CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

CITY OF SAN JOSE
Planning, Building and Code Enforcement
200 East Santa Clara Street
San José, CA 95113-1905
tel (408) 535-3555 fax (408) 292-6055
Website: www.sanjoseca.gov/planning

NOTICE OF ENVIRONMENTAL APPEAL

TO BE COMPLETED BY PLANNING STAFF

FILE NUMBER PP 11 - 043	RECEIPT # 733266
TYPE OF ENVIRONMENTAL DETERMINATION (EIR, MND, EX) EIR	AMOUNT $100
	DATE 11/4/13
	BY DF

TO BE COMPLETED BY PERSON FILING APPEAL

PLEASE REFER TO ENVIRONMENTAL APPEAL INSTRUCTIONS BEFORE COMPLETING THIS PAGE.

THE UNDERSIGNED RESPECTFULLY REQUESTS AN APPEAL FOR THE FOLLOWING ENVIRONMENTAL DETERMINATION:

REASON(S) FOR APPEAL (For additional comments, please attach a separate sheet.):
Please Attached letter from the Citizens Committee to Complete the Refuge, San Francisco Baykeeper, Santa Clara Valley Audubon Society and the Sierra Club

PERSON FILING APPEAL

NAME Please see attached list of groups' representatives		DAYTIME TELEPHONE ( )	
ADDRESS	CITY	STATE	ZIP CODE
SIGNATURE		DATE	

CONTACT PERSON
(IF DIFFERENT FROM PERSON FILING APPEAL)

NAME			
ADDRESS	CITY	STATE	ZIP CODE
DAYTIME TELEPHONE ( )	FAX NUMBER ( )	E-MAIL ADDRESS	

PLEASE CALL THE APPOINTMENT DESK AT (408) 535-3555 FOR AN APPLICATION APPOINTMENT.

Citizens Committee to Complete the Refuge
Person filing Appeal: Eileen McLaughlin 408-257-7599
6494 Bancroft Way, San Jose, CA 95129 wildlifestewards@aol.com

San Francisco Bay keeper
Person filing Appeal: Jason Flanders } 415-856-0444
Contact Person: Ian Wren } ian@baykeeper.or
785 Market St. Ste 850
San Francisco, CA 94103

Santa Clara Valley Audubon Society
Person filing Appeal: Shani Kleinhaus 650-868-2114
shani@scvas.org

22221 McClellan Rd.
Cupertino, CA 95014

Sierra Club
Person filing Appeal: Katja ~~Irvin~~ Irvin

Lome Prieta Chapter Office ——— 650-390-8411
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November 4th, 2013

Appeal of certification of the Final Environmental Impact Report for the San Jose/Santa Clara Water Pollution Control Plant Master Plan by the San Jose Planning Commission

The Citizen's Committee to Complete the Refuge, San Francisco Baykeeper, The Sierra Club Loma Prieta Chapter and the Santa Clara Valley Audubon Society appeal the actions of the San Jose Planning Commission in certifying the Final Environmental Impact Report (EIR) for the San Jose/Santa Clara Water Pollution Control Plant Master Plan.

We maintain:

a. This appeal is unnecessary under the just published *California Clean Energy Committee v. City of San Jose*, 2013WL 5803717.
b. However, because the City has not amended its illegal appeal procedure, and because the city would not give us written assurances, we are filing the appeal and paying the fee under protest.

Our comments and concerns still remain regarding the EIR for the Plant Master Plan. We have reviewed the First Amendment to the Draft EIR. We found the responses to our concerns (and those of others) inadequate. We expressed some of our concerns during the Planning Commission EIR Certification hearing October 30th, 2013. Again, we found the responses to our concerns and to questions by commissioners to be inadequate and often incomplete or misleading. We maintain that the Final EIR fails to comply with CEQA, and failed to respond adequately to Project and Program concerns expressed by us and by others verbally and in writing. The attached documents discuss in detail the reasons why the EIR fails to comply with CEQA and the basis for this appeal.

We continue to believe that the Plant Master Plan is not compliant with regional Plans and Goals associated with biological resources and sea level rise. We find that the EIR consistently and inadequately defers analysis of environmental impacts, as well as the preparation of a Water Supply Assessment. We continue to ask that an alternative should be provided that would significantly reduce the number of employees on the Plant lands, reduce the need for additional bridges and road connections, and thus reduce most of the significant and unavoidable effects on Biological Resources (including wetlands and associated species, riparian ecosystems and burrowing owls), Traffic and Transportation, Flooding and Liquefaction risks, Odors, Energy Efficiency, Greenhouse Gas Emissions and Global Climate Change.

