

Mr. Roth

RECEIVED OCT 28 2013



## United States Department of the Interior

FISH AND WILDLIFE SERVICE  
San Francisco Bay National Wildlife Refuge Complex  
1 Marshlands Road  
Fremont, California 94555



October 24, 2013

Sent via electronic mail: No hardcopy to follow

City of San Jose  
Department of Planning, Building & Code Enforcement  
200 East Santa Clara Street, 3rd Floor  
San Jose, CA 95113-1905  
Attn: Bill Roth ([Bill.Roth@sanjoseca.gov](mailto:Bill.Roth@sanjoseca.gov))

Subject: Comments on the First Amendment to the Draft Environmental Impact Report for the San Jose/Santa Clara Water Pollution Control Plant Master Plan (File No. PP11-043)

Dear Mr. Roth:

The U.S. Fish and Wildlife Service (Service), Don Edwards San Francisco Bay National Wildlife Refuge (Refuge) appreciates the opportunity to review the October 18, 2013 First Amendment to the Draft Environmental Impact Report for the San Jose/Santa Clara Water Pollution Control Plant Master Plan (Master Plan). As an adjacent landowner, we continue to be interested in commenting on the proposed Master Plan and the potential effects of the project on fish, wildlife and plants and their habitats on adjacent Refuge lands as well as on our Environmental Education Center (EEC), which is adjacent to the Master Plan footprint. We previously provided comments on March 8, 2013 on the Draft EIR for the Master Plan. We appreciate your responses to our comments in the First Amendment to the EIR. However, we continue to have concerns that the proposed Master Plan will have adverse effects to species and their habitats that are present within and near the project site.

We previously commented that we had concerns regarding the impacts that may result from the research and development, retail, and light industrial areas due to their proximity to the Coyote Creek riparian corridor. We commented that there should be a wider buffer area between the development and the riparian corridor since the Coyote Creek riparian area is an important and limited habitat in this region that supports a variety of bird species. The development areas are likely to result in lighting and noise impacts, increased human disturbance, and increased predators for these species. Your Draft EIR acknowledges these effects and also cites the City of San José Riparian Corridor Policy Study which identifies streams and riparian corridors found

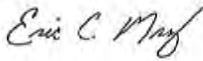
TAKE PRIDE  
IN AMERICA 

within San José and provides guidelines on the manner in which development should be designed to protect and preserve riparian corridors.

In the response, the City emphasizes that its Riparian Policy provides for exceptions to the 100-foot setback of that policy. The response states that the widest buffer could be approximately 440 feet in the area shown as Flexible Space and the Draft EIR assumes that up to 132 acres of Light Industrial would be developed within the Flexible Space area and the City has not specified where within the Flexible Space this development would be located. The City acknowledges that there may be instances where development and/or Dixon Landing Road extension may occur within the 100-foot buffer. The City refers to the exceptions to the buffer would occur in "instances where implementation of the project includes measures which can protect and enhance the riparian value of the corridor more than could a 100-foot setback." We believe there should be no exceptions to the 100-foot buffer and the project should include measures to protect and enhance the riparian corridor. In addition, the policy was identified in the General Plan to be updated and upgraded to an official Council Policy. Currently it exists only as a planning study/policy and the Service would like to see it upgraded to an official policy.

Thank you for considering our comments. We recommend that you also contact the U.S. Fish and Wildlife Service, Endangered Species Division in Sacramento to discuss potential effects of the proposed Master Plan to listed species and their habitat. Please keep us informed of the EIR process, especially any future opportunities to provide comment. If you have questions regarding our comments, please contact Wildlife Refuge Specialist, Melisa Amato at 510-792-0222.

Sincerely,



Digitally signed by Eric Mruz  
DN: cn=Eric Mruz, o=USFWS, ou,  
email=eric\_mruz@fws.gov, c=US  
Date: 2013.10.28 08:48:10 -07'00'

Eric Mruz  
Refuge Manager  
Don Edwards San Francisco Bay  
National Wildlife Refuge

TAKE PRIDE  
IN AMERICA 





October 29, 2013

*Via E-Mail and Hand Delivery*

City of San Jose Planning Commissioners

Re: Comments on the San Jose/Santa Clara Water Pollution Control Plant Master Plan Final Environmental Impact Report

Dear Honorable Chair Bit-Badal and Planning Commissioners:

The Santa Clara Valley Audubon Society (SCVAS) previously submitted comments to the City of San Jose on the adequacy of the Draft Environmental Impact Report ("DEIR") for the San Jose/Santa Clara Water Pollution Control Plant ("WPCP") Master Plan ("PMP" and "Project"). In a February 26, 2013 letter to the City, I provided my expert opinion that the Project would have a significant impact on burrowing owl populations; identified important analyses that the DEIR failed to conduct; and discussed additional deficiencies that rendered the DEIR legally inadequate under the California Environmental Quality Act Pub. Res. Code § 21000 *et seq.* ("CEQA") and the CEQA Guidelines, C.C.R. § 15000 *et seq.*. Letter from S. Kleinhaus to B. Roth (Feb. 26, 2013) ("Kleinhaus"). I have a Ph.D. in Ecology from the University of California, Davis, and have contributed to conservation research, advocacy and planning in a variety of ecosystems in the US and overseas for over 20 years. I have worked with SCVAS on burrowing owl conservation since 2009, coordinating monitoring, restoration and advocacy efforts throughout Santa Clara county. Richard Grassetto also submitted a letter to the City on behalf of SCVAS, documenting 14 ways that the DEIR failed to comply with CEQA and the CEQA Guidelines. Letter from R. Grassetto to City of San Jose (Feb. 22, 2013) ("Grassetto").

On October 18, 2013 the City released its First Amendment to the DEIR including changes to the DEIR text and the City's response to comments, which together with the DEIR constitutes the Final EIR ("FEIR"). The City's FEIR fails to cure the legal deficiencies that SCVAS previously identified in its comment letters. This letter focuses in detail on the City's most glaring violations of CEQA. Specifically, (1) the City repeatedly defers analysis of the potentially significant environmental impacts of the

*p. 1 of 33*

Project—analysis that it can and must do in the EIR, (2) the City fails to adequately analyze impacts to burrowing owls and those impacts remain significant and unavoidable, (3) the City fails to conduct an adequate water supply assessment, (4) the City has not included feasible mitigation measures that could further reduce the Project’s significant greenhouse gas (“GHG”) impacts, (5) the City has failed to consider a reasonable range of alternatives that would reduce the Project’s significant water supply, GHG, and biological impacts, (6) the City has failed to properly disclose and mitigate project impacts in conjunction with sea level rise and (7) the City fails to adequately analyze the odor impacts of the Project. The Staff Recommended Alternative [Modified Alternative 4] does not address any of these deficiencies.

An EIR’s central purpose is to identify the significant environmental effects of proposed projects and evaluate ways of avoiding or minimizing those effects. § 21002.1(a), § 21061<sup>1</sup>. CEQA also requires the lead agency to adopt feasible mitigation measures or alternatives that can substantially lessen the project’s significant environmental impacts. § 21002; CEQA Guidelines § 15002(a)(3). Accordingly, the City may not approve the Project, including any General Plan amendments to conform the General Plan to the land use designations in the PMP, until it considers additional alternatives, revises the FEIR to adequately analyze the Project’s impacts, identifies all feasible mitigation measures, and recirculates a second amendment to the DEIR.

As the Supreme Court has explained, the EIR is “the heart of CEQA,” an “environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.” *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d at 392 (citations omitted). The EIR is the “primary means” of ensuring that public agencies “take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.” *Id.* (quoting § 21001(a)). The FEIR for the Project fails to meet these purposes.

**I. The FEIR still improperly defers analyses that reasonably can and should be done now.**

Time and time again, the FEIR fails to analyze the Project’s impacts, and attempts to justify this failure with promises of future analyses when specific developments are proposed. This approach violates CEQA. “Tiering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration.” CEQA Guidelines §15152(b). “CEQA’s demand for meaningful

---

<sup>1</sup> All undesignated statutory references are to CEQA.

information is not satisfied by simply stating information will be provided in the future.” *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431.

SCVAS previously commented that the program-level review in the EIR is inadequate to support approval of the Other Land Uses because it unnecessarily defers analysis. Grassetti at 1. The City responds that no analysis is necessary for undefined possible future actions, citing *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018. FEIR at 4.2-9. However, the proposed land uses permitted by the General Plan Amendments are not the “speculative” future developments at issue in *Environmental Council of Sacramento*.

Under well-settled case law, an EIR must analyze a planning document’s maximum development potential. As the court in *City of Redlands* explained, “an evaluation of a ‘first phase-general plan amendment’ must necessarily include a consideration of the larger project, i.e., the future development *permitted* by the amendment.” *City of Redlands v. County of San Bernardino* (2002) 96 Cal. App. 4th 398, 409 (emphasis added). Environmental review of the development allowed by a planning enactment must take place regardless of whether that development will actually materialize. *See Bozung v. Local Agency Formation Comm’n of Ventura County* (1975) 13 Cal. 3d 263, 279, 282 ; *Christward Ministry v. Superior Court* (1986) 184 Cal. App. 3d 180, 194–95 (“The fact future development is not certain to occur and the fact the environmental consequences of a general plan amendment changing a land use designation are more amorphous does not lead to the conclusion no EIR is required.”); *City of Carmel-by-the-Sea v. Board of Supervisors of Monterey County* (1986) 183 Cal. App. 3d 229, 244 (holding it is the “commitment to expanded use” of property embodied in a land use enactment that is the “project” requiring review under CEQA).

Accordingly, contrary to statements in the FEIR (at 4.2-9), it is immaterial that specific development proposals relying on the proposed General Plan designations are not yet known. The EIR must analyze the full development *permitted* by the proposed General Plan Amendment. This includes 459 acres of land developed for light industrial, institute, office/R&D, Retail Commercial, Combined Industrial Commercial and roads. DEIR at 3-54.

The “programmatic” nature of this EIR is no excuse for the City’s lack of detailed analysis. *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511, 533 (“Designating an EIR as a program EIR [] does not by itself decrease the level of analysis otherwise required in the EIR.”); *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829 (“[T]he ultimate decision of whether to approve a project . . . is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project”  
*p. 3 of 33*

required by CEQA.) Rather, agencies approving a programmatic activity must produce an EIR that considers the program's reasonably foreseeable impacts "as specifically and comprehensively as possible." CEQA Guidelines § 15168(c)(5). "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.

Here, the City's proposed land use designations include an extraordinary amount of detail. For the preferred alternative, the maximum commercial building area is already known to be 4,833,000 square feet, the maximum industrial building area is known to be 6,947,456 square feet, and building heights are set. DEIR at 3-54. The Project is estimated to generate a total of 15,400 jobs. Such details are also known for each alternative studied in the FEIR. Because the Project is so detailed, the EIR's analysis of impacts must be correspondingly detailed.

The City must fully analyze the Project's impacts now, because they will largely be determined by the "first-tier" approval of the General Plan designations, which provide certain entitlements to development proposals consistent with those designations. *Vineyard*, 40 Cal. 4th at 431 (agencies may defer environmental analysis only "when the impacts or mitigation measures are not determined by the first-tier approval decision but are specific to the later phases" of a project).

It is important to analyze the Project's impacts at the programmatic level because a piecemealed analysis of impacts at the project-level may be too late. A program EIR prepared in compliance with CEQA will "provide an occasion for a more exhaustive consideration of effects and alternatives than would be practical in an EIR on an individual action [and] ensure consideration of cumulative impacts that might be slighted in a case-by-case analysis." CEQA Guidelines § 15168(b)(4). It will also "allow the lead agency to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts." *Id.* In other words, the City's approach in the FEIR hides the true impacts of the Project and may foreclose alternatives or mitigation measures that could reduce those impacts.

Just a few examples of the FEIR's impermissible deferral of analysis that can and must be done in the FEIR are listed below. Others have been previously identified by SCVAS. Kleinhaus 3-10, Grasseti at 2-6.

- Land Use: The EIR delayed evaluating the proposed uses on lands within the northwestern portion of the Coyote Creek watershed for consistency with the Coyote Watershed Stream Stewardship Plan. DEIR at 3-68. Are the permitted uses consistent with the Plan's goals? This analysis does not rely on site-specific details.

*p. 4 of 33*



- Biological: SCVAS previously commented that Mitigation Measure Bio-4.d impermissibly deferred analysis and mitigation measures for the wetlands impacts from the WPCP program-level improvements and planned land uses. Grassetti at 4. In response, the FEIR deletes this mitigation measure and expands measure Bio-4c. However, this measure still defers analysis of the project’s impacts on wetlands to the design phase. The FEIR tries to avoid this by requiring any (currently unknown) loss to wetlands to be compensated through on-site or off-site wetland creation or enhancement. This mitigation measure fails to provide the public and decision-makers with information about the extent of current, baseline on-site wetlands that would be impacted—information that should be readily discernible based on current surveys and the already identified locations for WPCP improvements and Other Land Uses.
- Hazardous Materials: SCVAS previously commented that mitigation measures Haz-1.a and 1.b defer performance of a limited soils and groundwater investigation, preparation of HASPS, and evaluation of soil and groundwater disposal options. Grassetti at 5. In response, the City states that contamination levels may change, HASPs must be developed based on pre-construction information, and that numerous federal and state laws regulate transportation and storage of hazardous materials, establishing the feasibility of mitigating hazardous impacts. Yet, the DEIR simply lists what types of hazardous materials may be present based on past uses. Instead of relying on this guess work, the FEIR must conduct the soils and groundwater investigations to determine what mitigation would be necessary, and whether mitigation within the planned WPCP improvements will be feasible. Simply relying on government regulations is insufficient to support a finding that the impacts are insignificant and without determining whether the mitigation measures would require modification of the Project. *See Kings County Farm Bureau v. Hanford* (1990)221 Cal. App. 3d 690.
- Police and Fire services: SCVAS commented that there is no analysis of the Project’s effects on response times, the adequacy of police and fire services, or whether new facilities would be required for nearly 12 million square feet of new development and 15,000 new jobs. Grassetti at 5. In response, the City states “it is uncertain whether actual development proposals would resemble the proposed land uses evaluation in the PMP EIR” and states that it will conduct this analysis prior to issuance of a grading permit and mitigate any significant impact. FEIR at 4.9.8-11. This is wholly inadequate. *See Christward Ministry v. Superior Court* at 194–

95. As stated above, full build-out of the permitted development must be examined and compared to the baseline of existing conditions. It is entirely possible to do this analysis now. It is not enough to commit to mitigating any impacts identified in the future. Significant *and unavoidable* impacts are not uncommon.

- **Traffic and Transportation:** SCVAS previously commented that the DEIR fails to adequately analyze the traffic impacts of the Other Proposed Land Uses. Grassetti at 6. The City responds that impacts related to capacity of intersections and roadways near the Project site were not evaluated because of the “lack of details of the land uses.” FEIR at 4.9.8-18. Yet the City already knows the number of jobs expected for the permitted uses and could easily estimate the number of trips associated with each type of permitted use. Further, the City has failed to provide substantial evidence for a future baseline when the proposed developments could occur more quickly than the EIR assumes.

The comment letter on the DEIR by Citizens Committee to Complete the Refuge identifies additional instances. FEIR Chapter 6, incorporated herein by reference to be a part of these comments. These are but a few examples where the program-level analysis in the FEIR fails to consider the reasonably foreseeable impacts of the WPCP improvements and proposed land uses “as specifically and comprehensively as possible.” CEQA Guidelines § 15168(c)(5).

## **II. The FEIR’s analysis and mitigation of Biological impacts are still inadequate.**

### **A. Impacts to burrowing owls remain significant and are not mitigated by future HCP fee payments.**

The FEIR must find that impacts to burrowing owls are significant if the Project would result in a “substantial adverse effect, either directly or through habitat modifications, on any species . . . identified as a special status species.” Burrowing owls are a California Species of Special Concern. See attached photos of burrowing owls in Santa Clara county.

As SCVAS previously commented, burrowing owl populations in the region are at a critical juncture. Past surveys found a 53% decline of burrowing owl populations in the greater San Francisco Bay area between 1986 and 1990 with just 43-47 pairs located in the HCP study area in 1990. Santa Clara Valley Habitat Plan (HCP) Appendix M at 1 (attached). Downward trends have continued, and a Population Viability Analysis in 2010 concluded that unless immediate and sustained reversion of the declining trend occurs, burrowing owls will no longer exist in Santa Clara County within 20 years.

*p. 6 of 33*



Kleinhaus at 5; HCP Appendix N at 4, 9-14 (attached). The causes of declining burrowing owl populations are well documented. As one Bureau of Land Management paper summarized, threats to burrowing owl populations include “direct mortality from man (including vehicle collisions); pesticides; habitat degradation, destruction and loss; and predators.” Kurt F. Campbell, *Burrowing Owl*, attached.

The FEIR assumes that by paying a HCP burrowing owl fee (or if the HCP is invalidated, funding equivalent mitigation), any impacts from converting burrowing owl habitat on the Project site will be fully mitigated. FEIR at 5-214, 5-219. This conclusion fails to understand the importance of the Project site to success of the HCP’s burrowing owl conservation efforts. The Final Santa Clara Valley Habitat Plan and its appendices A-O can be found at [http://www.scv-habitatplan.org/www/site/alias\\_default/346/final\\_habitat\\_plan.aspx](http://www.scv-habitatplan.org/www/site/alias_default/346/final_habitat_plan.aspx) and is incorporated herein by reference to be a part of the administrative record.

The WPCP buffer lands constitute the “second most vigorous burrowing owl breeding population in the [HCP] study area.” *Id.* at 23. It is also a “site of importance” within the HCP’s North San Jose/Baylands burrowing owl conservation region. *Id.*, Appendix M at 3. Conservation of burrowing owl habitat within this region is the “highest priority” of the HCP’s burrowing owl habitat conservation strategy “because of the existing colonies and it has the greatest potential for expansion of the population. *Id.* at 4. Indeed, “occupied burrowing owl nesting habitat currently only occurs in this region.” *Id.* at 12.

The HCP’s Borrowing Owl Conservation Strategy uses “a phased conservation approach, initially focusing efforts on areas within 5 miles of an established breeding site . . .” HCP Appendix M at 2. During the first phase, the HCP Agency will acquire the sites of importance in the region or, in the case of public lands, enter into permanent management agreement to enhance owl populations. *Id.* at 4. The HCP identifies the WPCP lands “including buffer lands” as “public lands where enhanced management may be secured to meet the [HCP’s] population goals in this region.” *Id.* at 5.

