area 3 & 4 (March, 2010), p. 26.)

## **III. The RTC Fails to Respond to Comments by LGW**

In preparing a final EIR, the agency must respond to significant environmental points

raised in the public review process. (*People v. County of Kern* (1974) 39 Cal.App.3d 830, 841.) The responses must describe the issue raised “ ‘and must particularly set forth in detail the reasons why the particular comments and objections were rejected and why the [agency] considered the development of the project to be of overriding importance.’ ” (*Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 628 (*EPIC*)). “It is not enough for the EIR simply to contain information submitted by the public and experts. Problems raised by the public and responsible experts require a good faith reasoned analysis in response.” (*Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715, 723, citing *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 357.) “The requirement of a detailed written response to comments helps to ensure that the lead agency will fully consider the environmental consequences of a decision before it is made, that the decision is well informed and open to public scrutiny, and that public participation in the environmental review process is meaningful.” (*City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 904 citing *Kern, supra* at 841-842.)

20. This office commented that by relying on the Areas 3 and 4 Specific Plan EIR, the General Plan Tune Up EIR necessarily incorporated many of the CEQA errors in the Area 3 and 4 Specific Plan EIR, including 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. The RTC offered no response to these detailed comments and submission of a CD with the relevant information, thus violating CEQA.

21. This office commented that given the specifics of the proposed General Plan, this DEIR was required to provide correspondingly specific, detailed analysis of potential impacts. The RTC failed to respond to the need for greater analytic specificity, required focus on secondary effects that can be expected to follow from General Plan amendments, what analysis was reasonably feasible, whether the Draft Tune Up EIR included 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.<sup>3</sup> The RTC also failed to respond to whether CEQA required the Tune Up EIR to undertake project-level environmental review of the Specific Plan portion of the proposed General Plan prior to EIR certification.

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<sup>3</sup> The RTC quibbled with whether the General Plan “obligated” completion of the Areas 3 and 4 Specific Plan project. The September 2013 LGW comments provided extensive detail from the Draft EIR showing the specifics of what is known about the proposed Specific Plan plans. These specifics require analysis now of foreseeable impacts, and the EIR has not provided that analysis.