On the Project level, the EIR provides no alternatives to the proposed Project. The siting of the Project on jurisdictional wetlands cannot feasibly be mitigated at this time[1] yet

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According to EIR, the Project would mitigate for 40+ acres of fill. The Water Quality Control Board explained to us that the proposed mitigation for the expansion of the Plant is not feasible because:

instead of providing distinct Project level alternatives, the EIR allocates "Flex Space" that could be used for Plant improvements in the future should the Project fails as planned in the only alternative analyzed. Use of this Flex Space for the Project must be analyzed in the EIR and provided as an alternative to the Plant improvements for consideration by the City.

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1. There is no Mitigation Bank currently available for 40+ acres of fill and no new mitigation banks in the pipeline. The Pajaro bank is out of the SF Bay Region, and is thus unacceptable as mitigation for this region.
2. Pond A18 is already a jurisdiction water of the State – so San Jose will not get mitigation credit for altering the type of water it is.
3. Money to the salt pond project is not permitted at this time, as it would allow the private sector to mitigate on public lands, and effectively allow a donation of public land to a private project
4. On-site or off-site creation – no viable options are available in the south bay.

JEFFREY B. HARE
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February 25, 2013

MR. BILL ROTH
DEPT. OF PLANNING, BLDG, AND CODE ENFORCEMENT
CITY OF SAN JOSE
200 E.SANTA CLARA ST., 3RD FLOOR
SAN JOSE, CA 95113

RE: **COMMENTS RE: DEIR FOR SAN JOSE/SANTA CLARA WATER POLLUTION CONTROL PLAN MASTER PLAN**
FILE NO. PP11-043; SCH #2011052074

Dear Mr. Roth:

Jubilee Christian Center of San Jose, Inc., a California Religious Corporation (hereinafter "Jubilee"), appreciates the opportunity to comment on the Draft Environmental Impact Report prepared for the San Jose/Santa Clara Water Pollution Control Plant Master Plan, January, 2013, File No. PP11-043 (hereinafter referred to as the "DEIR" and/or the "Project.") Jubilee currently owns and/or operates three properties located immediately adjacent and to the southwest of the Project site at 105, 161, and 175 Nortech Parkway, San Jose, California.

As a starting point for these Comments, we would like to clarify a couple of items in the DEIR. The DEIR correctly acknowledges that Jubilee Christian Center operates a church on property located immediately adjacent to the southwestern edge of the Project boundary, as well as a "Children's Center" (actually "Jubilee Christian Youth Center")(See p. 4.2-7.) Jubilee also operates an Administration building on Nortech Parkway. The DEIR identifies a small parcel of land located to the west of the City of San Jose water tower, which is characterized as a "small park" (p. 4.4-6), and included in its discussion of "Sensitive Receptors."

The "small park" is no longer part of land leased to Jubilee, and access has been fenced off. However, it should be noted that Jubilee regularly conducts a number of outdoor activities on its properties, and that these activities include participation by families with children and youth in attendance. These activities, conducted on the grounds around the Church, the Youth Center, and in the vicinity of the Administration Building, include fairs, festivals, and other similar gatherings. In addition, during Church

services, parents often take their children to and from the Youth Center while attending the services conducted in the Church itself.

As a consequence of these events and activities, children, youth and their families are regularly and routinely exposed to environmental impacts of Plant operations. Jubilee notes that the DEIR concludes that "there are no hospitals, daycare centers, or long-term care facilities within 0.5 mile of the project site." (Emphasis added). Jubilee submits that for all practical purposes, the presence of children, youth and their families engaged in regular and routine outdoor activities on the Jubilee properties should be taken into consideration in evaluating the impacts of Plant operations as they relate to potentially adverse impacts on existing sensitive receptors.

Specific Areas of Concern

Because Jubilee Christian Center provides church and youth services to thousands of individuals on a fairly regular basis, there are some specific areas of concern that were identified in the DEIR. The concern goes to the question whether the specific areas analyzed in the DEIR properly and adequately addressed the impacts, given the existence of sensitive receptors, i.e., children, youth and elderly persons participating in activities in connection with existing and ongoing church programs. Even to the extent that these programs are conducted indoors, the participants must traverse the parking lot from their vehicles, and sometimes traverse between buildings located on the different parcels, and therefore would be exposed to impacts from the Plant.