The second phase of the HCP’s Borrowing Owl Conservation Strategy is enhanced land management on the sites of importance to increase populations. *Id.* The final phase is to facilitate expansion of current burrowing owl range relying on dispersal of the increased populations at the sites of importance. *Id.* In other words, the success of the HCP conservation strategy depends upon first preserving occupied lands such as the Project area, enhancing these existing populations, and then, after local population recovery, expanding their range to new sites.

Far from contributing to the success of the HCP, this Project’s conversion of one of the HCP’s key priority sites dooms it. The fact that developers will pay the HCP

*p. 7 of 33*

burrowing owl fee, or other similar mitigation, does not change that fact. The HCP intends to use such fees to preserve the very lands the Project proposes for development. *Id.* at 13. The HCP's Burrowing Owl Conservation Strategy lists three "threats and uncertainties" to its success. One of these is the development of portions of the WPCP buffer lands. *Id.* at 23. Given the critical importance of the WPCP lands to the success of the HCP's Burrowing Owl Conservation Strategy, the City may not conclude that impacts to the burrowing owl from development of these lands can be mitigated to a less than significant level—even with payment of HCP fees.

The Project's threat to the success of the HCP's Burrowing Owl Conservation Strategy is a significant impact—a substantial adverse effect on the species. Further, because the Project converts lands that the HCP is relying on for success of its Conservation Strategy, the Project would "conflict with the provisions of an adopted habitat conservation plan," a significant biological impact. FEIR at 5-241. The FEIR also fails to discuss that the HCP considers the Project site to be a breeding ground that will support future species recovery. Accordingly, the Project's impacts are also significant because it would "impede the use of native wildlife nursery sites." FEIR at 5-239.

At the very least, the Project would constitute a significant cumulative effect to the burrowing owl, contrary to the FEIR's findings. FEIR at 5-133. The EIR's cumulative impact analysis purportedly analyzed impacts from the City of San Jose Envision 2040 General Plan. Compare the priority occupied nesting burrowing owl habitat locations in the North San Jose conservation region of the HCP (HCP figure 5-11) with the General Plan designations that allow for habitat conversion in as shown on the General Plan 2040 Land Use Designation maps (Attached). If all of the properties within the HCP's priority region were developed as permitted by the General Plan, the HCP would not be able to implement its Conservation Strategy.

CEQA cases have emphasized that "to be adequate the payment of fees must be tied to a functioning mitigation program." *California Native Plant Society v. County of El Dorado* (2009) 170 Cal.App.4th 1026. As the HCP and numerous expert comments submitted to the City demonstrate, the Project site is a necessary part of the success of the HCP's burrowing owl strategy. See Kleinhaus at 6, 8. The HCP Burrowing Owl Conservation Strategy has not yet been implemented, and any conversion of habitat on the WPCP lands must not occur until the documented success of that strategy. The Burrowing Owl Conservation Strategy will begin to function when there is "a positive growth trend in the permit area by Year 15." HCP, Appendix M at 9. For reliance on the HCP to be adequate mitigation, at the very least, (1) all of the WPCP buffer lands should be designated as open space or to otherwise include conservation as an allowed use to permit the Habitat Conservation Agency to acquire or enter into permanent management

agreements for these lands, (2) any General Plan designations allowing development on these lands must specify that no development permits will be granted until the Habitat Conservation Agency has determined that the HCP's Burrowing Owl Conservation Strategy is succeeding by Year 15 of the Plan, and (3) the ability to develop prime habitat in the North San Jose area is demonstrated by the HCPs establishment of at least six breeding pairs on protected HCP lands south of San Jose. In addition, the City should redesignate the lands identified as Flexible Space in the PMP as "Open Space" to allow the HCP Agency to purchase or manage these lands for owls in perpetuity.

**B. The FEIR still underestimates the amount of burrowing owl habitat on the Project site.**

The FEIR underestimates the extent of valuable habitat loss from the Project. It narrowly defines "occupied habitat" as habitat within 0.5-miles of nesting areas as documented over the last three years. However, as SCVAS previously commented, additional burrferlands, the drying beds and lagoons, and the SCVWD Easement all provide important habitat for the survival and recovery of the burrowing owl. This is also demonstrated in comments made by burrowing owl expert Lynne Trulio. FEIR Chapter 6, Letter from L. Trulio to B. Roth (Feb. 25, 2013) incorporated herein by reference. The FEIR must be revised to include these habitats in its calculation of valuable burrowing owl habitat and impacts to these areas.

In addition, the FEIR continues to count the Flexible Space as 247 acres of "proposed" habitat. FEIR at 5-193. There is no basis for doing so. The FEIR acknowledges 132 acres of the 247 acres of Flexible space could be developed as light industrial. *Id.* But even this underestimates the development potential. The Flexible Space General Plan designation would allow development of all 247 acres as light industrial. As previously stated, the FEIR must analyze the Project's biological impacts assuming the full permitted development.

**C. Impacts from the proposed Nortech Parkway Extension remain significant.**

SCVAS previously commented that the proposed Nortech Parkway Extension traverses the proposed 180-acre burrowing owl habitat and would significantly reduce the value of this habitat. In response, the City relies on unspecified reports of owls nesting next to roadways to conclude that roads do not harm burrowing owls. However, the burrowing owl's tolerance for roads is exactly why vehicle-collisions are a significant threat to individuals. As explained by one expert, "Haug et al. (1993) state that, 'collisions with vehicles [are] often a serious cause of mortality,' citing several studies in which this was documented as being significant. This may be in part due to the relatively high tolerance of the species for vehicular disturbance (Plumpton and Lutz, 1993;

*p. 9 of 33*



Coulombe, 1971), along with a preference for roads and flat, open spaces.” K. Cambell at 3-4.

The City also relies on a speed limit of 40 miles per hour to reduce collision impacts, citing a report to Congress founding that speeds above 55 mph are shown to result in “significantly higher vehicle-wildlife collisions.” FEIR at 5-203. This report is inapplicable to the situation here, and hardly constitutes an analysis of direct adverse burrowing owl impacts from the Project. That speeds above 55 mph are shown to result in “significantly higher vehicle-wildlife collisions” only proves the fact that even low speeds can result in mortalities. Regardless, the FEIR does not include any mitigation measures to establish or enforce the “typical” roadway design speed. There simply is no evidence in the record to suggest that roadway impacts will not have a substantial direct effect on owl populations. Indeed the Haug report cited above and attached hereto finds that in mortality studies, “collisions with vehicles [are] often a serious cause of mortality.” Haug, E.A., B.A. Millsap and M.S. Martell. 1993. Burrowing Owl (*Speotyto cunicularia*) (Attached). *The Birds of North America*, No. 61 The American Ornithologists' Union at 11-12. Here, as SCVAS previously commented, the Nortech Parkway extension is proposed to be constructed directly adjacent to a burrow currently occupied. Kleinhaus at 4.

The FEIR suggests that 177 acres of the Project’s burrowing owl reserve could be used for future mitigation. FEIR at 5-216. But if the Nortech Parkway extension is constructed, the habitat would be fragmented and not suitable as mitigation lands. *Id.*; HCP Appendix M at 17, 20. Further, in calculating the number of acres necessary for success of the Burrowing Owl Conservation Strategy, the HCP assumed that conservation actions will occur on 15% of public lands without contribution from the HCP. HCP Appendix M at 17. Finally, as SCVAS previously commented, based on the HCP standards, the 180-acre owl habitat is not even large enough to mitigate for impacts to two of the six owl pairs found at the site in 2012. Accordingly, preservation of this site cannot serve as mitigation for the Project.

#### **D. Impacts from biocide use have not been mitigated.**

SCVAS commented that the DEIR should evaluate the potential for biocide use to impact plants and wildlife and cause secondary impacts on burrowing owls. SCVAS stated that an appropriate mitigation would restrict rodent control to mechanical means. Instead of following this expert advice, the FEIR stated that all WPCP improvements and economic development would be subject to San Jose Municipal Code section 17.78.250 *et. seq*, which it suggested would “likely ensure that impacts from biocide are less than significant.”

There is no evidence to support the City's finding. San Jose Municipal Code Chapter 17.28 (REQUIREMENTS FOR FACILITIES WHERE MATERIALS WHICH ARE OR WHICH MAY BECOME TOXIC GASES ARE FOUND)<sup>2</sup> only applies to "facilities where regulated materials subject to this chapter are present in concentrations which exceed the level of concern." Regulated materials are only those that act as a gas and are stored in maximum levels above which would be harmful to human health in the air. *Id.* Biocides of concern to burrowing owls do not meet this definition and therefore would not be covered by this code. Accordingly, there is no basis to presume that impacts from biocides are reduced to a less than significant level. The City owns the WPCP and can easily implement the mechanical rodent control mitigation measure for WPCP improvements. In addition, the City plans to lease all of the economic development lands, and this, as well as other suggested mitigation measures, could easily be made a requirement of any future lease through a mitigation measure in this EIR.

**E. Impacts from impeding east-west movement remain significant and unmitigated.**

SCVAS commented that the EIR should analyze and mitigate the significant impacts from fragmentation of east-west movement corridors for owls and other species. Kleinhaus at 5. The City responds that east-west movement is restricted by developments on either side of the Project site. FEIR at 4.9.9-7. To begin with, this is incorrect. Parts of the designated owl habitat border other owl preserve lands currently owned by Cisco. More importantly, the EIR fails to consider the fragmentation of east-west corridors *within* the Project site. Specifically, under the Modified Alternative 4, there remains developed barriers for travel between the owl habitat and the Flexible Space that may also serve as owl habitat. The EIR must revise the layout and/or operation of the proposed land uses to allow for an east-west corridor from the Owl Habitat to the Flexible Space lands.

**F. Impacts from bird collisions remain significant and unmitigated.**

SCVAS previously commented that the EIR must provide analysis and mitigation guidelines for implementing the City's bird safe design policy. Bird collisions with existing structures can be a significant impact to populations and feasible design mitigation measures exist. *See* San Francisco Planning Department *Standards for Bird Safe Buildings and Design Guide Standards for Bird-Safe Buildings* (attached). The City

---

<sup>2</sup> Found on [http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose\\_ca/sanjosemunicipalcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanjose\\_ca](http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose_ca/sanjosemunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:sanjose_ca), and incorporated herein by reference to be a part of the record.

impermissibly delays the study and development of mitigation measures to when future development proposals come forward. However, as the San Francisco bird-safe design reports incorporated above establish, it is entirely possible to develop appropriate mitigation measures at the program-level of review. A revised EIR must be prepared to analyze the flight needs of resident and migratory birds in this area and provide bird-safe design measures now. For instance, the height limits provided in the proposed General Plan designations for the site may need to be revised.

**G. Impacts from feral animals and competition remain significant.**

In response to SCVAS's comments regarding the necessity to analyze and mitigate impacts from feral animals and pets, the City refers to a number of City policies that it hopes will reduce this impact. However, none of these policies are adopted as enforceable mitigation measures and therefore cannot be relied on to find a less than significant impact. The FEIR also concludes that competition on remaining open space will not result in significant biological impacts if the HCP conservation strategy is implemented. However, this does not respond to the concern that reduction of open space *on the Project site* will lead animals currently using those areas to compete with animals currently located on the designated open space *on the Project site*.

The City may not approve the Project or the modified alternative because the FEIR fails to analyze biological impacts "as specifically and comprehensively as possible." CEQA Guidelines § 15168(c)(5). Further, the FEIR's conclusion that biological impacts are mitigated to a less than significant level is unsupported by the record. Rather, the evidence shows that conversion of a significant portion of the WPCP bufferlands will have a significant effect on the burrowing owl species.

**III. The FEIR's water supply analysis is inadequate because it does not include a Water Supply Assessment or analyze the impacts of procuring additional supplies.**

**1. The City may not rely on the General Plan Update WSA.**

The proposed land uses are a project requiring a Water Supply Assessment (WSA) as defined by Water Code section 10912. SCVAS previously commented that preparation of a water supply assessment should not be deferred. Grasseti at 5. The City responds that water supplies for the Project were analyzed as part of the WSA for its General Plan update. FEIR at 4.9.8-14.

The General Plan update WSA was prepared three years ago in 2010 to document the San Jose Municipal Water System's (SJMWS's) existing and future water supplies and compare supplies to the "buildout water demands described in the General Plan

*p. 12 of 33*



Update.” Todd Engineers for SJMWS, Water Supply Assessment for Envision San Jose 2040 General Plan Update (Sept. 2010) at 1 (General Plan WSA). It found that projected water demand in North San Jose may only be met if additional SCVWD groundwater supplies become available in an area prone to saltwater intrusion and subsidence. *Id.* at 22-23. The City cannot rely on this previous WSA.

Water Code section 10910(h) provides the limited circumstances when a project may rely on a previous WSA. Those circumstances are not present here. To begin with, it is only proper to rely on a previous WSA that found that “water supplies are sufficient to meet the projected water demand associated with the proposed project.” Wat. Code §10910(h). Here, as the FEIR acknowledges, the General Plan WSA found that water supplies in the Project area would *not* be sufficient from SJMWS water sources. General Plan Update WSA at 22-24.

Even if such a finding was made, a project cannot rely on a previous WSA when the WSA does not meet all of the requirements of water code section 10910. Here, the General Plan WSA does not meet all these requirements as a WSA for the Project. To begin with, Water Code section 10910(c)(1) requires the City to determine whether the projected water demand associated with the project was included as part of the most recently adopted urban water management plan (UWMP). There is no evidence that the City has complied with this section, and the FEIR admits that the SCVWD and water retailers in the area, including SJMWS, were still in the process of preparing their Urban Water Management Plans (UWMP) when the General Plan WSA was prepared. FEIR at 4.9.8-33. Nor is there any evidence that the City has since concluded that the Project is part of the most recent UWMPs. Further, because water supply for the Project is proposed to include groundwater, section 10910(f) requires additional information that was not included in the General Plan WSA. Accordingly, the General Plan WSA does not meet the water code requirements to serve as a WSA for this Project.

Finally, relying on a previous WSA is improper where (1) there have been changes in the project that result in a substantial increase in water demand, (2) changes in the circumstances or conditions affecting water supply for the project, and (3) significant new information becomes available which was not known before. Wat. Code §10910(h). These circumstances are present here. For instance, since the General Plan WSA was prepared, the 2010 UWMPs for SJMWS and SCVWD were released. In addition, SCVWD since released its Water Supply and Infrastructure Master Plan (Water Master Plan).

These new plans assess water supply in the area and constitute significant new information that demands a new WSA for the Project. For instance, the SJMWS 2010 UWMP states that it plans to construct additional wells in the area after 2030. FEIR at 4.9.8-33. SCVWD’s 2010 UWMP found that after 2025, additional water supplies must

*p. 13 of 33*

be secured. *Id.* In response to comments about inadequate water supplies, the City states that it will “coordinate future supplies from SFPUC and SCVWD to ensure future sustainability.” FEIR at 4.8.11-3. But how can the Project rely on SCVWD groundwater when its UWMP finds that current supplies are insufficient for existing demand? The Water Master Plan increases the concern that there will not be sufficient water supply for the Project by finding that current supplies and reserves would fall short of meeting demand in an extended drought.

The FEIR makes the untenable argument that because the Water Master Plan will involve further studies, there is no new information before those studies are complete. FEIR at 4.9.8-33. However, the UWPs and Master Plan themselves are significant new information that demands a new WSA. Additional new information is also likely available if the City complied with the water code and asked the SCVWD to prepare a WSA. The General Plan Update WSA stated that the “SCVWD is currently assessing the availability of the groundwater basin for all retailers and is working to determine reasonable rates of groundwater extraction. As this process continues, SCVWD may be able to provide more information on reasonable rates of groundwater extraction for North San José and the other service areas.” What is the status of these assessments? What has the SCVWD concluded? The FEIR must include a WSA that incorporates new information developed by the SJMWS and the SCVWD regarding water supply for the Project area.

In reaction to this new information, instead of complying with the Water Code and preparing a new WSA, the City concludes that “by the time a project-level WSA is prepared, better information will be available.” FEIR at 4.9.8-32. Of course, there will *always* be better information if lead agencies delay analysis of environmental impacts. CEQA does not require the best possible analysis, CEQA requires a useful analysis based on available and obtainable information at the program level, before the City approves a General Plan amendment permitting developments for which there are insufficient water supplies. Mitigation measure UT-1 (Water Supply Assessment) therefore impermissibly defers analysis of the Project’s impacts and development of mitigation measures. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412.

Under the express terms of Wat. Code §10910(h), the City must prepare a new WSA. The City’s failure to comply with the water supply assessment requirements in Water Code section 10910 renders the FEIR inadequate. § 21151.9. Indeed, Water Code section 10911 provides that when an agency determines that water supplies are insufficient to serve the Project, as the FEIR found (DEIR at 4.13-18), additional information must be included in the EIR. This includes an estimate of the total cost, proposed financing methods, timeframe, and required permits and entitlements for

acquiring the additional water supplies. Wat. Code § 10911. None of this information is included in the FEIR and it thus fails to fulfill its informational purposes or comply with the law.

It is entirely possible for the City to conduct this analysis now. FEIR at 4.9.8-30. Estimated water use for the proposed land uses are known. Has recycled water from the South Bay Water Recycling Water program been allocated to serve other planned growth or is it available for the Project's proposed land uses? Do the SCVWD's current plans to expand groundwater capacity include projected water demand from the Project? Would developing new wells in the area be feasible?

Delaying a WSA to when individual development projects are proposed will prevent the City from seeing the cumulative impacts of all proposed developments on the precarious water supplies in the area. It also prevents the city from considering the impacts of water supply when considering alternatives. As the SCVWD commented, where groundwater wells are placed makes a difference in environmental impacts. At this time, however, the City does not know if its land use designations prevent the environmentally superior well location.

## **2. The FEIR fails to analyze the environmental impacts of obtaining additional water supplies.**

The SCVAS previously commented that when water supplies are found to be inadequate, the EIR must discuss "possible replacement sources or alternatives and the environmental consequences of those contingencies." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 432. In response, the City claims that the "economic development land uses are conceptual and subject to change based on actual proposals by developers" and that the FEIR "defers preparation of a WSA until meaningful and accurate assessment could be prepared." FEIR at 4.9.8-31. However, as discussed above, a land use planning document must analyze the impacts of the "permitted" uses. *Bozung v. Local Agency Formation Comm'n of Ventura County* (1975) 13 Cal. 3d 263, 279, 282. Here, the DEIR has estimated the water demand from the permitted uses. DEIR at 4.13-20. With such data in hand, it must also analyze the impacts of meeting that demand. "The future water sources for a large land use project and the impacts of exploiting those sources are not the type of information that can be deferred for future analysis." *Vineyard Area Citizens for Responsible Growth, Inc.*, 40 Cal.4th at 431.