The specific areas of concern include, but are not necessarily limited to, the following:

1. Air Quality: odors, pollutants. It is noted that the DEIR classifies the Air Quality Impacts as "SU," or *Significant and Unavoidable*. Jubilee requests that further analysis of potential mitigation measures be conducted, particularly in light of the fact of Jubilee's existing and ongoing activities involving children, youth and other vulnerable individuals.

2. Noise and Vibrations. The DEIR identifies that there would be project and program level operations would increase noise exposure. Again, Jubilee requests further analysis to identify appropriate mitigation measures to protect its members from potential impacts resulting from these Plant activities, both during construction and during operational activities.

3. Transportation and Traffic. The primary access to Jubilee's properties is through the intersection of Highway 237 and North First Street. Jubilee notes that this intersection was not included in the analysis; the DEIR only included the intersection of Highway 237 at Zanker Road. By itself, this would appear to be an oversight, since two of the alternative proposals include extending Nortech Parkway through to Zanker Road. In addition, Jubilee raises the question of the potential impact during the construction phase as to the specific traffic circulation

of heavy equipment, haul trucks, etc. Typically, planners seek to route such activities to non-peak hours, yet it is during some of these same "non-peak" hours that Jubilee's activities take place. Jubilee requests that more specific details be provided so that adequate and appropriate mitigation measures can be identified and implemented.

4. Transportation and Traffic – Emergency Vehicle Access; Circulation. The DEIR characterizes the impacts on emergency vehicle access and effectiveness of the performance of the circulation system resulting from the Project to either require mitigation, or to be "significant and unavoidable." Any impact on emergency vehicle access would be considered a significant concern to Jubilee, and Jubilee requests further details and identification of adequate and appropriate mitigation measures, as indicated. (Similar – see Public Services, below).

5. Hazardous Materials. The immediately proximity of Jubilee to the Project site's location is the basis for Jubilee's concerns over potential hazards based on operations or incidents. Jubilee would like to be kept fully apprised of all proposed activities and mitigation measures.

6. Public Services. The DEIR notes that there is a possibility that subsequent development in the Project area could substantially affect SJPD and SJFD response times, and suggests that mitigation may require construction of new facilities. Since the development and funding of new facilities may lag behind actual adverse impacts, Jubilee recommends that adequate steps be taken, where necessary, to implement interim mitigation measures to maintain essential levels of public safety services, as well as other mitigation measures.

Jubilee Christian Center of San Jose, Inc. appreciates the opportunity to participate in the review process. Please include my law firm in all future notices and correspondence related to this Project.

Respectfully submitted,

JB Hare

Jeffrey B. Hare

cc: Client

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 burrrowing 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.

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 Plant 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:

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- 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

Shani Kleinhaus, Environmental Advocate

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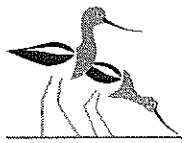

October 29, 2013

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 Grassetti 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. Grassetti to City of San Jose (Feb. 22, 2013) ("Grassetti").

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

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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[1]. 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

[1] All undesignated statutory references are to CEQA.

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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"

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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, Grassetti 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.

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- 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–

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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 uot 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.

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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 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

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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 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

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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 burfferlands, 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;

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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 and 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."

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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)[2] 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 Cicsco. 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

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[2] Found on 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.

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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. Grassetti 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

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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

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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

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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

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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:

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> 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 though 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

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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.4th9 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."[3]

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[3] James Hansen et al., Target Atmospheric CO2: Where Should Humanity Aim? 2 Open ATMOSPHERIC SCI. J. 217, 226 (2008) (attached).

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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

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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.

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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

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"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. Qnite obviously it was designed to address an environmental objective that is highly relevant under CEQA (climate stabilization). . . SANDAG thns 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/snstainable 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 throngh 2040 dne to better land use planning and consequent reductions in vehicle miles traveled. To do so, it nsed current planning assnmptions under jurisdictions' general plans to develop a proposed land use development scenario that would reduce vehicle trips and meet the GHG rednction 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 rednctions forecast in Plan Bay Area. Also, by developing millions of square feet of development away from existing transit service, where workers will be reliaut 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 shonld 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.

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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)(l); *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)(l)(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

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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:

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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.

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• 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).

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- 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.[4] 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

[4] 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.

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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

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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.

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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 Unv. 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 *Sequoyah Hills*, for example, the court found a project was consistent with "tentative" density policies in a general plan. *Sequoyah Hills Homeowners Ass'nv. 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

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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. Grassetti 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

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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.

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Very truly yours,

Santa Clara Valley Audubon Society

Shani Kleinhaus

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COMMITTEE FOR GREEN FOOTHILLS

Santa Clara Valley Audubon Society

SAN FRANCISCO BAYKEEPER

GREENBELT ALLIANCE

SIERRA CLUB

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").[1] 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

[1] 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 resnlt 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 subjeet, 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

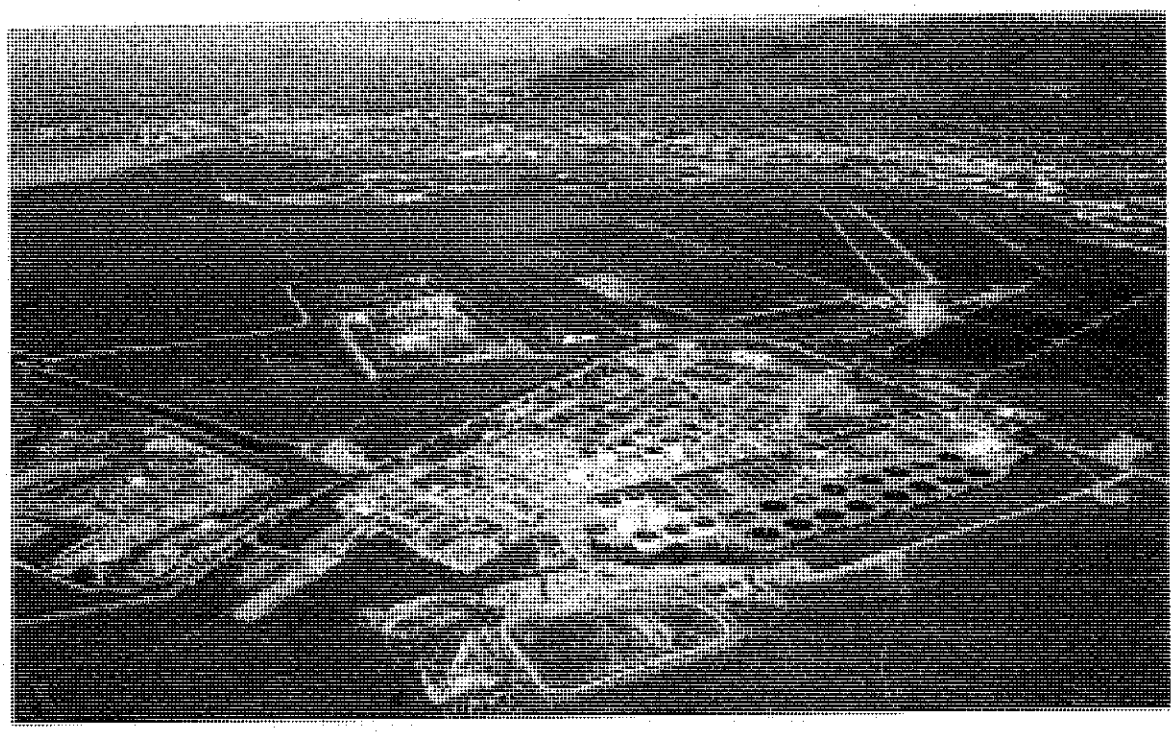
Eileen McLaughlin, Board Member
Citizens Committee to Complete the Refuge