The City claims that the DEIR did analyze the potential impacts of greater reliance on groundwater. FEIR at 4.9.8-30. However, no analysis exists. The FEIR simply states in two sentences that relying on groundwater creates "a risk of salt water intrusion" and notes that this area "is prone to subsidence." There is no analysis of the potential extent

*p. 15 of 33*



of saltwater intrusion or subsidence or the environmental harms that would be caused by such events. Instead, the FEIR concludes that supplying water to the Project will not cause subsidence or salt water intrusion, because the SCVWD is working to prevent such impacts. FEIR at 4.8.11-3. This is a circular argument. The SCVWD commented that the Project could create a significant impact on groundwater levels in the Project area and that salt water intrusion and subsidence risks must be further evaluated. FEIR Chapter 6, Letter from M. Martin to B. Roth (March 13, 2013) incorporated herein by reference.

Finding that the Project's water supply impacts are significant and unavoidable does not cure the insufficiency of the FEIR's water supply analysis. Numerous courts have held that an agency cannot cure its failure to analyze an impact by rotely acknowledging the impact's significance. The court in *Galante Vineyards* expressly rejected this tactic, stating bluntly, "[T]his acknowledgment is inadequate. 'An EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences.'" *Galante Vineyards v. Monterey Peninsula Water Management Dist* (1997) 60 Cal.App.4th 1109, 1123 (quoting CEQA Guidelines § 15151); see also *Mira Monte*, 165 Cal.App.3d at 365 (EIR protects "the right of the public to be informed in such a way that it can intelligently weigh the environmental consequences of a[] contemplated action").

Thus, the City may not "travel the legally impermissible easy road to CEQA compliance . . . [by] simply labeling the effect 'significant' without accompanying analysis." *Berkeley Jets Over the Bay Com v. Bd of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1371. Rather, "a more detailed analysis of how adverse the impact will be is required." *Galante Vineyards*, 60 Cal.App.4th at 1123. To evaluate the Project, both decision-makers and the public must know whether additional water supplies for the project are available and whether procuring those supplies merely cause minor effects or will lead to major environmental consequences. The City's refusal to provide this information violates CEQA.

#### **IV. The City may not approve the Project until the Odor impacts from the WPCP improvements are fully analyzed.**

A project will have a significant odor impact if it would "create objectionable odors affecting a substantial number of people. DEIR at 4.5-38, SCVAS previously commented that the DEIR does not contain a sufficient analysis of the odor-reducing technologies proposed for the WPCP improvements. Grassetti at 7. The Final Draft Plant Master Plan concluded that additional studies would be needed to assess the impacts of the recommended odor control improvements:

Without a comprehensive data collection effort and modeling of current and future odor impacts, recommendations for odor-related capital improvements cannot be optimized nor their success verified after installation. Therefore, in addition to a preliminary evaluation of plant odor control needs and solutions, the Master Plan presents a conceptual scope of work for completion a comprehensive regional odor assessment program (ROAP). [F]inal recommendations for odor control improvements at the Plant cannot be made without undertaking additional steps within the confines of an ROAP. PMP at 32.

In response to SCVAS's comment that this study must be completed, the City states that the EIR reviewed a technical assessment conducted as part of the PMP development. FEIR at 4.9.8-23. But that analysis was obviously insufficient given the PMP's conclusion that additional studies would be necessary through the ROAP. The FEIR never suggests that its analysis completes the necessary ROAP.

The City states that it made "an impact significance determination based on a qualitative evaluation of odor impacts on nearby land uses, including sensitive receptors. FEIR at 4.9.8-23. The DEIR analysis was limited to impacts to adjacent land uses, however. DEIR at 4.5-38. What the City failed to consider, was the odor impacts to the proposed land uses that are a part of the Project. This includes a 40 acre park with sports fields used by children immediately south of the WPCP in addition to economic development expected to generate 15,400 employees. DEIR at 5.57. The DEIR contains no analysis of the odor impacts of the Projects' WPCP improvements on the "substantial number of people" who will be located on site if the Project is approved.

The City may not approve the General Plan amendment until the ROAP is completed and the impacts to people on site are analyzed. CEQA requires that the reasonably foreseeable impacts of a Project be analyzed *prior* to its approval. [cite] Here, the City will not know whether the project will cause significant odor impacts if it approves the proposed WPCP improvements and land use designation changes.

The PMP states that approval of developments for the buffer lands will be staged to occur until after the WPCP improvements are made and the effectiveness of odor control measures are established. But it is approval of the General Plan amendment that must not occur until after the effectiveness of odor control measures are established. The FEIR impermissibly defers an analysis that CEQA requires the City to undertake.

This is not a case of studying the impacts of the environment on the Project because the WPCP improvements as well as the proposed land use designations are part

*p. 17 of 33*

of the *same* Project. Regardless, people are a part of the environment that CEQA aims to protect. The impacts of expanded use of the site must be studied. *City of Carmel-By-The-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 252 involved the rezoning of a parcel of land in Monterey County from single family residential to open space and resort uses. *Id.* at 233–34. At the time of the rezone, the parcel was already being used for resort purposes in compliance with the local coastal program. The County argued that it need not prepare an EIR for the project because the existing use of the property was consistent with the rezone and “no expanded use of the property was proposed.” *Id.* at 235. The Court of Appeal rejected this argument, finding that the impacts of expanded use of the property must be studied.

#### **V. The EIR Fails to Adequately Evaluate the Project’s Contribution to Climate Change.**

The EIR’s analysis of greenhouse gas (“GHG”) emissions attributable to the Project is sorely deficient. The proposed Project—which consists of a expansion of the water treatment plant, 4.8 million square feet of commercial space and almost 7 million square feet of industrial development, will have a significant impact related to climate change by any rational measure. This includes short-term impacts from the WPCP improvements. DEIR at 3-5 and 3-54. The EIR concludes the Project’s short-term GHG impacts are less than significant only because it ignores the Project’s inconsistency with the City’s General Plan and it’s inconsistency with relevant plans and policies to reduce GHG emissions. Because the Project will have a significant climate-related impact the City must consider and adopt all feasible mitigation. However, the EIR fails to do so, in the short-term or the long-term.

With regard to climate change, existing conditions are such that we have already exceeded the capacity of the atmosphere to absorb additional greenhouse gas emissions without risking catastrophic and irreversible consequences. Therefore, even seemingly small additions of greenhouse gas emissions into the atmosphere must be considered cumulatively. *See Communities for a Better Env’t v. Cal Res. Agency* (2002) 103 Cal.App.4th 9 at 120 (“the greater the existing environmental problems are, the lower the threshold for treating a project’s contribution to cumulative impacts as significant.”); see also *Center for Biological Diversity v. National Highway Traffic Safety Administration* (9th Cir. 2007) 508 F.3d 508, 550 (“we cannot afford to ignore even modest contributions to global warming.”). Based on these and other recent climate change observations, leading scientists now agree that “humanity must aim for an even lower level of GHGs.”<sup>3</sup>

---

<sup>3</sup> James Hansen et al., Target Atmospheric CO<sub>2</sub>: Where Should Humanity Aim? 2 *Open ATMOSPHERIC SCI. J.* 217, 226 (2008) (attached).



**A. The EIR Fails to Support Its Conclusion that the Project is Consistent with the City's General Plan and Greenhouse Gas Reduction Strategy.**

Determining whether or not a project may result in a significant adverse environmental effect is a key aspect of CEQA. CEQA Guidelines § 15064(a) (determination of significant effects “plays a critical role in the CEQA process”). Under CEQA, agencies use thresholds of significance as a tool for judging the significance of a Project's impacts. CEQA Guidelines §§ 15064.4, 15064.7. The DEIR establishes that the project would result in a significant impact if it is not consistent with the City's Greenhouse Gas Reduction Strategy (“GHG Reduction Strategy”). DEIR at 4.6-12. The GHG Reduction Strategy, in turn, establishes that “the primary test for consistency with the GHG Reduction Strategy is conformance to the General Plan Land Use/Transportation Diagram and supporting policies.” *See* GHG Reduction Strategy, Implementation section. Implicit in this statement is the fact that, for a project to be consistent with the GHG Reduction Strategy, it has to be consistent with planned land use designations and uses, and *not* include a General Plan amendment. The GHG Reduction Strategy is designed to mitigate impacts of the General Plan as adopted and not as it might be amended in the future.

The DEIR concludes that the project-level WPCP Improvements would not result in significant climate change impacts, in part because the improvements are consistent with the General Plan and the City's GHG Reduction Strategy. However, the WPCP Improvements were not part of the General Plan and were thus not included in the environmental analyses prepared for that plan and for the GHG Reduction Strategy. The EIR provides no evidence to support its conclusion that the project-level WPCP Improvements would not result in significant impacts. These project-level improvements would substantially expand the existing WPCP operational area and substantially increase the capacity of the plant.

The proposed Project's land use changes related to economic development uses likewise were not included in the General Plan or any related analysis of associated greenhouse gas emissions. The Project would develop almost 12 million square feet of commercial and industrial uses on 327 acres of buffer lands that are currently open space and designated for public uses. DEIR at 4.2-3 and 3-44. In addition, the Project would allow an additional 247 acres designated as “flexible space” to be developed for economic development uses, for a total of 574 acres of development. Here too, the EIR concludes that the changes in land use are consistent with the General Plan.

The EIR relies on General Plan text indicating that WPCP lands provide an opportunity for new employment-generating land uses to support its assertion. DEIR at 4.2-23. The General Plan text states that “[w]ithin the Alviso Plan area, the Water Pollution Control Plant lands have been identified as a significant opportunity for new

*p. 19 of 33*

employment land areas, and in particular to provide an opportunity for new light industry or manufacturing activity jobs.” General Plan at 28. However, the General Plan does not specify how much of the WPCP lands should be designated for new employment-generating uses or at what densities. In fact, the General Plan indicates that the bulk of employment lands are planned for different areas. Specifically, “[t]hree areas are designated as Employment Centers because of their proximity to regional transportation infrastructure. These include the North San José Core Area along North First Street, the portion of the Berryessa/International Business Park in close proximity to the planned Milpitas BART station and existing Capitol Avenue Light Rail stations, and the Old Edenvale area, which because of its access to light rail, is also planned for additional job growth.” General Plan at 29.

Nowhere does the General Plan indicate that the WPCP site should be developed to the extent and at the density proposed by the Project. The proposed economic development uses would bring more than 15,000 people to the site resulting in thousands of additional vehicle trips per day. DEIR at 3-54. These vehicle trips would translate directly to substantial greenhouse gas emissions. The General Plan did not contemplate the proposed uses or the associated vehicle trips and emissions. DEIR at 4.6-23. Therefore, the Project cannot be said to be consistent with the General Plan or the GHG Reduction Strategy.

The DEIR even admits that “only with the proposed General Plan amendment would the Project be consistent with the General Plan and GHG Reduction Strategy.” DEIR at 4.2-22 and 26. Despite this evidence, the DEIR ignores its own threshold and, absent any evidence, reaches the conclusion that the Project is consistent with the General Plan and the GHG Reduction Strategy. The EIR then goes on to conclude that related short-term impacts will be less than significant. As discussed above, this determination is insupportable. A revised EIR must properly apply the document’s significance criteria and evaluate the Project’s inconsistency with the General Plan. See *Endangered Habitat League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783-84, 796 (holding that the county improperly ignored its own thresholds of significance by using the volume-to-capacity ratio to evaluate the significance of traffic impacts).

**B. The DEIR’s Conclusion that the Project Will Not Conflict With Other Relevant Plans to Reduce GHG Emissions Is Not Supported By Substantial Evidence.**

The DEIR also recognizes that the Project will have significant GHG-related impacts if it will conflict with an applicable plan, policy, or regulation that was adopted for the purpose of reducing the emissions of GHGs. DEIR at 4.6-12. However, the EIR concludes that the Project will not conflict with any such plan, and therefore will not have a significant impact. The EIR’s analysis on this point is deeply flawed.

*p. 20 of 33*

First, the DEIR errs by considering the Project's consistency with only a subset of relevant plans and policies. Primarily, it only considers whether the Project will conflict with AB 32. DEIR at 4.6-6 to 4.6-11 and 4.6-19 to 4.6-25 (analyzing compliance with AB 32 ). However, AB 32 is not the only relevant policy or plan that has been adopted for the purpose of reducing GHG emissions. Crucially, Executive Order ("EO") S-3-05 also sets forth state policy related to GHG reduction, including that it is the policy of the state to reduce GHG emissions to 80% below 1990 levels by 2050. DEIR at 4.4-6.

The DEIR acknowledges EO S-3-05, but erroneously concludes that the Executive Order does not directly pertain to the proposed project. *Id.* EO S-3-05 establishes statewide emission reduction targets through 2050. Its reduction targets beyond 2020 are substantial: 80% below 1990 levels. Yet the DEIR never analyzes the Project's consistency with EO S-3-05.

The DEIR also fails to analyze the Project's consistency with portions of the GHG Reduction Strategy that go beyond the 2020 targets. For example, the GHG Reduction Strategy includes GHG reduction targets for 2020, 2035, and 2050, yet the DEIR does not measure the Project's impacts against the 2035 and 2050 targets. DEIR at 4.6-24.

Instead, the EIR defers this analysis to some future date and states only that

"any proposed economic development that would occur subsequent to year 2020 would make a cumulatively considerable contribution to City-wide emissions that were determined by the EIR for the Envision San Jose 2040 General Plan to be significant and unavoidable by 2035 even with implementation of the measures contained in the GHG Reduction Strategy." DEIR at 4.2-24

The DEIR's failure to compare the Project's emissions—which will continue for decades if not in perpetuity—against long-term GHG emission reduction policies such as those in EO S-3-05 is unlawful. The GHG reductions in EO S-3-05 embody the reductions that climate scientists have concluded are necessary to provide a 50-50 chance of limiting global average temperature rise to 2°C above pre-industrial levels. The AB 32 Scoping Plan incorporates this goal, establishing a "trajectory" for reaching it over time. That trajectory requires continuing and steady annual reductions in both total and per capita emissions. Accordingly, analyzing the impacts of a long-term project such as this against only short-term GHG-reduction plans misleads the public into thinking that the Plan will help achieve the GHG reductions necessary to stabilize our climate. This is inaccurate. In fact, even if the Project helped achieve the 2020 targets embodied in AB 32, the Project is wildly out of compliance with the necessary 80% reductions embodied in EO S-3-05.

The courts have made clear lead agencies' obligation to measure a project's impacts against EO S-3-05. In *Cleveland National Forest Foundation v. San Diego Association of Governments*, the Superior Court held that SANDAG's EIR for its Regional Transportation Plan was

“impermissibly dismissive of Executive Order S-03-05. SANDAG argues that the Executive Order does not constitute a ‘plan’ for GHG reduction, and no state plan has been adopted to achieve the 2050 goal. [ROA 62 at 34]. The EIR therefore does not find the RTP/SCS's failure to meet the Executive Order's goals to be a significant impact. This position fails to recognize that Executive Order S-3-05 is an official policy of the State of California, established by a gubernatorial order in 2005, and not withdrawn or modified by a subsequent (and predecessor) governor. Quite obviously it was designed to address an environmental objective that is highly relevant under CEQA (climate stabilization). . . SANDAG thus cannot simply ignore it.”

Ruling on Petitions for Writ of Mandate, Dec. 3, 2012, pp. 11-12, (attached). So too here, the City ignores EO S-03-05 when analyzing the significance of the Project’s GHG impacts.

Indeed, the DEIR ignores any comparison of Project impacts to long-term GHG reduction goals. In addition to EO S-03-05, it also fails to analyze the Project’s inconsistency with SB 375 and the recently adopted Plan Bay Area, the regional transportation plan/sustainable communities strategy (“RTP/SCS”) for the Bay Area. Attached and Draft and Revisions available at <http://onebayarea.org/regional-initiatives/plan-bay-area/final-plan-bay-area.html>, and incorporated herein by reference to be a part of the record; DEIR at 4.2-21 through 4.2-28 (describing and analyzing consistency with various local, regional and statewide plans, but not SB 375 or Plan Bay Area). Pursuant to SB 375, the Association of Bay Area Governments (ABAG) and the Metropolitan Transportation Commission (MTC) were required to adopt an RTP/SCS that achieved specific GHG reduction targets through 2040 due to better land use planning and consequent reductions in vehicle miles traveled. To do so, it used current planning assumptions under jurisdictions’ general plans to develop a proposed land use development scenario that would reduce vehicle trips and meet the GHG reduction targets. Here, the Project does not comply with existing General Plan designations for the site, and therefore frustrates the Region’s ability to meet the reductions forecast in Plan Bay Area. Also, by developing millions of square feet of development away from existing transit service, where workers will be reliant on private vehicles for virtually all offsite trips (and many onsite trips), the Project flies in the face of SB 375 and Plan Bay Area, which are supposed to facilitate reduced driving. The DEIR’s failure to analyze the Project’s inconsistency with the above plans and laws means that the City has failed to proceed in the manner required by law. Further, the thresholds and targets included in these plans and policies are themselves thresholds of significance that should be analyzed in the EIR.

The WPCP project-level improvements fail to reduce GHG emissions as required by EO S-03-05 and AB 32. Accordingly, the short-term Project impacts are significant and the City has failed to consider any alternatives that would reduce those impacts to a less than significant level.



### **C. The DEIR Fails to Adequately Mitigate the Project's Contribution to Climate Change Impacts.**

The EIR quantifies the Project's greenhouse gas emissions and concludes that the Project would have significant, unavoidable impacts related to climate change. DEIR at 4.6-26. With this significance determination comes CEQA's mandate to adopt feasible mitigation measures that would reduce or avoid the impact. CEQA Guidelines § 15126.3(a)(1); *see also Woodward Park Homeowners Ass'n, Inc. v. City of Fresno*, 2007 150 Cal. App. 4th 683,724 ("The EIR also must describe feasible measures that could minimize significant impacts."). Under CEQA, "public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects." *Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm'rs* (2001) 91 Cal.App. 4th 1344,1354 (quoting § 21002). Accordingly, CEQA requires lead agencies to identify and analyze all feasible mitigation, even if this mitigation will not reduce the impact to a level of insignificance. CEQA Guidelines § 15126.4(a)(1)(A) (discussion of mitigation "shall identify mitigation measures for each significant environmental effect identified in the EIR"); *see also Woodward Park Homeowners Ass'n, Inc. v. City of Fresno* (2007) 150 Cal.App.4th at 724 ("The EIR also must describe feasible measures that could minimize significant impacts."). Mitigation measures must be "fully enforceable" and the lead agency must provide assurance that the measures will actually be implemented. § 21081.6(b); CEQA Guidelines § 15126.4(a)(2); *Anderson First Coalition v. City of Anderson* (2005)130 Cal.App.4th 1173,1186-87 ; *Fed'n of Hillside & Canyon Ass'ns v. City of Los Angeles* (2000) 83 Cal.App.4th 1252,1261.