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

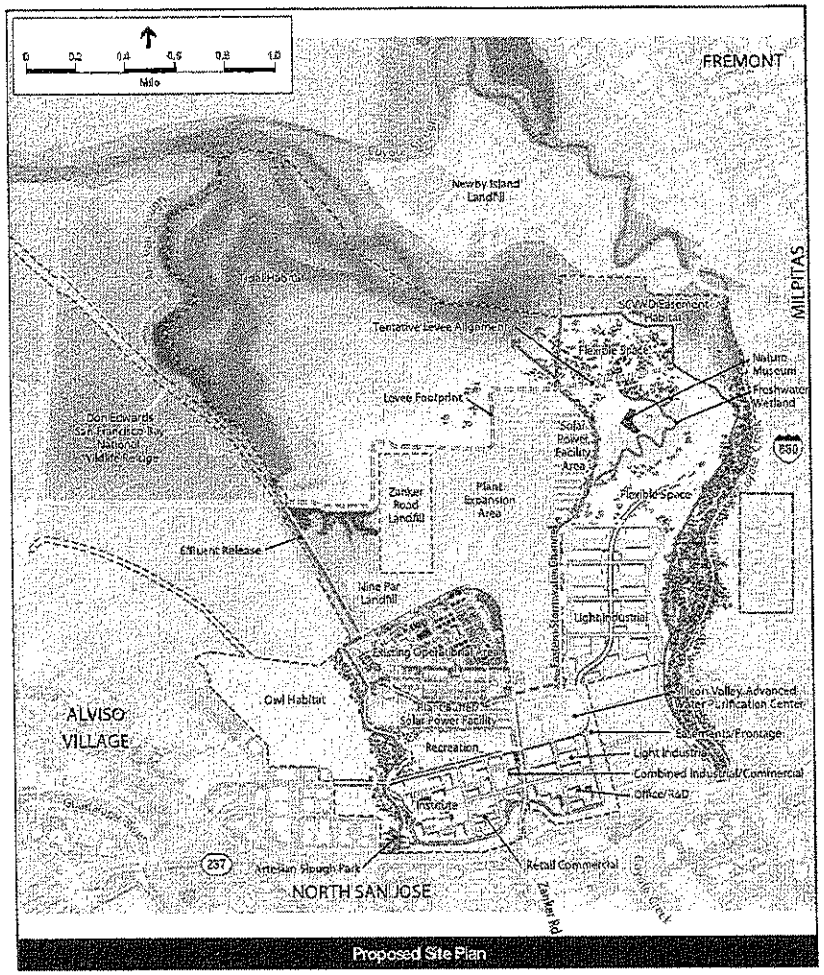
Ian Wren, Staff Scientist
San Francisco Baykeeper

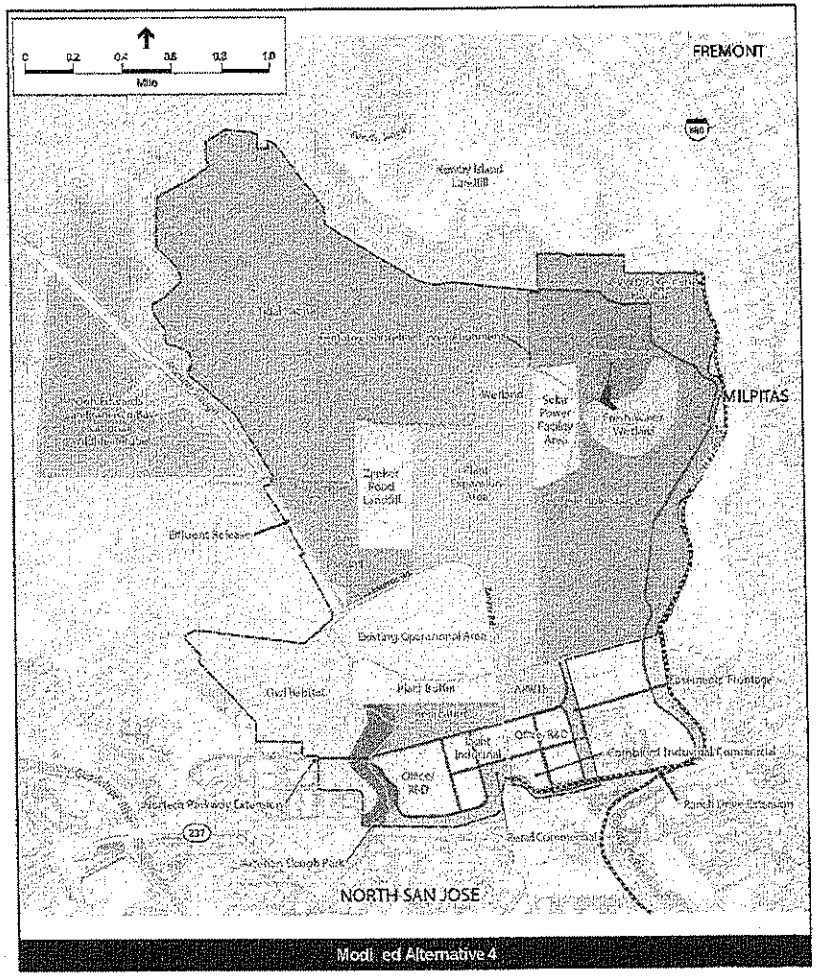
Michele Beasley, Regional Director
Greenbelt Alliance