Here, the EIR concludes that the Project's overall increase in GHG emissions is significant and unavoidable. DEIR at S-6 and 4.6-26. The EIR acknowledges that "[t]he majority of the emissions would be associated with mobile sources (i.e., vehicle trips) generated off-site...." DEIR at 4.6-24. But, rather than identify feasible mitigation measures that would reduce vehicle miles travelled, the EIR takes the approach of relying on future preparation of a mitigation program to address related GHG emissions. DEIR at S-5 and 4.6-26. The DEIR identifies Mitigation Measure TR-8 (Implement Transportation Demand Management Program), but this measure defers any potential action until a later date. Further, it fails to require feasible mitigation measures, stating that "Such measures *could* include implementing a Transportation Demand Management (TDM) Program as well as establishing progressive parking strategies and developing bicycle facilities and transit services as part of the development projects." *Id.*; emphasis added. This measure is inadequate under CEQA because it relies on a program that is not yet approved and because it is vague and non-committal. DEIR at IV.D-26. Moreover, the two other mitigation measures identified by the EIR fail to address emissions

generated by the Project's increase in vehicle trips. (See Mitigation Measures GHG-1a and 1b, . DEIR at S-6 and S-7).

Measures that are vague, insubstantial, and non-binding cannot be relied on to mitigate Project impacts. Measures must be "fully enforceable" through permit conditions, agreements, or other legally binding instruments. § 21081.6(b); CEQA Guidelines § 15126.4(a)(2). Similarly, they must actually be implemented, not merely adopted and then disregarded, and thus the mitigation must provide assurance that such implementation will in fact occur. *Anderson First*, 130 Cal. App. 4th at 1186-87; *Fed'n of Hillside & Canyon Ass'ns v. City of Los Angeles* (2000) 83 Cal. App. 4th 1252, 1261. The DEIR's GHG "mitigation measure" does not meet this standard.

In fact, the Court of Appeal invalidated a similar attempt to defer climate change mitigation. In *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal. App. 4th 70, 93 ("CBE"), the Court found deferral of mitigation particularly inappropriate because the "novelty of greenhouse gas mitigation measures" made it crucial that "mitigation measures timely be set forth, that environmental information be complete and relevant, and that environmental decisions be made in an accountable arena." *Id.* at 96 (internal quotation omitted). Here, as in CBE, the EIR's proposed Mitigation Measure TR-8 defers preparation of a TDM program to a future date and provides no more assurance to the public than the mitigation rejected in the CBE case.

In addition, the EIR provides no evidentiary support that the proposed measure would effectively reduce GHG emissions. The document's bare-bones description of the TDM Program does not allow decision-makers and the public to evaluate the potential for implementation of the measure or to determine what quantity of emissions it would eliminate. Moreover, the DEIR fails to provide a quantitative estimate of emission reductions that would be achieved by the measures. The EIR must either generate an emission reduction estimate or explain, based on substantial evidence, why doing so would be infeasible. See *Berkeley Keep Jets Over the Bay vs. Bd. of Port Comm'rs* (2001) 91 Cal. App. 4th at 1370-71; *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal. App. 3d 421, 430. Without that estimate, the public and decision-makers cannot determine the extent to which the proposed measure in fact would reduce emissions. Unless and until the EIR develops concrete, specific mitigation measures, this environmental review will remain inadequate.

Moreover, because the Project's actual GHG emissions will cause a significant impact, the EIR must analyze, and the City must adopt, *all* feasible mitigation to reduce those impacts. § 21157.1(c). Numerous agencies and organizations have documented the types of mitigation that are appropriate and feasible for commercial and industrial development projects. Below is a list of measures that the City must adopt and/or require any future developments to implement, to reduce the Project's significant GHG impacts:

*p. 24 of 33*

## **Transportation and Motor Vehicles**

- Use low or zero-emission vehicles, including construction vehicles.
- Promote ride sharing programs *e.g.*, by designating a certain percentage of parking spaces for ride sharing vehicles, require designating adequate passenger loading and unloading and waiting areas for ride sharing vehicles, and providing a web site or message board for coordinating rides.
- Create car sharing programs. Accommodations for such programs include providing parking spaces for the car share vehicles at convenient locations accessible by public transportation.
- Require local “light vehicle” networks, such as neighborhood electric vehicle (NEV) systems.
- Provide the necessary facilities and infrastructure to encourage the use of low or zero-emission vehicles (*e.g.*, electric vehicle charging facilities and conveniently located alternative fueling stations at the Project site.
- Build or fund a transportation center where various public transportation modes connecting to the Project site intersect.
- Provide shuttle service to public transit.
- Provide public transit incentives such as free or low-cost monthly transit passes.

## **Energy Efficiency**

- Site buildings to take advantage of shade, prevailing winds, landscaping and sun screens to reduce energy use.
- Install efficient lighting and lighting control systems. Use daylight as an integral part of lighting systems in buildings.
- Install light colored “cool” roofs, cool pavements, and strategically placed shade trees.
- Provide information on energy management services for large energy users.
- Install energy efficient heating and cooling systems, appliances and equipment, and control systems.
- Install light emitting diodes (LEDs) for traffic, street and other outdoor lighting.

*p. 25 of 33*

- Limit the hours of operation of outdoor lighting.
- Use solar heating, automatic covers, and efficient pumps and motors for pools and spas.
- Provide education on energy efficiency.

### **Renewable Energy**

- Install energy-efficient heating ventilation and air conditioning. Educate consumers about existing incentives.
- Use combined heat and power in appropriate applications.

### **Water Conservation and Efficiency**

- Create water-efficient landscapes.
- Install water-efficient irrigation systems and devices, such as soil moisture-based irrigation controls.
- Design buildings to be water-efficient. Install water-efficient fixtures and appliances.
- Restrict watering methods (e.g., prohibit systems that apply water to nonvegetated surfaces) and control runoff.
- Implement low-impact development practices that maintain the existing hydrologic character of the site to manage storm water and protect the environment. (Retaining storm water runoff on-site can drastically reduce the need for energy-intensive imported water at the site.)

In addition, GHG mitigation measures provided by the following agencies must also be considered and adopted where feasible:

- Governor’s Office of Planning and Research. 2008. Technical Advisory. CEQA AND CLIMATE CHANGE: Addressing Climate Change through California Environmental Quality Act (CEQA) Review. See Attachment 3, “Examples of GHG Reduction Measures.” (Attached).
- California Air Pollution Control Officers Association (CAPCOA). 2008 (January). CEQA & Climate Change. Evaluating and Addressing Greenhouse Gas Emissions from Projects Subject to the California Environmental Quality Act. See page 79, “Mitigation Strategies for GHG.” (Attached).

*p. 26 of 33*



- Attorney General of the State of California. 2008 (December). The California Environmental Quality Act. Addressing Global Warming Impacts at the Local Agency Level. (Attached).

These documents cover a wide range of topics, including (1) land use, urban design, transportation measures; (2) shade and sequestration, including using trees to shade buildings; (3) energy conservation; (4) water Conservation; and (5) carbon offset credits. The City must consider all of these types of mitigation measures for the Project's significant impacts. It is entirely feasible for the City to require any future development of the site to implement these mitigation measures as a part of this EIR and Project approval. They are applicable to any type of development proposal the City could receive. They City's deferral of the analysis and adoption of these mitigation measures to a project-level review is thus unwarranted and contrary to CEQA.

Because the EIR relies on a program that is not yet approved, and because it fails to provide enforceable measures and performance criteria for the proposed measure, there is no assurance the climate change impacts would be mitigated at all. See *Sacramento Old City Ass'n v. City Council* (1991) 229 Cal.App.3d 1011. A revised EIR must identify all feasible mitigation measures and analyze alternatives that would substantially lessen the significant impacts of the Project.

## **VI. The EIR Fails to Properly Disclose and Mitigate Project Impacts in Conjunction with Sea Level Rise.**

The FEIR makes significant revisions to the DEIR by modifying the Project to include measures to reduce or avoid impacts to the built Project in conjunction with projected sea level rise. While we support the spirit of this Project revision to incorporate the realities of rising sea levels into land use planning, the EIR revisions are based on a flawed interpretation of CEQA following *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, and distort the CEQA process.<sup>4</sup> The EIR should be revised to disclose the Project's significant impacts in conjunction with sea level rise, and should adopt enforceable mitigation measures and alternatives to avoid such impacts wherever feasible.

The EIR must evaluate the reasonably foreseeable adverse impacts from the Project to the environment. While the EIR asserts that rising sea levels are a "future environmental baseline," the EIR still must adhere to CEQA's fundamental purpose to

---

<sup>4</sup> Notably, another district Court of Appeal has already declined to follow the holding of *Ballona*. See *California Building Industry Assn. v. Bay Area Air Quality Management Dist.*, 218 Cal. App. 4th 1171, 1194-1196.  
p. 27 of 33

evaluate any impacts that the Project *itself* will cause in conjunction with projected sea level rise. For example, it is well documented that, if flooding or inundation occurs as a result of sea level rise, the Project's pollution loading to the Bay and its tributaries will likely increase. This increased pollutant load would come from the Project itself, not from the rising sea level, and must be evaluated in this EIR. Similarly, wastewater and stormwater infrastructure may be compromised by rising sea levels, with serious resulting consequences to water quality. Furthermore, the EIR acknowledges that its impact from greenhouse gas emissions will be significant and unavoidable, and admits that sea level rise is a direct result of increased greenhouse gas emissions. For all of these reasons, the EIR is wrong to state that rising sea levels are a condition of the existing environment, but not an effect of the Project itself.

By converting the Project's sea level rise mitigation measures into part of the Project itself ("Floodproofing Design Considering Sea Level Rise") the EIR avoids CEQA's requirement and fundamental purpose of disclosing the Project's significant environmental impacts, and adopting enforceable mitigation measures or avoidance alternatives to reduce this impact. In addition to circumventing this informational purpose, it is unclear how enforceable the newly proposed floodproofing design elements will be. While CEQA requires that adopted mitigation measures be enforceable throughout the life of a project, a lead agency may choose to ultimately implement some elements of an approved project, while not implementing others.

In sum, the EIR should be revised to accurately describe the potentially significant environmental impacts to water quality, habitat, flood risk, among others, associated with the Project development when viewed in conjunction with ongoing sea level rise. And such significant impacts must be mitigated or avoided where feasible (as suggested in numerous comments). The EIR may not escape this essential CEQA framework by converting mitigation measures into project elements, and couching rising sea levels as a future environmental baseline.

## **VII. The EIR's Alternatives Analysis is Inadequate**

Every EIR must analyze a reasonable range of project alternatives. § 21100(b)(4); Guidelines § 15126.6(a). To be "reasonable," these alternatives must provide enough variation from the proposed project "to allow informed decisionmaking" regarding options that would reduce environmental impacts. *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal* (1988), 47 Cal.3d. 376, 404-05. "[T]he purpose of an alternatives analysis is to allow the decisionmaker to determine whether there is an environmentally superior alternative that will meet most of the project's objectives." *Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089; *see also* CEQA

*p. 28 of 33*

Guidelines § 15126.6(a) & (b). Here, the EIR’s analysis of alternatives failed to satisfy these requirements.

**A. The EIR fails to consider a reasonable range of alternatives.**

**1. The DEIR fails to consider an alternative that would reduce development to the same level as Alternative 3.**

The City should consider a modified Alternative 3 that would remove the Dixon Landing Road connection and provide access to the light industrial development via Zanker Road, along with any needed transportation upgrades to serve this development along that route. The City has failed to show that it would be infeasible to access the light industrial development in this alternative via Zanker road. This modified alternative would meet the City’s Project objectives and further reduce most of the significant environmental impacts. It must be considered. *Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, 616-17 (Invalidating EIR where City failed to consider suggested alternative that would reduce environmental impacts.)

**2. The reduced energy alternative was improperly eliminated from further analysis.**

The City initially considered an alternative that would include all upgrades to the WPCP but maintain existing biosolids management practices. Doing so reduces the projects energy consumption, GHG emissions, and loss of open space. It also eliminates odor control, but this would not be a significant impact because the DEIR found that existing WPCP operations do not have significant odor impacts. 4-5.39. The City eliminated consideration of this alternative from further analysis in the EIR because “the No Project Alternative . . . most closely resembles [this] alternative.” However, this alternative has significant differences from the No Project alternative in that it meets more of the Project objectives regarding upgrades to the existing WPCP and has fewer environmental impacts. Further, there is no basis for the City’s assumption that this alternative would preclude any economic development of the plant lands. The City discusses no odor study that establishes this fact. Further, many types of economic development, such as light industrial warehouses and R&D industrial may still be possible with other odor control mitigation measures for workers at the site, such as air filtration systems. The reduced energy alternative must be fully considered in a revised EIR. *Flanders Foundation*, 202 Cal.App.4th at 616-17.

### **3. The EIR must consider alternatives to the project-level WPCP improvements.**

The WPCP improvements result in a number of significant and unavoidable environmental impacts. *See* FEIR Table S-1. Yet the EIR does not consider any alternatives to the proposed WPCP improvements. The City responds that the FEIR does consider wastewater treatment “options.” FEIR at 4.5-12. But these options are simply vague Project descriptions that allow the City to select from a list of types of improvements. The EIR does not “evaluate the comparative merits” of the options as required by CEQA. Guidelines §15126.6. Citing *California Oak Foundation v. Regents of Univ. of Cal.* (2010) 188 Cal.App.4th 227, the City also claims that the city may choose to consider alternatives that reduce or modify some but not all of the project’s individual components. But that case involved a challenge to a project-level EIR for a stadium construction project and actually supports the requirement to study alternatives for project-level review. Here, the City has combined a project-level EIR for the WPCP improvements with a program-level EIR for the proposed Other Land Uses. In such an instance, alternatives to the project-level project must be considered to fulfill CEQA’s requirement that alternatives be selected and discussed “in a manner to foster meaningful public participation and informed decisionmaking.” 15126.6. (a). Otherwise, an agency could always combine a project with a larger land use plan and avoid CEQA’s requirement to consider a reasonable range of alternatives.

#### **B. The FEIR incorrectly assumes that environmentally preferable alternatives are infeasible.**

The City rejected various alternatives that would not allow for economic development of the WPCP buffer lands as infeasible because it would supposedly conflict with various policies and statements in the City’s General Plan. However, a project only conflicts with a General Plan when it conflicts with specific, mandatory standards. In *Sequoiah Hills*, for example, the court found a project was consistent with “tentative” density policies in a general plan. *Sequoiah Hills Homeowners Ass'n v. City of Oakland* (1993) 23 Cal.App.4th 704, 718. Although the project's density was somewhat higher than identified in a general plan map, that map stated that the densities were only “illustrative in nature” and that specific projects might “Justify variation from those details.” *Id.* Because the policies were designed to be flexible, there was no set rule governing their implementation. *See id.* at 718-19. The court also rejected a claim that the project was inconsistent with three general plan policies related to protecting natural landforms which were not mandatory.

Here, the City relies on various permissive statements in the General Plan that the City “may” amend the General Plan Land Use Diagram to incorporate the outcome of the



PMP planning process. FEIR at 4.5-14. These statements and policies are not the type of mandatory, quantifiable policies that support an inconsistency finding.

Further, the General Plan merely notes that the planned job capacity of the Alviso Master Plan area as a whole is 25,520 jobs. *Id.* The EIR contains no analysis about what lands within the Alviso Master Plan area were undeveloped at the time of the General Plan update, how many jobs have been created since then, and how many jobs may be incorporated in remaining developable lands within the area. Without this analysis, the EIR's analysis of consistency with the General Plan is inadequate and the City cannot find that the jobs it insists must be located on the Project site (down to 6,700 jobs in Alternative 3) cannot be located in other developable properties in the Alviso Master Plan area. That the General Plan EIR may have evaluated a certain number of jobs at the Project site, does not mean that that level of development *must* occur. The General Plan actually recognizes that development may not occur at the Project site and be accommodated elsewhere in the area. Policy LU1.10. Indeed, there is significant development capacity for the same types of land uses proposed by the Project at nearby lands that were formerly a part of the Cisco Systems Site 6 Project. The City must conduct this analysis before there is any evidence to conclude that the General Plan requires the creation of jobs at the Project site.

Regardless, alternatives that would require an amendment to the General Plan must be studied. Even when an alternative must involve a change in the law, such as an amendment to the General Plan statements and policies cited by the City, an EIR must still consider those alternatives. *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437; *Citizens of Goleta Valley v. Bd. of Supervisors* (1990), 52 Cal. 3d 553, 573. For instance, the employment goals for the Alviso Master Plan area could be reduced. Or, as the SCVAS previously commented, an alternative that considers adjusting General Plan designations to allow for more compact, intense development on already developed lands should be considered. Grasseti at 12. CEQA requires a consideration of such alternative locations for the economic development portion of the Project. § 15126.6(f)(2).

**C. Regardless, the City may not approve the project because Alternative 3 is environmentally superior.**

The EIR finds that Alternative 3, Western Open Space Reduced Development is the environmentally superior alternative. DEIR at 7-32. Like the other alternatives considered in detail in the FEIR, Alternative 3 “would meet most of the basic objectives of the project.” DEIR at 7-30. Further, unlike other alternatives that do not allow any economic development on the Project site, the FEIR does not find that this alternative is infeasible. FEIR at 4.5-15. Indeed, City staff located other locations within the City “that could accommodate additional jobs.” FEIR at 7-20. Accordingly, Under General

*p. 31 of 33*

Plan Policy IP-3.4 the total planned job growth in the City would not be diminished and this alternative is clearly consistent with the General Plan. *Id.*

Because the Project would result in significant and unavoidable impacts, and because Alternative 3 is feasible, the City may not approve the Project. Pub. Res. Code § 21081(a)(3); Guidelines § 15091(a)(3); *Flanders Found v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603,620.

Alternative 3 is still environmentally superior to the Staff Recommended Alternative [Modified Alternative 4] presented at the Planning Commission for all the same reasons stated in the EIR. DEIR at 7-32.

### **VIII. The staff recommended alternative does not address the EIR's deficiencies or reduce the Project's impacts to less than significant**

The SCVAS has reviewed the Staff Recommended Alternative [Modified Alternative 4] presented to the Planning Commission in the October 17, 2013 staff reports. This alternative does nothing to cure the EIR's inadequate and deferred analysis of the Project's biological, GHG, water supply, and other impacts discussed above. Further, the final proposed Plant Master Plan still includes permitted development on designated Flexible Space, which could have "many potential uses" including ones that would generate vehicle trips. PMP at 50. The Staff Recommended Alternative still provides inadequate east-west wildlife corridors through the site, divides the 180-acre owl habitat with the Nortech Parkway Extension, and allows development on a majority of the site's prime burrowing owl habitat. It still fails to adopt all feasible mitigation measures for the project's significant biological, GHG, and other impacts.

Further, the October 17, 2013 Staff Report to the Planning Commission regarding Plant Master Plan Adoption, states that "*if* economic development is limited to the area south of the Wastewater Facility operational area, there would not be a need to construct a Dixon Landing Road connection which would reduce environmental impact to the area east and northeast of the Wastewater Facility operational area." At 9. However, since the PMP still permits development on the area east of the operational area, the future extension of Dixon Landing Road connection is a reasonably foreseeable consequence of the Project approval. In *Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal. 3d 376, the California Supreme Court specifically rejected the notion that an agency may avoid analysis of future phases of a project simply because they are not encompassed within the initial project approval. Accordingly, if the PMP continues to list those lands as Flexible Space, the City may not rely on the absence of the Road from current plans to find that the Project's impacts are less than significant.

*p. 32 of 33*

Very truly yours,

Santa Clara Valley Audubon Society

A handwritten signature in cursive script that reads "Shani Kleinhaus". The signature is written in black ink and is centered below the organization's name.

Shani Kleinhaus

RECEIVED OCT 29 2013



COMMITTEE FOR  
GREEN FOOTHILLS



Santa Clara Valley  
Audubon Society



SAFETY COMMITTEE TO  
COMPLETE THE REFUGE



October 29, 2013

San Jose Planning Commission  
200 E. Santa Clara St.  
San Jose, CA

Re: San Jose/Santa Clara Water Pollution Control Plant Master Plan  
File No. PP11-043

Dear Planning Commissioners,

The undersigned organizations submit this letter as our comments on the Draft Environmental Impact Report ("DEIR") and the First Amendment to the DEIR ("Amended DEIR") (together, "Final EIR") for the San Jose/Santa Clara Water Pollution Control Plant ("WPCP") Master Plan ("PMP").<sup>1</sup> Our organizations together represent the majority of environmental nonprofit groups working in the South Bay Area on the environmental impacts associated with the proposed PMP. We believe that the Final EIR is fatally flawed and should not be certified, and that economic development and associated road infrastructure on WPCP lands should not be allowed as proposed based on this flawed document. If the Planning Commission decides to certify the Final EIR without fully considering no-or significantly reduced- economic development alternatives, please consider the following background and recommended modifications to the Modified Alternative 4:

### **Background**

The WPCP site constitutes the last significant open space between urbanized San Jose and the Bay, and at 2,860 acres, it includes some of the largest areas of restorable salt marsh habitat along the entire South Bay shoreline. (See overhead photo of the WPCP site from the Amended DEIR, attached.) Historically, this area was covered in tidal marsh, where land merged imperceptibly into water and sloughs formed channels through the reeds and other native marsh plants leading out to the shallow water of the South Bay. Although the land has been diked and drained, the slough channels are still visible on

<sup>1</sup> The Santa Clara Valley Audubon Society is also submitting a more detailed letter commenting on the FEIR's deficiencies.



the WPCP lands (e.g. the channel labeled "Artesian Slough Riparian Corridor" in the DEIR). The open space bufferlands on the site now form habitat for a variety of wildlife, including burrowing owls, raptors, pheasants, and mammals such as jackrabbits and skunks, as well as Congdon's tarplant, a state rare plant. These bufferlands are critical to the survival of burrowing owls in the Bay Area and the success of the Burrowing Owl Conservation Strategy of the Valley Habitat Plan. On the eastern edge of the site, Coyote Creek flows through a wooded riparian corridor with willows and cottonwood, providing habitat for species such as woodpeckers, great horned owls, hawks and other birds, as well as a vital wildlife corridor for many other species.

The PMP as proposed would result in significant environmental impacts to these important natural resources. It is important to note that the upgrades and modifications to the WPCP's water treatment operations that form the core of the PMP could be performed without imposing development onto these open spaces. Although our organizations, plus others, requested the City of San Jose multiple times in letters and public comments to include in the DEIR an alternative that would preserve these open spaces and natural resources, the DEIR's alternatives all include economic development and associated infrastructure on the lands surrounding the WPCP.

Since the submittal of comments on the DEIR, two proposed modifications have been presented to the public. The first, contained in the Amended DEIR, proposes a "Wetland Preservation Refinement" that will reduce the footprint of the future Plant expansion area by about 35 acres (out of 653), thus reducing by about 10 acres the amount of wetlands permanently affected by the project. (Amended DEIR at 3-2.) The second is a "Modified Alternative 4" that would implement the original Alternative 4 from the DEIR with some minor modifications. (September 30, 2013 Memo from K. Romanow to Transportation and Environment Committee, attached to October 17, 2013 Staff Report to the Planning Commission.) Alternative 4, titled "Eastern Open Space Compressed Development," would purportedly eliminate potential Light Industrial development within the "Flexible Space" area in the eastern biosolids lagoons, and would also eliminate the Dixon Landing Road extension through the biosolids lagoons from current plans. The proposed Modified Alternative 4 would maintain these changes, while replacing the Institute, Combined Industrial/Commercial, and Retail uses with more acreage for Light Industrial use. Modified Alternative 4 also adopts the Wetland Preservation Refinement proposed in the Amended DEIR. (See Attachment A from September 30, 2013 Staff Memo, attached.)

The Modified Alternative 4 would reduce the environmental impacts of the project by eliminating the Dixon Landing Road extension and the future Light Industrial development. This would be a significant improvement over the original project, since the Flexible Space area is adjacent to the Coyote Creek corridor, and the road extension would have to cross over the creek and disturb both riparian habitat and existing marsh mitigation. In spite of these improvements, however, significant environmental impacts from the project still remain. Through additional, feasible modifications, these impacts could be further reduced.

The Final EIR is fatally flawed and should not be certified. We reiterate that environmentally superior alternatives are feasible; specifically, alternatives that eliminate or greatly reduce proposed economic development of the bufferlands and that eliminate the Dixon Landing Road extension. If the Planning Commission does certify the Final EIR, the following recommendations should be incorporated into the Modified Alternative 4 to further reduce its environmental impacts as feasible:

**Summary of Recommendations** for Modified Alternative 4:

- 1) Designate the “Flexible Space” area as “Open Space, Parkland and Habitat,” in keeping with the decision to eliminate the Dixon Landing Road extension and the future Light Industrial development;
- 2) Limit solar power development to the built environment;
- 3) Do not allow the Nortech Parkway extension through the designated burrowing owl habitat; and
- 4) Retain the “Public/Quasi-Public” designation for the bufferlands (except that the burrowing owl reserve should be designated “Open Space, Parkland, Habitat”) until certain development triggers have occurred, as detailed below.

**Discussion of Recommendations** for Modified Alternative 4:

**A. No Development in the “Flexible Space”**

As mentioned above, the Modified Alternative 4 eliminates the Dixon Landing Road extension and the future Light Industrial development on the Flexible Space. The October 30, 2013 Staff Memo states that this would reduce the development footprint by almost 50%, reduce construction-related dust, noise and emissions, and preserve the Flexible Space that would otherwise be eliminated, all while generating approximately the same number of jobs as the original project. (October 30, 2013 Staff Memo, p. 5.) In order to ensure that these benefits are achieved, the Flexible Space should be designated as “Open Space, Parkland, Habitat” in the General Plan, just as is proposed for the burrowing owl reserve and Pond A18. The DEIR states that the Flexible Space area is reserved for future land use needs, including “a range of potentially compatible uses including light industrial, recreation, or habitat.” (DEIR at 3-57). When and how this space would be developed “would be determined by community needs and market demands.” (Id.) Thus, the proposed Modified Alternative 4, although an improvement over the original project, would not put future development of the Flexible Space off the table.

If the Modified Alternative 4 is selected, the Flexible Space area should remain free from development both because it offers rare and important habitat opportunities and because it is unsuited to development due to risks from flooding, sea level rise and liquefaction. Both the opportunities and the risks stem from the proximity of the Flexible Space to Coyote Creek and the Bay. Here in the semi-arid Bay Area, creeks and rivers are lifelines of survival for the vast majority of wildlife. Riparian vegetation is denser and more diverse than that found in drier upland areas, which means that a wide array of species utilize the riparian corridor for nesting, foraging and breeding; for example, more species of birds use riparian areas to breed in than any other habitat. In addition, riparian corridors serve as vital wildlife migratory pathways, especially in urban developed areas. The South Bay has lost the vast majority of its historical riparian ecosystem, as well as the entire natural habitat of the valley floor, to development, infrastructure and agriculture; thus, the few remaining natural riparian corridors and associated habitat are all the more precious and must be preserved.

Coyote Creek, which is home to the federally threatened Central California Coast Steelhead and Fall-Run Chinook Salmon, is one of the most significant waterways in Santa Clara Valley, and restoration of this creek, its riparian corridor and adjacent valley floor habitat, would offer critically needed benefits for wildlife as well as recreation opportunities and access to nature for the public. One possibility for

restoration is the creation of a “Coyote Creek Delta,” which would allow the creek, here at its mouth, to create a wider and more natural route as was the case historically. This would allow the formation of a southern fork to connect with Pond A18, in addition to the existing channel, which goes farther north past Newby Island. (See attached map from proposed January 2011 draft Master Plan, detailing what this delta might potentially look like.) Such a delta would not only provide Pond A18 with sediment from Coyote Creek that could help prevent restored tidal marsh from inundation due to sea level rise, but could also work to reduce flooding in central San Jose. Wider channels and/or multiple creek mouths would allow stormwater to flow through more quickly, thus relieving flooding potential upstream. Thus, designating the Flexible Space as “Open Space, Parkland, Habitat” would mitigate flooding risks to San Jose residents as well as provide habitat value.

Coyote Creek’s tendency to flood is another reason to designate the Flexible Space as an area where development will not occur. According to current FEMA Flood Insurance Rate Maps (FIRM), portions of the proposed Flexible Space are located in Flood Zone AE, due to fluvial flood risk associated with Coyote Creek. Such areas are subject to inundation by the 1-percent-annual-chance flood event (100-year event), subjecting development on such areas to mandatory flood insurance purchase requirements and floodplain management standards. These risks are most likely to increase under projected rates of sea level rise expected over the life of the project, coupled with more intense storm events under future climate scenarios. Historically, Coyote Creek has been the source of repeated flooding to Central San Jose and also downstream to Alviso. The Creek has produced more flood events in Alviso than has the Guadalupe River/Alviso Slough. The opportunity to reduce the extraordinary risks of flood events is a unique and appropriate use of WPCP lands, mimicking nature’s original design. The Flexible Space should be intentionally reserved for such a purpose.

The threat of sea level rise is a further risk to future development on the Flexible Space. Significant portions of the WPCP site are already below sea level. Although levee projects are under consideration for the South Bay, the complex process of designing miles of levees that intersect with three streams and a railroad crossing that will require a custom-designed solution because it cannot be elevated to cross above the levee, is likely to take some time.

Finally, this is an area that is highly susceptible to liquefaction. (See ABAG Liquefaction Susceptibility Map, attached.) It sits atop an ancient alluvial fan, the geologic nature of which allows water from the Bay to seep through permeable layers of soil, creating unstable conditions ripe for extensive liquefaction in severe earthquake events, much like what happened in San Francisco’s Marina District in 1989. While today’s construction engineering and building codes help ensure that structures survive, infrastructure of roads, levees, water, gas, sewage and power are harder to fortify against seismic forces. Taken together, the hazard risks of the Flex Space (fluvial flooding, sea level rise, seismic events) should be all the reason needed to preserve it permanently as open space.

## **B. Solar development should be limited to the built environment**

Another issue is the location of the solar power facility area in the flexible space. With the Wetland Preservation Refinement modification, the solar power facility will now be directly in between the 35-acre wetland area and the freshwater wetland area originally planned for the northern part of the biosolids lagoons. (See Attachment A to the Staff Memo, attached.) In the interests of not fragmenting the wetland habitat, the solar power facility should not be located in the middle of the wetlands. Solar panels are often



placed on top of buildings and over surface parking lots; this would be a more manageable and environmentally superior location for this facility within the built environment in the project area.

### **C. Nortech Parkway extension should not transect the designated burrowing owl habitat**

As currently proposed, the PMP calls for Nortech Parkway, which currently dead-ends at the boundary of the WPCP site, to be extended through the burrowing owl reserve, across the Artesian Slough Riparian Corridor, and through to Zanker Road. It is unacceptable for an area supposedly set aside for protection of a particular species to be transected by a roadway.

The October 17, 2013 Staff Report to the Planning Commission states that “based on numerous reports of burrowing owls successfully nesting next to roadways . . . the effects of the roadway on burrowing owls are expected to be low.” (Staff Report, p. 20.) This assumption ignores the fact that collision with vehicles is in fact one of the primary mortality factors for burrowing owls. Owls do not automatically avoid roads and traffic, and tend to nest and raise young in risky areas near roads. Of two burrowing owls brought to the Wildlife Center of Silicon Valley in 2013, one was hit by a car.

Simply because some owls survive when nesting next to roadways, does not mean that no owls are killed, nor does it mean that the species as a whole can successfully survive in the area in spite of these roadway deaths. The burrowing owl population in Santa Clara County is barely hanging on. It is surely inappropriate for a site specifically intended to be set aside as a burrowing owl reserve to be compromised with infrastructure that is known to be a threat to owl survival.

### **D. General Plan Land Use Designation Amendment to allow development along Highway 237 is premature.**

The Planning Commission is asked to recommend that the City Council approve a General Plan Land Use Designation Amendment that will redesignate part of the WPCP lands to different uses than the Public/Quasi-Public designation currently in place. This is appropriate with regard to the lands to be designated as Open Space, Parklands, and Habitat. However, we recommend that the remaining bufferland area remain as Public/Quasi-Public space, to be redesignated only if several development “triggers” are reached. These proposed development triggers are as follows:

#### **D.1. Burrowing Owls**

We believe that the development of the remaining bufferlands as proposed in Modified Alternative 4, and the 4-lane extension of Nortech Parkway, could result in the failure of the Burrowing Owl Strategy of the Valley Habitat Plan (VHP) and the extinction of the species in Santa Clara County. In recent years, almost all of the land available for nesting and foraging habitat in North San Jose has been developed, and remaining open space has entitlements to development. The VHP’s Burrowing Owl Conservation Strategy uses a phased conservation approach, initially focusing efforts on areas within 5 miles of established breeding sites. During the first phase, the HCP Agency will acquire the sites of importance in the region or, in the case of public lands, enter into permanent management agreement to enhance owl populations. The VHP identifies the WPCP lands “including buffer lands” as “public lands where enhanced management may be secured to meet the [VHP’s] population goals in this region.”

The second phase of the VHP's Burrowing Owl Conservation Strategy is enhanced land management on the sites of importance to increase populations. The final phase is to facilitate expansion of current burrowing owl range relying on dispersal of the increased populations at the sites of importance. In other words, the success of the VHP conservation strategy depends upon first preserving occupied lands such as the WPCP site, enhancing the existing populations on those sites, and then expanding their range to new sites. This process is expected to take 15 years to show results.

The fact that the WPCP bufferlands constitute one of the VHP's key priority sites means that payment of the VHP burrowing owl fee, or other similar mitigation, cannot mitigate the impacts caused by development on these lands – because the VHP intends to use such fees to preserve the very lands the PMP proposes for development. In fact, one of the three “threats and uncertainties” to the success of the VHP's Burrowing Owl Conservation Strategy is the development of portions of the WPCP buffer lands. Given the critical importance of the WPCP lands to the success of the VHP's Burrowing Owl Conservation Strategy, the City may not conclude that impacts to the burrowing owl from development of these lands can be mitigated to a less than significant level—even with payment of VHP fees. Furthermore, as a partner to the VHP, the City should have an interest in ensuring its success, and avoiding actions that would potentially jeopardize it.

The VHP Burrowing Owl Conservation Strategy has not yet been implemented, and any conversion of habitat on the WPCP lands must not occur until the documented success of that Strategy. The Burrowing Owl Conservation Strategy will be considered successful when there is “a positive growth trend in the permit area by Year 15.” For reliance on the VHP to be adequate mitigation, at the very least, (1) all of the WPCP buffer lands should be designated as open space or to otherwise include conservation as an allowed use to permit the Habitat Conservation Agency to acquire or enter into permanent management agreements for these lands, (2) the General Plan designations should not be changed to allow development on these lands until the Habitat Conservation Agency has determined that the VHP's Burrowing Owl Conservation Strategy is successful by Year 15 of the Plan, and (3) the ability to develop prime habitat in the North San Jose area is demonstrated by the VHP's establishment of at least six breeding pairs on protected VHP lands south of San Jose.

In sum, the bufferland should not be redesignated for development-related land use unless and until these conditions have been achieved.

#### D.2. Land Use Subject to Regulatory Permits.

As proposed in Modified Alternative 4 and the General Plan Amendment, the Plant Operations will lose access to buffer lands before it has certainty that it won't need any more of that land for its operations. Changing the Land Use designation for the lands south of the Plant prematurely would reduce the Plant's options to, if necessary, make changes in its proposed footprint.

The PMP proposes that the new biosolids facilities be built on the inactive biosolids lagoons, an area that includes jurisdictional wetlands subject, for purposes of building, to permitting by the U.S. Army Corps of Engineers (USACE) and related permits from the Regional Water Quality Control Board, the US Fish and Wildlife Service and possibly other agencies. The nature of the USACE permit process requires identification of the Least Environmentally Damaging Practicable Alternative (LEDPA). As the issue is filling wetlands, the LEDPA will be an alternative that best avoids or minimizes alteration of



wetlands. This means that the Plant could be required to place the biosolid facilities somewhere else on Plant lands, including potentially on the lands proposed for development in the PMP. Therefore, these areas should not be redesignated in the General Plan until it is certain that these lands will not be needed for expansion of the Plant operations.

### D.3. Shoreline Levee Project Completion

As discussed earlier, the WPCP lands are particularly vulnerable to flooding due to sea level rise or even, in the near-term, any coincident of king tides and extreme storm events. These risks are particularly high due to dependency on existing levees, constructed primarily from Bay mud. Within the region of the Plant, land use changes in the area have enhanced that vulnerability. For example, Newby Island, sitting across pond A18 from the Plant, once was 300+ acres of open flood plain, available to allow the dispersion of high water. Today it is a landfill and an obstacle that elevates and exacerbates the high water conditions of Coyote Creek as it blends into the Bay.

Furthermore, the DEIR described building techniques that would require that new structures be built on elevated construction sites to prevent inundation. This technique, in a flood situation, only increases hazards by deflecting stormwater runoff to surrounding surface development and the roadways that would be needed by emergency services. As the Plant lands, generally, are sloped toward the community of Alviso, elevated site construction would put that community at increased peril.

As discussed earlier, the Flexible Space should be redesignated as "Open Space, Parkland and Habitat," in keeping with the Modified Alternative 4 elimination of the Dixon Landing Road extension and the Light Industrial development in the Flexible Space. If the Planning Commission decides to keep this area designated as "Flexible Space," however, there should be a condition imposed that no development may occur in this area until the Shoreline Levee is complete.

### D.4. Odor at Levels Acceptable for Development:

For decades, odor emanating from sewage treatment at the WPCP has caused many complaints from adjoining and downwind individuals and landowners, complaints tracked in part by the Bay Area Air Quality Management District (BAAQMD). Among the impacted individuals were office and retail park owners and developers who found their investments to be less successful due to too frequent episodes of odors. All of these complaints came from points some distance from the WPCP.

For the first time on these lands, Modified Alternative 4 would place office parks and other development within Plant land boundaries. As there is ample local evidence that the value of such development would be diminished by noxious odor, it is prudent to hold off any development until there is measurable certainty that odor is no longer a factor to economic value.

To any employee of the Plant today, the odors are the nature of the place. That is the reason that the BAAQMD does not have any reports of odor complaints from locations on the Plant site. But employees can describe the sites that produce odor, the factors that affect odor intensity and when odor emissions happen as episodes of certain phases of treatment. That is the existing odor environment which can and should be used as the baseline to monitor success of future odor reduction actions. As the DEIR and First Amendment did not describe nor analyze the existing or future odor conditions within Plant

lands, establishing this trigger must start with defining the existing baseline and establishing target odor reduction milestones.

Thank you for your consideration of these comments.

Sincerely,



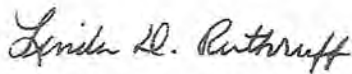
Alice Kaufman  
Legislative Advocate, Committee for Green Foothills



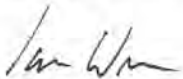
Shani Kleinhaus, Environmental Advocate  
Santa Clara Valley Audubon Society



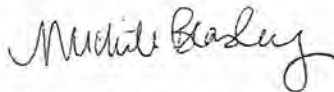
Eileen McLaughlin, Board Member  
Citizens Committee to Complete the Refuge



Linda Ruthruff, Conservation Committee Chair  
California Native Plant Society, Santa Clara Valley Chapter



Ian Wren, Staff Scientist  
San Francisco Baykeeper



Michele Beasley, Regional Director  
Greenbelt Alliance

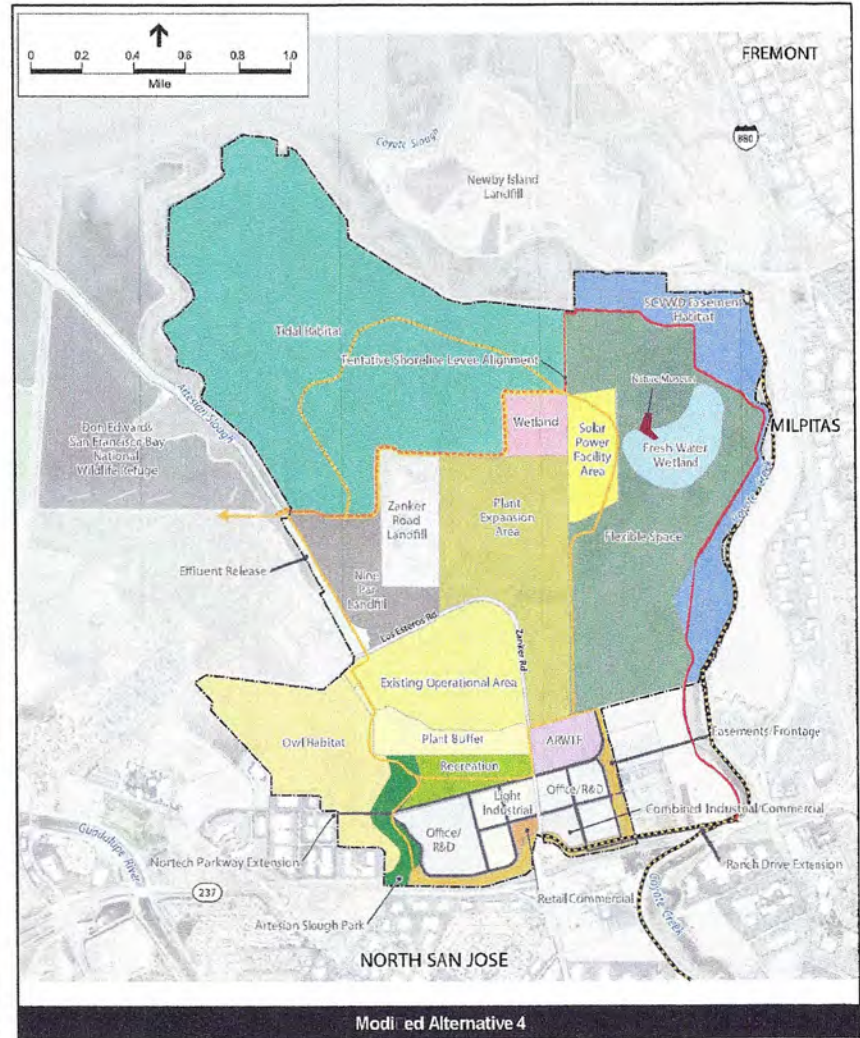


Mike Ferreira, Chapter Conservation Chair  
Sierra Club Loma Prieta Chapter



Overhead view of the Water Pollution Control Plant (cover of First Amendment to DEIR)







# Draft Recommended Alternative



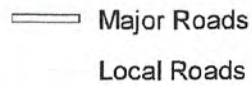
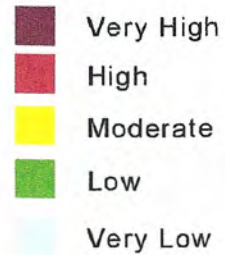
Plant Master Plan





## Liquefaction Susceptibility Map

### Susceptibility Level



Scale: 1 inch = 1.21 miles

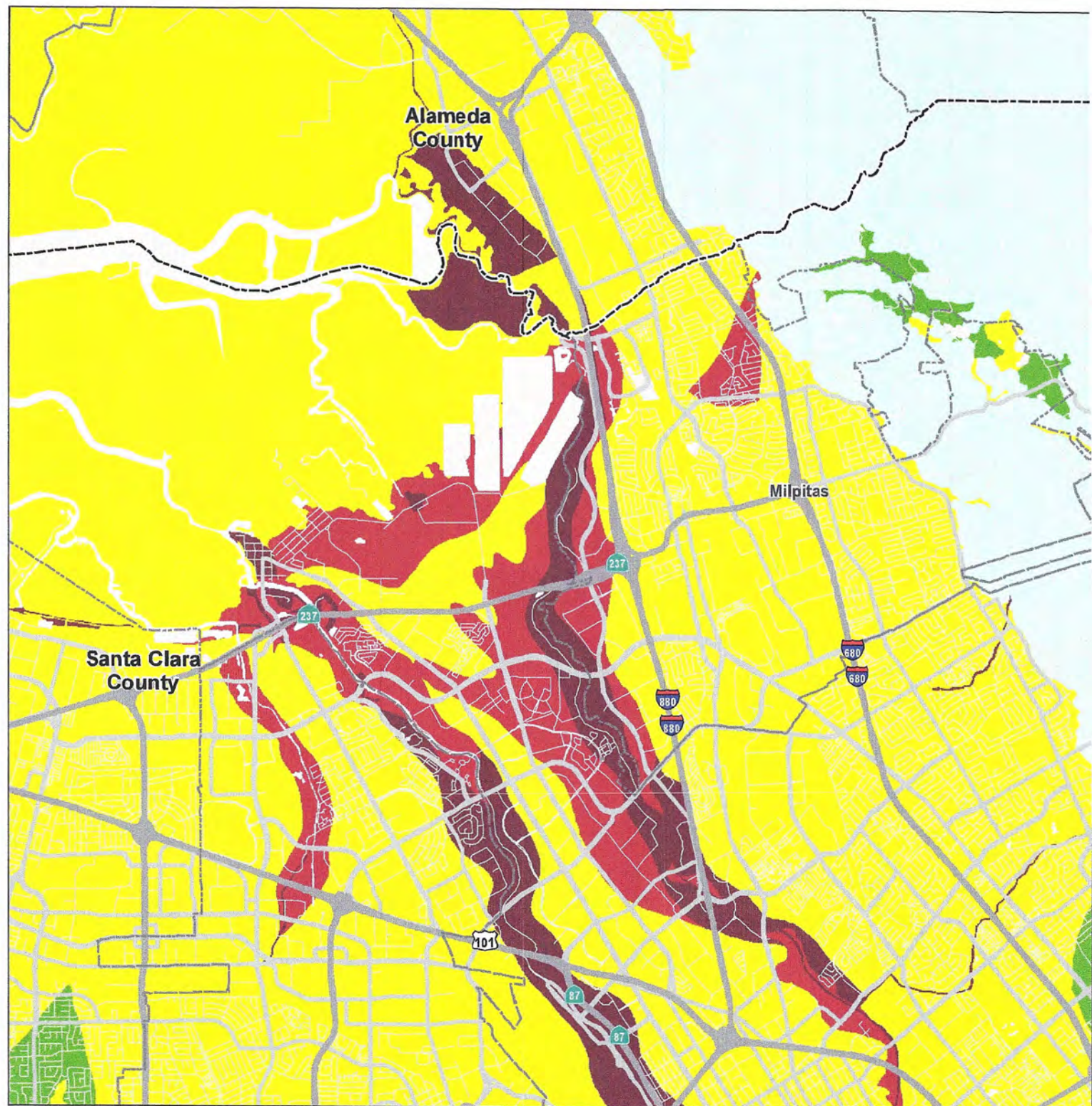
This map is intended for planning use only and is not intended to be site-specific. Rather, it depicts the general risk within neighborhoods and the relative risk from community to community. More detailed maps are needed for site development decisions.

This map is available at  
<http://quake.abag.ca.gov>

Sources:  
This map is based on work by William Lettis & Associates, Inc. and USGS. USGS Open-File Report 00-444, Knudsen & others, 2000 and USGS Open-File Report 2006-1037, Witter & others, 2006

For more information visit:  
<http://pubs.usgs.gov/of/2000/of00-444/>  
<http://pubs.usgs.gov/of/2006/1037/>

Map Prepared by the ABAG Earthquake Program,  
June 2009.



October 28, 2013

TO: Planning Commission, City of San Jose  
City Clerk, City of San Jose  
San Jose, CA 95133

FROM: Lynne Trulio, Ph.D., Wildlife and Wetlands Ecologist  
316 St. Francis Street  
Redwood City, CA 94062  
ltrulio@earthlink.net

SUBJECT: Comments on certification of a Final EIR for the San José-Santa Clara Regional Wastewater Facility Master Plan ("Master Plan" or "Plant Master Plan") and the consideration of a General Plan Amendment Request for 308 acres

In this letter, I provide comments to the City of San Jose Planning Commission on the certification of the Final EIR for the San José-Santa Clara Regional Wastewater Facility (the Plant) Master Plan and the consideration of a General Plan Amendment Request for 308 acres. This letter specifically addresses the portions of this document pertaining to impacts and mitigation relevant to Western burrowing owls (*Athene cunicularia*) and their nesting and foraging habitat. I am a burrowing owl researcher who has studied and published on the ecology of urban burrowing owls in California for the past 25 years. I am a co-author of the "Bufferlands Interim Burrowing Owl Management Plan", which provided recommendations for enhancing the grasslands around the Plant for burrowing owls. Many of these comments will sound similar to those I provided in February 2013 in response to the DEIR, as the City did not address many of the significant deficiencies in that document with respect to project impacts to burrowing owls.

The burrowing owl is a California Species of Special Concern. As a result, the impacts from the project elements (or phases)—project, program and "Other Proposed Land Uses"—to burrowing owl nesting and foraging habitat must be mitigated. The entire approximately 650 acres of grasslands in the project area are valuable nesting and foraging habitat for burrowing owls as shown by the City's data documenting nesting by burrowing owls on the bufferlands over the past 10 years. I described the extensive use of the bufferlands by nesting and foraging burrowing owls in my letter of February 2013 in response to the DEIR for the Plant Master Plan. The City is incorrect in stating that only 408 acres in the project area are burrowing owl habitat. In my opinion, the entire area of approximately 650 acres of bufferlands are owl habitat. At the very least, the City should defer to the California Department of Fish and Wildlife's assessment that 603 acres are burrowing owl habitat.

The burrowing owl population in Santa Clara County has dropped precipitously in the past 20 years. Loss of habitat is one major reason for this decline. The Plant bufferland habitat is critical to preserving burrowing owls in our region because very little of this habitat remains. Given the scarcity of burrowing owl habitat and the fact that burrowing owls have been documented to nest in many locations on the bufferlands, impacts to any of the approximately 650 acres of grassland habitat at the Plant bufferlands is a significant impact to burrowing owls and has the potential to reduce their population in Santa Clara County.

The FEIR proposes extensive development on burrowing owl habitat, with the General Plan Amendment setting the stage for the first projects. The mitigations for impacts to burrowing owls of the proposed



development on the bufferlands--which include setting aside 180 acres and/or paying the "Burrowing Owl Fee" into the Santa Clara Valley Habitat Plan--will not reduce the adverse impacts of the "other proposed land uses" on these grasslands to a less than significant level. Even with substantial enhancements, the approximately 180 acres of "burrowing owl preserve" would not mitigate for the loss of the other grasslands. Projects that convert grasslands to development impose a significant impact on the burrowing owl population of the region. The California Department of Fish and Wildlife determines if habitat enhancement might offset any impacts to burrowing owls of the FEIR project. However, in general, development impacts to *any* of the 650 acres of owl habitat at the bufferlands must be mitigated by creating new habitat of equivalent or higher habitat value. The General Plan Amendment request would designate 180 acres as burrowing owl habitat and 128 acres would be zoned for development. The FEIR /Amendment does not provide adequate mitigation--in the form of new habitat--for the loss of 128 acres of burrowing owl habitat. Thus, impacts to burrowing owls from the proposed General Plan Amendment and the FEIR as a whole remain significant.

As the City of San Jose Staff Report (October 17, 2013) notes, nearly all the impacts to burrowing owls "would occur due to implementation of proposed economic development land use changes in the bufferlands, as opposed to improvements to WPCP facilities and operations". The uses proposed on the bufferlands in the General Plan Amendment areas have nothing to do with upgrading the Plant and are not necessary in any way to maintaining a well-functioning Plant. To avoid impacts to burrowing owls and the necessity to mitigate for loss of essential burrowing owl habitat, the City should not propose the conversion of Plant bufferlands lands from habitat to urban uses. There are other ways to gain economic value from these lands while preserving them as burrowing owl habitat. Such alternatives should be explored.

One aspect of the proposed General Plan Amendment and FEIR that should absolutely be removed is the extension of Nortech Parkway. This element is especially egregious as it fragments and eliminates part of the burrowing owl preserve. If the City of San Jose is serious about maintaining habitat for burrowing owls, no roads, paths, or recreation should be proposed in the burrowing owl preserve area as these are known to reduce habitat quality. Auto strikes are well-documented as a major source of burrowing owl mortality in urban areas. To place a road *in* the burrowing owl preserve significantly degrades that area for use by burrowing owls, increases mortality risk to birds and reduces the size of the preserve. The FEIR is *incorrect* in stating the road extension is a less than significant impact—it most certainly is a significant impact. Putting a road in the burrowing owl preserve--and with the very first action under the FEIR--strongly signals that the City is not dedicated to maintaining the preserve. This proposed development is most discouraging and shows a lack of good faith on the part of the City.

I recommend that the City of San Jose not certify the FEIR or approve the General Plan Amendment. Based on our knowledge of burrowing owl ecology and populations in Santa Clara County, we know that the Plant bufferlands are essential habitat for the burrowing owl and are some of the last lands still open to them. In fact, this habitat is essential in supporting the increase of owl numbers in the Santa Clara Valley Habitat Plan area, as owls at the Plant bufferlands will serve as a source of birds for areas in the Habitat Plan boundaries. In the future, if the Santa Clara Valley Habitat Plan is successful at increasing burrowing owl numbers in our region to a more sustainable level, then impacts to burrowing owl habitat at the Plant bufferlands may not be viewed as significant. However, under current conditions, impacts to the Plant bufferlands are significant and the FEIR does not reduce them to a less than significant level.

RECEIVED OCT 30 2013

**From:** Richard Santos [mailto:rsantos@valleywater.org]  
**Sent:** Wednesday, October 30, 2013 1:12 PM  
**To:** Roth, Bill  
**Subject:** San Jose-Santa Clara Regional Wastewater Facility comments

As a member of the 2040 Master Plan I tried to address these following issues but was not aigenized. I have also made these comments numerous times to the many hearings related to the 2600 acres of buffer land including the Treatment Plant.

Dot allow retail of 35 acres of this site, because it will allow competition to the mom and pop stores in Alviso and new stores on North First St

It will also allow for more pollution, noise and increase traffic to the small Community of Alviso. This will also infringe on possible expansion of the new Purification Plan being built on Zanker

Do not open up a new Street from Hwy 880, Dixion Road Landing to Zanker. This will just divert traffic and bottle neck up on Zanker and Hwy 237. In addition it will allow increase traffic moving through the Alviso Community to Hwy 237. It will endanger our neighborhood and children walking to school. Do not allow Nortech street to connect to Zanker Rd for the same reasons.

The 2600 acre buffer land should be used for future City Maintenance Yards, as the Mayberry Yard will soon be closed due to new housing developments next to the flea Market. This land can also be used for huge solar systems to be installed to assist the Plan with energy and also the new Purification Plan. This land can also be used for Measure P Softball funding complexes and other sports facilities. A savings of land costs since the City owns this land. This land can also be used for training schools, such as technology, water, environment, etc

The 2600 acre site can also be used for a huge Golf course with ponds for percolation that can bring jobs and revenue for the City

There is plenty of room to house many endangered species and much land for environmental use. Open Spaces should be protected.

Richard P. Santos  
(408) 251-9696

October 30, 2013



Bill Roth  
 Department of Planning, Building and Code Enforcement  
 200 East Santa Clara Street, 3<sup>rd</sup> Floor  
 San Jose, CA 95113

VIA EMAIL: [bill.roth@sanjoseca.gov](mailto:bill.roth@sanjoseca.gov)  
[sanhita.ghosal@sanjoseca.gov](mailto:sanhita.ghosal@sanjoseca.gov)

Re: Master Plan for San Jose/ Santa Clara Water Pollution Control Plant

Dear Mr. Roth,

On behalf of the Board of Directors of the Santa Clara County Open Space Authority, I am writing to urge the City of San José to consider making changes to the Preferred Project Alternative for the Water Pollution Control Plant Master Plan. Such changes are necessary to protect and enhance special status wildlife species and their habitat, provide critical flood protection for nearby communities and facilitate public access to open space and the Bay shoreline for the region's growing urban population.

At 2,860 total acres, the Water Pollution Control Plant (WPCP) planning area includes some of the last and most extensive undeveloped open space along the shoreline of the South San Francisco Bay. Through the Master Plan, the City has the opportunity to not only address the necessary expansion of the WPCP but to create an *enduring open space legacy* for the South Bay, a legacy that honors the significant public investment in the Don Edwards National Wildlife Refuge, the South Bay Salt Pond Restoration and numerous conservation projects that have contributed to protecting and restoring the San Francisco Bay ecosystem over the last 50 years.

The WPCP Master Plan designates a sizable area adjoining Coyote Creek as "Flexible Space." The City should reserve this area as a special study area and over the coming months evaluate the economic and environmental benefits from future resource enhancement, riparian restoration and public open space. Before future decisions are made about the "Flexible Space" acreage, it is important that a balanced cost/benefit assessment be conducted to not only evaluate the potential economic benefits of built infrastructure / commercial development but the potential economic benefits of natural / green infrastructure including enhanced property values, recreational tourism, improved public health, improved water quality, and flood protection. This economic assessment should also look at the costs that would accrue from losing the ecosystem services of these lands and the estimate for repair and replacement costs for built capital due to flood and storm events.

This "Flexible Space" area offers unprecedented opportunities to restore critical riparian resources along Coyote Creek, habitat for the Federally-threatened Central California coast steelhead and Fall-run Chinook salmon. Improving the overall health of Coyote Creek also has health benefits for people through enhanced recreational opportunities for residents. Creation of an enhanced Coyote Creek Delta would also provide greater connectivity between the Creek and the Bay, help sustain the future tidal marsh of nearby Pond A18, protect the water treatment facility and North San Jose from severe flooding

6980 Santa Teresa Blvd  
 Suite 100  
 San José, CA 95119  
 408.224.7476 T  
 408.224.7548 F  
[openspaceauthority.org](http://openspaceauthority.org)



NOV 08 10 00 AM '13

Page Two  
Bill Roth  
October 30, 2013

and storm surges, and minimize the costs for maintaining and upgrading the South Bay Shoreline levee into the future.

Additionally, to achieve the Plan's burrowing owl conservation strategy, it is important to set aside sufficient habitat and habitat connections to ensure the viability of this population. This means eliminating fragmentation of the designated habitat with roads.

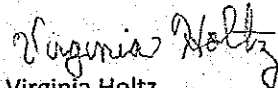
Lastly, as a public land conservation agency that protects and restores open space, water resources and wildlife habitat in addition to providing recreational trails that connect urban populations to nature, the Open Space Authority would welcome an exploratory partnership with the City, the Wildlife Refuge, and many conservation organizations, community groups and foundations to fund protection, restoration and public access on these regionally-significant and economically beneficial open space lands.

Thank you for the opportunity to comment on the Water Pollution Control Plant Master Plan.

Sincerely Yours,



Andrea Mackenzie  
General Manager



Virginia Holtz  
Board Chair

Cc: Board of Directors, Santa Clara County Open Space Authority

RECEIVED OCT 30 2013

**Roth, Bill**

---

**From:** Jeff Moneda [jmoneda@ci.milpitas.ca.gov]  
**Sent:** Wednesday, October 30, 2013 5:02 PM  
**To:** Roth, Bill  
**Cc:** Johnny Phan; Marilyn Nickel; Steven McHarris; Sheldon AhSing  
**Subject:** FW: San Jose / Santa Clara Water Pollution Control Plant Master Plan First Amendment to Draft Environmental Impact Report (PP11-043, GP13-020)  
**Attachments:** Letter to SJ EIR.pdf

Bill,

Please see attached letter. Our comments and concerns still remain regarding the EIR for the Plant Master Plan. We have reviewed Section 4.8.2 of the First Amendment to Draft EIR responding to our concerns and find the responses from San Jose to be inadequate in addressing our concerns.

Jeff

**Jeff Moneda, PE**  
**Public Works Director/City Engineer**  
**City of Milpitas**  
**455 E. Calaveras Blvd.**  
**Milpitas, CA 95035-5411**  
**408.586.3345 Phone**  
**408.586.3305 Fax**

---

**From:** Johnny Phan  
**Sent:** Friday, October 18, 2013 8:26 AM  
**To:** Jeff Moneda  
**Subject:** FW: San Jose / Santa Clara Water Pollution Control Plant Master Plan First Amendment to Draft Environmental Impact Report (PP11-043, GP13-020)

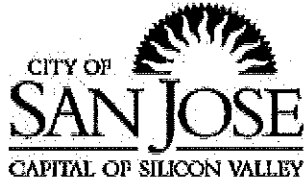
Johnny V. Phan  
Assistant City Attorney  
City of Milpitas  
455 E. Calaveras Blvd.  
Milpitas, CA 95035  
Direct: (408) 586-3042  
Fax: (408) 586-3056  
jphan@ci.milpitas.ca.gov

---

**From:** Mike Ogaz  
**Sent:** Friday, October 18, 2013 8:17 AM  
**To:** Steven McHarris; Sheldon AhSing; Scott Ruhland; Johnny Phan  
**Subject:** FW: San Jose / Santa Clara Water Pollution Control Plant Master Plan First Amendment to Draft Environmental Impact Report (PP11-043, GP13-020)

10/31/2013

**From:** Roth, Bill [mailto:Bill.Roth@sanjoseca.gov]  
**Sent:** Thursday, October 17, 2013 4:58 PM  
**To:** Roth, Bill  
**Subject:** San Jose / Santa Clara Water Pollution Control Plant Master Plan First Amendment to Draft Environmental Impact Report (PP11-043, GP13-020)



*Department of Planning, Building and Code Enforcement*

JOSEPH HORWEDEL, DIRECTOR

**NOTICE OF A FIRST AMENDMENT TO THE  
DRAFT ENVIRONMENTAL IMPACT REPORT (EIR)**

**Amendment to the Draft Environmental Impact Report (EIR) for the San José/Santa Clara Water Pollution Control Plant Master Plan, File No. PP11-043**, to adopt the San José/Santa Clara Water Pollution Control Plant (Facility) Master Plan, to amend the San José General Plan to ensure that existing and proposed onsite uses are consistent with the City's land use policies, and designations. The Master Plan includes a variety of improvements to the Facility's infrastructure and operations in the near term and over the next 30 years (through the year 2040). The Master Plan also includes the phased development of the surrounding lands, including the creation and restoration of habitats and natural corridors to support wildlife and amenities, as well as commercial, retail, and light industrial development. This EIR provides environmental clearance for near term Facility improvements and other project level elements of the Master Plan.

The Facility is located at the southern end of the San Francisco Bay within the northernmost portion of the City of San Jose, approximately north of State Route 237, west of Interstate 880, within the Alviso community. The project site is approximately 200 acres, within which the main operational area occupies approximately 196 acres. Council District: 4

The First Amendment to the Draft EIR, which provides responses to comments made on the Draft EIR, will be available for public review on **October 18, 2013** online at the City of San José's website: <http://www.sanjoseca.gov/index.aspx?nid=2434> and in hard copy at the following locations:

Department of Planning, Building, and Code Enforcement 300 East Santa Clara Street, 3 <sup>rd</sup> Floor San José, CA 95113 (408) 535-3555	Alviso Branch Library 5050 North First Street San Jose, CA 95002 (408) 263-3626	Dr. Martin Luther King Jr. Main Library 150 E. San Fernando St. San José, CA 95112 (408) 808-2000
---	--	--

raft EIR and the First Amendment to the Draft EIR together comprise the Final EIR. Public hearings before the Planning Commission to consider certification of the Final EIR and the City Council to consider certification and adoption of the Final EIR are scheduled as follows:

Planning Commission Hearing Wednesday, October 30, 2013 (6:30 p.m.) City Council Chambers, City Hall 200 East Santa Clara Street, San Jose, CA 95113 <a href="http://www.sanjoseca.gov/planning/hearings/DefaultPC.asp">www.sanjoseca.gov/planning/hearings/DefaultPC.asp</a>	City Council Hearing Tuesday, November 19, 2013 (7:00 p.m.) City Council Chambers, City Hall 200 East Santa Clara Street, San Jose, CA 95113 <a href="http://sanjoseca.gov/index.aspx?NID=3549">http://sanjoseca.gov/index.aspx?NID=3549</a>
---	--

contact Bill Roth at (408) 535-7837 or via e-mail at [bill.roth@sanjoseca.gov](mailto:bill.roth@sanjoseca.gov) with any questions.

Để biết tin tức bằng tiếng Việt Nam về tờ thông tin này, xin quý vị liên lạc Sylvia Do ở số (408) 535-7907 và đọc số dự án 43, GP13-020. Para información en Español acerca de esta solicitud, comuníquese con Elizabeth Zepeda al (408) 535-7907 e indique el número de proyecto PP11-043, GP13-020.

Bill Roth, AICP  
 City of San José, Planning Division  
 200 E. Santa Clara Street, Tower 3  
 TEL: (408) 535-7837 | FAX: (408) 292-6055  
<http://www.sanjoseca.gov/planning/>







**CITY OF MILPITAS**  
**OFFICE OF THE CITY MANAGER**

455 EAST CALAVERAS BOULEVARD, MILPITAS, CALIFORNIA 95035-5479  
 PHONE: 408-586-3050, FAX: 408-586-3056, [www.ci.milpitas.ca.gov](http://www.ci.milpitas.ca.gov)

March 13, 2013

City of San Jose  
 Department of Planning, Building & Code Enforcement  
 200 East Santa Clara Street, 3<sup>rd</sup> Floor  
 San Jose, CA 95113-1905

Sent via electronic mail: No hardcopy to follow

Attn: Bill Roth ([Bill.Roth@sanjoseca.gov](mailto:Bill.Roth@sanjoseca.gov))

**RE: Draft Environmental Impact Report, File No. PP11-043, SCH # 2011052074,  
 San Jose/Santa Clara Water Pollution Control Plant Master Plan**

Dear Mr. Roth:

The City of Milpitas has reviewed the above-referenced Environmental Impact Report and has several comments, many of which focus on the subject of odor emissions. Although the Draft EIR recognizes that existing odor emissions need to be reduced, there are several sections that fail to address the significance of this well-documented issue on the entire City of Milpitas community. The following comments have been developed to assist the City of San Jose in completing an accurate and compliant Final EIR, in compliance with the California Environmental Quality Act. 1

Section 1.3 Issues to be Resolved. Thank you for including Plant odor emissions has a known area of controversy in Milpitas. However, the City of Milpitas notes that odor is not identified as an "Issue to be Resolved." The City of Milpitas strongly objects to the Draft EIR assumptions that the odor issue can be assumed to be resolved through various assumptions and BAAQMD complaint standards contained with the Draft EIR.

Section 3.0 Project Description: The proposed project states that the Master Plan addresses the Plant improvement projects needed to reduce odors. 2

Section 3.2 cites that the project is needed to advance City policies regarding odor control. These City odor emissions policies should be identified and analyzed along with related City of Milpitas policies.

Section 3.3 Project Goals and Objectives is missing any reference to odor control as a project goal which would apply to both Environmental and Social main goals. 3

Section 3.3.2 Intended Benefits of the Plant Master Plan cites Odor Control improvements to the Headworks, Primary, and Biosolids processes. Although the City of Milpitas agrees that reductions in these areas would benefit the City of Milpitas, there are a number of questions remaining regarding the timing and effectiveness of any assumed reductions in each of the process areas. The Draft EIR should include clear analysis, using proven methods of odor control that demonstrates exactly when and by how much each phase and component of the Master Plan will reduce odor emission impacts to the City of Milpitas. 4

Section 3.5.3 Headworks. We understand Headworks 1 will be phased out and be replaced by Headworks 2. We further understand that the installation of covers made of steel or reinforced fiberglass over existing junction boxes, screens, and screenings and grit collection areas of the Headworks 2 complex, along with installation of conduits for the collected foul air, and combination biological-chemical treatment air scrubbers will be accomplished as part of the proposed project. However, the Draft EIR does not contain any analysis that bridges the gap between the above improvements and the qualified and quantified reductions on odor emissions. The Draft EIR only assumes that such improvements will allow for the odor emissions to be a less than significant impact to the City of Milpitas.

5

B3-P1 and P2: Covered Lagoons Phase 1 and Phase 2 identifies covers, potentially flexible fabric covers with gas collection facilities, would provide odor control. Again, where is the analysis?

6

B5-P1 and P2: Greenhouse Drying Phase 1 and Phase 2 identifies greenhouse drying equipped with odor control air scrubbers – same comment as above.

7

Section 3.6.4 – Economic Development (page 3-54). The first paragraph of this section contains the statement that the Cities of San Jose and Santa Clara would retain ownership of Plant lands designated for economic development. Part IV of the Master Agreement for Wastewater Treatment between City of San Jose, City of Santa Clara, and City of Milpitas (March 1, 1983) defines Milpitas' participation in and rights to Plant lands, stating that it is mutually agreed between First Parties (San Jose and Santa Clara) and the City of Milpitas that if First Parties should sell or otherwise dispose of Plant lands, listed in the Agreement Exhibit C, which are no longer needed for Plant purposes, the City of Milpitas shall share in the revenue of the sold land. San Jose's intent to convert this land from Plant use to economic development clearly demonstrates that the land is no longer needed for Plant purposes. San Jose needs to sell the land and then share the revenue, or may sell the land to itself and pay the City of Milpitas and other agencies their proportionate share of the land value. Note, that by the Master Agreement, all tributary agencies either paid San Jose or still owe San Jose for the lands listed in Exhibit C, largely acquired for use as Plant buffer lands or for the Residual Solids Management area (biosolids lagoons and beds).

8

B7: Retirement of Eastern Lagoons and Drying Beds. This section mentions the decommissioning of lagoons after biosolids processing converts to "mechanical dewatering and drying."

Section 3.6.7 Transportation Systems states that a portion of the Dixon Landing Road extension would be within the jurisdiction of the City of Milpitas and the City Council of the City of Milpitas has already expressed support for this road connection. This also is cited in Section 4.2.3.4 Impacts and Mitigation Measures.

9

Section 3.8 Schedule and Phasing. This section of the Draft EIR contains no mention of odor emissions reductions and the Draft EIR is unclear as to how the significant goal of odor emission reductions fits into the overall Plant Master Plan in terms of schedule and phasing. This section offers an opportunity to clearly identify a schedule of each odor emission reduction will occur in relation to the proposed project improvements. The schedule should demonstrate not only mitigating for increased Plant capacity but the equally important reduction in current odor emission.

10

Section 3.10.3 Other Local Plans and Policies of Tributary Agencies. The Draft EIR cites the City of Milpitas Guiding Principles, General Plan Policies, and Odor Policy in the Draft EIR. With Odor Emissions being one of the most significant issues impacting the City of Milpitas, this section should be expanded to include referenced City of Milpitas policies, including the City of Milpitas Odor Control Action Plan, 2008, and subsequent analysis, before reaching any conclusions the proposed project supports the City of Milpitas' goals and policies for mitigating odor emissions. The Draft EIR should also include the results of the environmental analysis on Table 4.2-4, Plant Master Plan Consistency With Relevant Plans and Policies.

11

4.1.2 Significance Determinations. It is not clear how the City of San Jose has set the threshold of significance for odor emission impacts to the entire City of Milpitas community. This section states that

12

the City of San Jose has used their thresholds to assess the severity of the proposed project's impacts. Yet the Draft EIR only provides BAWMD recorded complaints to conclude that odor emissions are less than significant. The City of Milpitas continues to disagree and affirm that odor emission continue to be a significant impact on the Milpitas community throughout the City and such impacts should be analyzed and quantified in a way that can be demonstrated to the public that the proposed project will significantly reduce current and future emissions. The odors emission impact analysis should also be identified in Section 4.2.3.4 Impacts and Mitigation Measures.

12  
cont'd

4.3.3.5 – Program-Level Analysis of City Measures of Effectiveness. The transportation analysis failed to adequately study and address the project build-out traffic conditions associated with the creation of 15,400 jobs to adjacent jurisdictions. Although, the study reported under the 2040 traffic model that the sizable increase of project-related traffic volumes will impact the new Ranch Drive connection located on McCarthy Boulevard in the City of Milpitas, no traffic mitigation is proposed for this location.

13

Section 4.5.2.4 Baseline Conditions. This section states that offensive odors are a major concern to residents in the project area. This statement should be expanded to include the entire City of Milpitas community. This issue is well documented as being a significant concern and negative environmental impact from the Plant to the City of Milpitas for over 30 years. In addition, although the Draft EIR cites a January 18, 2011 report to the City of Milpitas mayor regarding odor emission from biosolids, it should not be construed that this is the only source of Plant emission that impacts the City of Milpitas. This section incorrectly states that only seven odor complaints were attributed to the Plant between January 1, 2009 to September 30, 2012. Our records indicate that out of the 440 complaints called into BAAQMD during this period, 85 complaints identified sewage-related odors.

14

Section 4.5.4.1 Thresholds of Significance. The Draft EIR relies on BAAQMD CEQA Air Quality Guidelines in combination with the BAAQMD's Revised Draft Options and Justification Report to support specific thresholds that are appropriate for use in odor emission analysis. BAAQMD considers five or more confirmed odor complaints per year averaged over three years as a significant odor impact, for the purpose of filing a nuisance.

15

Section 4.5.4.4 – Impacts and Mitigation Measures (page 4.5-39). The conclusion that there is no significant odor impact associated with the existing conditions at the WPCP, based on the BAAQMD public odor reporting process, is not correct, as it is based an assumption that there were only seven unconfirmed complaints attributed by the public to the Plant. Our records show the actual number to be 85, which greatly exceeds the BAAQMD guidance of 3 unconfirmed complaints per year for a 3 year period. Our records agree that BAAQMD was not able to confirm these 85 complaints, but we note that the confirmation process is extremely difficult for BAAQMD to complete in this location and so is not an appropriate measure of significance. The BAAQMD process for confirming odor complaints depends on motivated members of the public to voluntarily call BAAQMD and then agree to remain at the site where they smelled the odor for 30 minutes or more to meet with a BAAQMD inspector. The BAAQMD inspector is then supposed to stand with the caller until s/he or she can ensure that s/he smells the same odor as the caller, and then drive to track the odor to its source a mile or more away.

16

In the January 1, 2009 to September 30, 2012 period cited in this section, the BAAQMD received 440 odor complaints from the people of Milpitas and confirmed a source for 15 of these, a confirmation rate of 3.4%. Of these reported odors, the public self-identified 85 to be from sewage, 247 to be from garbage, and 163 to be of unknown origin. The City of Milpitas began its own odor reporting program in May 2011 and, through September 2012, the City received 207 complaints, of which 66 identified the odor as sewage, 127 identified its as sewer, and 14 report to be unknown or other.

The reason the BAAQMD confirms is not an accurate measure of significance is that many members of the community bothered by odors do not bother to call the BAAQMD, since they tell us it has not proven to be effective. Those who do call do not always wait to meet with an inspector. The BAAQMD inspectors frequently cannot track an odor to its source because odors are ephemeral and shift with wind speed and wind direction. Also, odors from the adjacent Newby Island Resource Recovery Park (municipal solid waste management facility) comingle with, and mask odors from the Plant.

We also believe the public attributes a less than an accurate portion of the odors they detect to the WPCP because many members of the public do not recognize the smell of aged biosolids, nor attribute biosolids odor to the Plant. Many of the public do not realize the Plant exists and so could be the source of odors they smell. San Jose's August 2010 MidPoint Survey Report showed that after two years of extensive public outreach, only 36% of the Milpitas population knew where the Plant was located. The public is more aware of the Newby Island facility as an odor source because they receive six free household dump days per year that lets them take their bulky items directly to the landfill for disposal.

16  
cont'd

Section 4.5.4.4 Impacts and Mitigation Measures, Impact AQ-5: The project could result in objectionable odors affecting people in the project area, a less-than-significant impact. The Draft EIR relies on the lack of BAAQMD confirmed complaints to immediately conclude there are no significant odor emission impacts associated with the existing conditions of the WPCP. The City of Milpitas strongly objects to this conclusion. The Draft EIR fails to acknowledge the constant and ongoing odor emission impacts. In addition, the odor emission impacts the entire City of Milpitas community which covers a distance over twice the BAAQMD's two-mile impact area distance criteria for significant odor emission impacts. This section also cites additional studies that are currently underway to inform future decisions regarding odor control such as a Regional Odor Assessment Program (ROAP). Furthermore, the City of Milpitas requested and received the Project Memorandum No. 5 Odor Treatment Alternatives Final Draft September 2011. This document assesses odor control alternatives and concludes that further detailed analysis should be developed as part of the ROAP before finalizing a detailed approach for addressing any specific odorous process area. The ROAP information is critical to the Draft EIR analysis and by the fact that it is being prepared, must be incorporated into the Draft EIR analysis before finalizing the EIR and making any decision on the proposed project.

17

Sincerely,



Thomas C. Williams  
City Manager  
City of Milpitas

Attachment:

Tally of BAAQMD and City of Milpitas' record of odor complaints for the period of January 1, 2009 to September 30, 2012

C: Milpitas Mayor and City Council  
Michael J. Ogaz, City Attorney  
Steve McHarris, Planning & Neighborhood Services Director  
Kathleen Phalen, Acting PW Director/City Engineer

BAAQMD Odor Program\*

Month	Confirmed Complaints	Unconfirmed Complaints	Pending Complaints	Total Complaints	Alleged Site of Confirmed Complaint	Odor Types		
						Sewage	Garbage	Other
Jan-09	0	1	0	1		0	1	0
Feb-09	0	1	0	1		0	1	0
Mar-09	0	1	0	1		0	1	0
Apr-09	0	4	0	2		2	3	0
May-09	1	2	0	2	Shopping Center	0	0	3
Jun-09	0	3	0	3		1	1	1
Jul-09	0	6	0	6		1	5	1
Aug-09	0	7	1	8		1	6	1
Sep-09	0	7	2	9		1	4	4
Oct-09	1	8	0	9	Happy Buffet	1	4	5
Nov-09	0	2	0	2		1	0	3
Dec-09	0	3	0	3		0	0	1
Jan-10	0	2	0	2		2	5	1
Feb-10	0	7	0	7		3	20	8
Mar-10	0	29	0	29				
Apr-10	2	14	0	16	(1) BFI - The Recyclery; (1) Unknown	2	11	4
May-10	0	5	0	5		1	3	2
Jun-10	0	4	0	4		0	4	0
Jul-10	0	3	0	3		0	2	1
Aug-10	0	1	0	1		0	0	1
Sep-10	0	12	1	13		2	8	3
Oct-10	0	13	0	13		3	9	3
Nov-10	2	11	0	13	(1) Recycling Plant; (1) Unknown	5.5	2.5	6
Dec-10	0	9	2	11		3	7	1
Jan-11	2	30	0	32	(2) Unknown	8.5	12.5	12
Feb-11	4	29	1	34	(4) Unknown	6	15	15
Mar-11	0	6	1	7		2.5	5.5	0
Apr-11	0	10	0	10		3.5	4.5	5
May-11	0	3	0	3		1	2	0
Jun-11	0	7	0	7		6	4	1
Jul-11	0	6	2	8		3	3	8
Aug-11	0	4	0	4		2	3	3
Sep-11	0	5	0	5		1	2	0
Oct-11	0	15	1	16		5	4	11
Nov-11	0	4	1	5		1	2	2
Dec-11	0	12	1	13		2	11	4
Jan-12	0	7	1	8		1	2	5
Feb-12	0	7	1	8		1	3	6
Mar-12	0	2	0	2		0	2	0
Apr-12	1	6	1	8	City Sewer	4	6	0
May-12	0	10	2	12		2	6	4
Jun-12	0	15	0	15	(1) Mekong Market; (1) Happy Buffet	0	6	9
Jul-12	2	26	2	30		4	22	9
Aug-12	0	26	2	28		1	22	9
Sep-12	0	14	7	21		2	11	8
Total	15	399	29	440		85	247	163

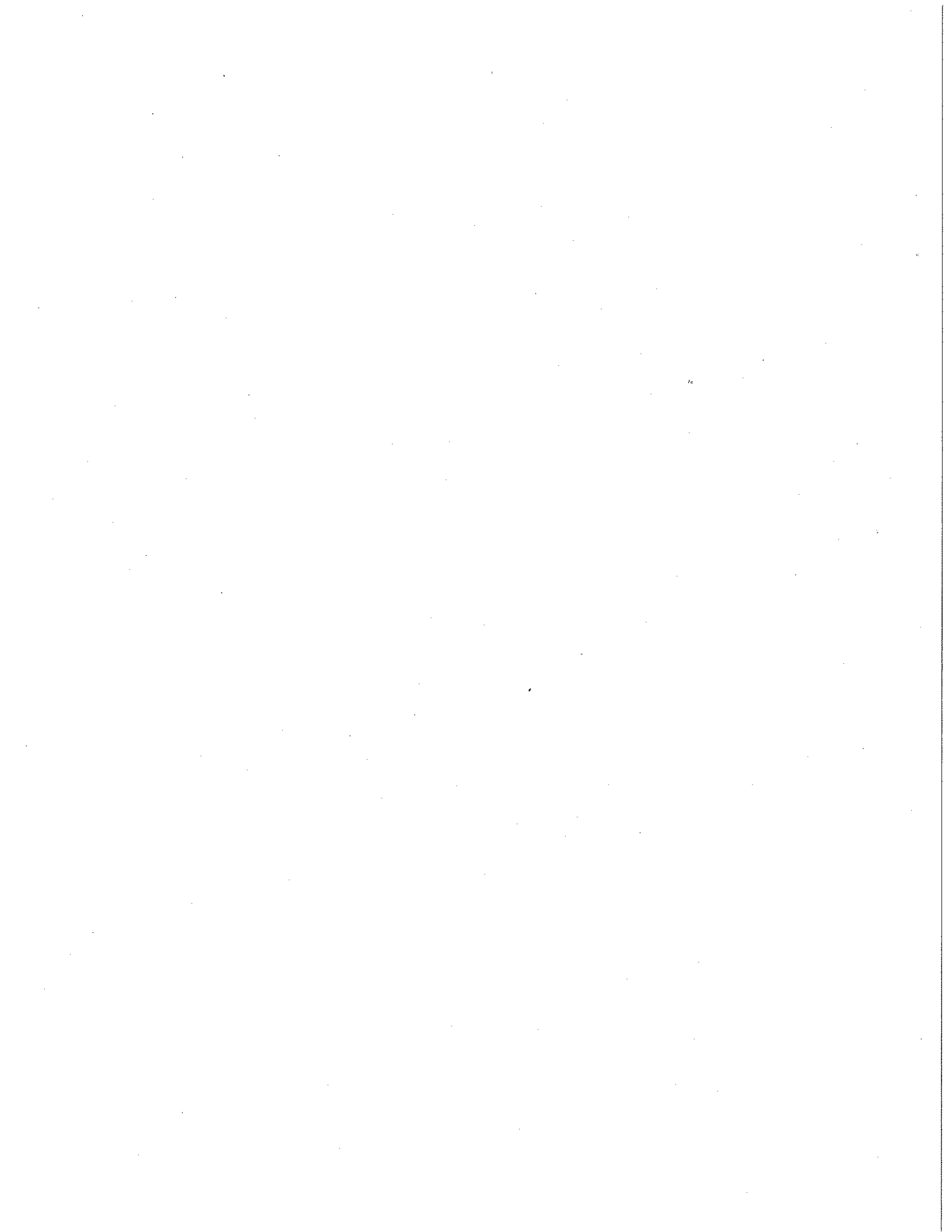
\*Confirmed and pending complaints do not provide information on attributed site(s).

City Odor Program\*\*

	Garbage	Sewer	Other	Total Complaints
May-11	0	0	0	0
Jun-11	0	0	1	1
Jul-11	1	2	1	4
Aug-11	1.5	1.5	0	3
Sep-11	12	4	1	17
Oct-11	2.5	2.5	0	5
Nov-11	12	12	1	25
Dec-11	8.5	9.5	0	18
Jan-12	2	2	1	5
Feb-12	8.5	5.5	1	15
Mar-12	0.5	1.5	0	2
Apr-12	2	3	0	5
May-12	7	3	2	12
Jun-12	10.5	1.5	1	13
Jul-12	19.5	5.5	3	28
Aug-12	25	8	1	34
Sep-12	14.5	4.5	1	20
Total	127	66	14	207

\*\* City does not investigate complaints to determine whether they are confirmed to a specific source.





RECEIVED OCT 30 2013



October 30, 2013

*Via Hand Delivery*

City of San Jose Planning Commission

Re: Request to Modify the Project

Dear Chair Badal and Honorable Commissioners:

As we have discussed, the Santa Clara Valley Audubon Society (SCVAS) and other environmental groups oppose the Plant Master Plan as proposed and believe the FEIR is deficient and should not be certified. Detailed letters were submitted to you yesterday by the SCVAS and by an alliance of environmental groups, including the SCVAS.

The environmental groups oppose any economic development on the WPCP buffer lands because of the significant environmental impacts such development will have. However, we have come together to suggest modifications to the staff recommended Modified Alternative 4 that will allow economic development while further reducing the Project's environmental impacts. Our recommendations represent a reasonable and fair compromise between economic and environmental goals. We hope that you will recommend approval of these modifications to avoid further disputes about this Project. Specifically, we request that the Modified Alternative 4 currently recommended by staff be revised as follows:

1) Designate the "Flexible Space" area as "Open Space, Parkland and Habitat," in keeping with the decision to eliminate the Dixon Landing Road extension and the future Light Industrial development;

2) Limit solar power development to the built environment;

3) Do not allow the Nortech Parkway extension through the designated burrowing owl habitat; and

4) Retain the "Public/Quasi-Public" designation for the bufferlands currently proposed for economic development (while redesignating the burrowing owl reserve as "Open Space, Parkland, Habitat"), until the following development triggers have occurred:

*p. 1 of 2*

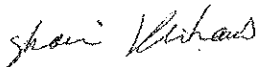
- The Santa Clara Valley Habitat Conservation Agency has determined that the VHP's Burrowing Owl Conservation Strategy is succeeding by Year 15 of the Plan;
- The ability to develop prime habitat in the North San Jose area is demonstrated by the VHP's establishment of at least six breeding pairs on protected VHP lands south of San Jose;
- The Shoreline Levee is complete;
- Odor control modifications have been completed and result in odor levels acceptable for proposed developments; and
- Regulatory agencies have permitted the use of the drying ponds for the Plant's expansion.

If the Commission decides to certify the EIR despite its inadequacies, and decides not to modify the Project as requested, it should recommend approval of Alternative 3. The EIR determined that Alternative 3 meets the Project's prime objectives, while reducing its environmental impacts. Alternative 3 limits development to the East of Zanker Road and relocates the remaining jobs to other feasible locations identified by City staff. By doing so, it preserves sufficient burrowing owl habitat to facilitate successful implementation of the VHP's Burrowing Owl Conservation Strategy. *The triggers listed above should also be applied to alternative 3.*

The EIR found that Alternative 3 the "environmentally superior alternative," in large part because it preserves a greater amount of the site's critical burrowing owl habitat. Accordingly, under CEQA, the City may not approve the proposed Plant Master Plan or the General Plan amendments, because these Projects have greater environmental impacts than Alternative 3. Pub. Res. Code § 21081(a)(3); Guidelines § 15091(a)(3); *Flanders Found v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603,620.

Alternative 3 could further reduce the Project's impacts if the Commission modified it to remove the Dixon Landing road connection. SCVAS requests that this modification be approved, with access to all future economic developments provided via Zanker Road. This would truly be a win win solution for all.

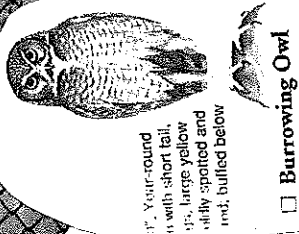
Thank you,



Shani Kleinhaus, Environmental Advocate

# SAN JOSE - SANTA CLARA WASTE WATER FACILITIES

**Hundreds of  
Borrowing Owls  
have had their  
habitat area to be  
destroyed by heavy  
development**



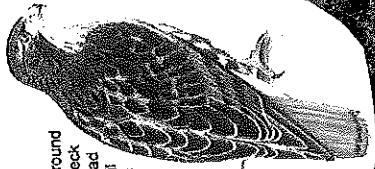
17" Year-round  
with short tail,  
its large yellow  
with spotted and  
red, buffed below

□ Borrowing Owl

37-39" Year-round  
Slender snow-white body  
with plumes on long slim  
neck; pointed yellow bill,  
black legs and feet

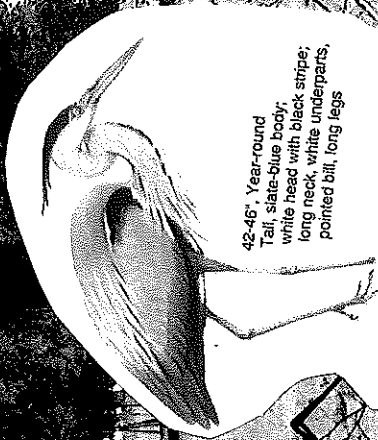
**Red -tail Hawks  
looking for a  
meal**

22-25" Year-round  
Dark brown, whitish neck  
and underparts; broad  
winged, wide red tail  
with barred edges



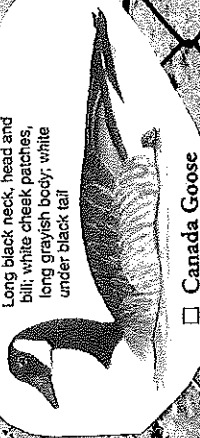
□ Great Blue Heron

42-46" Year-round  
Tall, slate-blue body,  
white head with black stripe;  
long neck, white underparts,  
pointed bill, long legs



**For decades this area  
due to high ground  
water, becomes a wet  
land during the winter  
rains [documented] the  
Great Blue Herons  
appear for food**

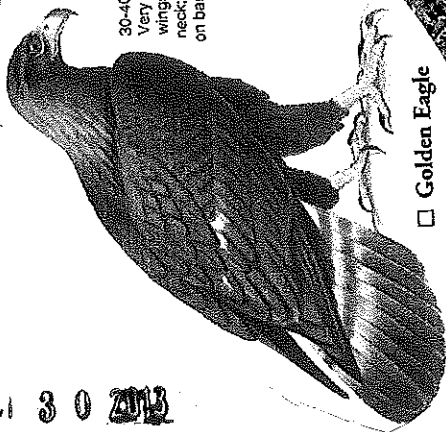
40-45" Fall, Winter, Spring  
Long black neck, head and  
bill; white cheek patches,  
long grayish body; white  
under black tail



□ Canada Goose

**Canada Goose use  
this area for a  
feeding area**

30-40" Year-round  
Very large, long brown  
wings; wash of gold behind  
neck; slight lightening  
on barred tail



□ Golden Eagle

**For the last  
Several years  
Two young  
Golden Eagles  
Have been spotted  
here looking for  
rabbits & squirrels**

RECEIVED OCT 30 2013

RW Gross Ph.D. 10/30/13

[NORTH 1<sup>ST</sup>]

HIGHWAY 237

[ZANKER ROAD]

(From Robert Gross, Ph.D.) Received at PC Hearing 10-30-2013