Mike Ferreira, Chapter Conservation Chair
Sierra Club Loma Prieta Chapter



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





SOURCE (Proposed): Skidmore, Owings & Merrill LLP

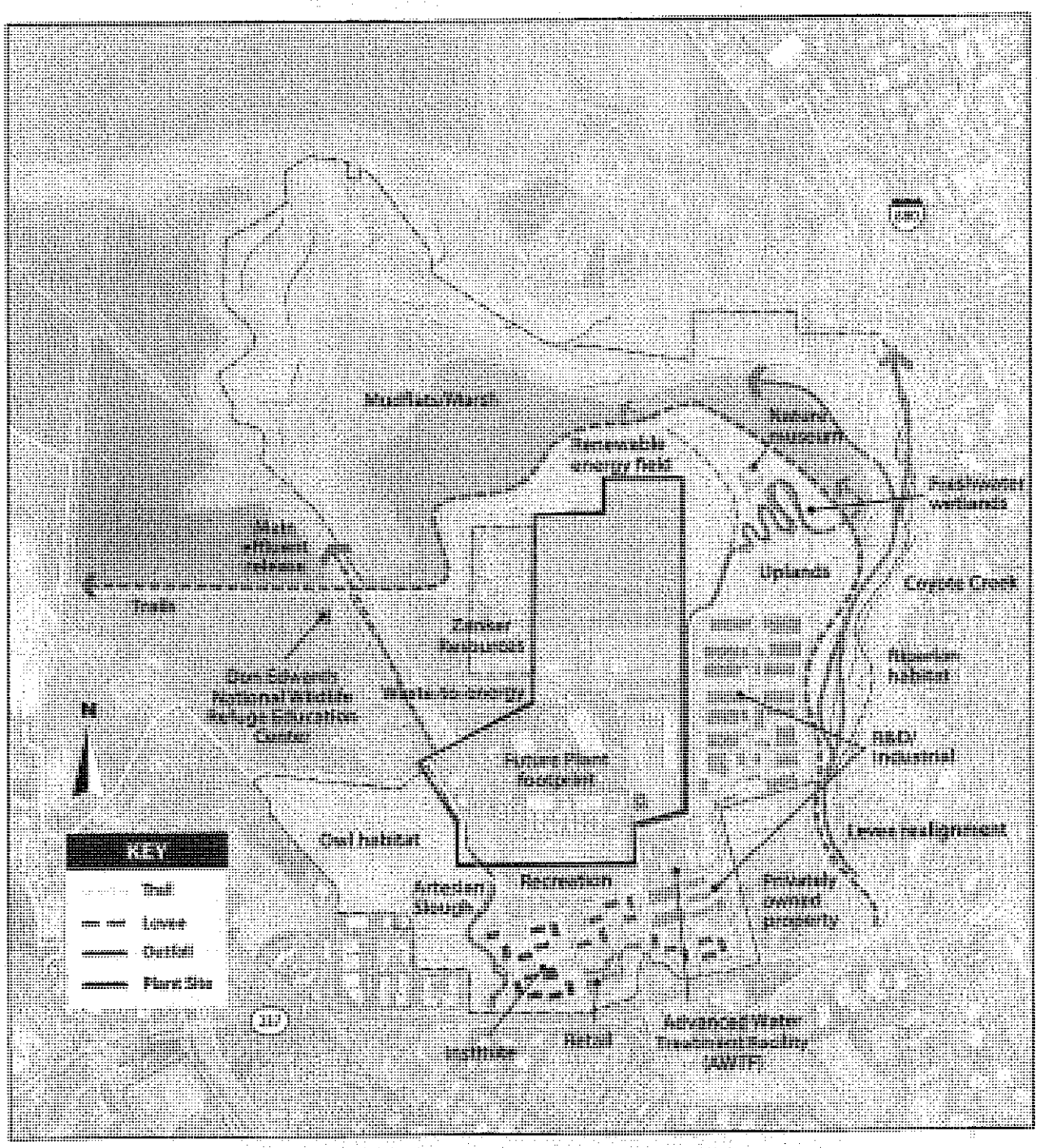
Attachment A

San Jose/Santa Clara WPCP Master Plan

Proposed Site Plan and Modified Alternative 4

Draft Recommended Alternative

Plant Master Plan



Liquefaction Susceptibility Map

Susceptibility Level

- Very High
- High
- Moderate
- Low
- Very Low
- Major Roads
- Local Roads

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.

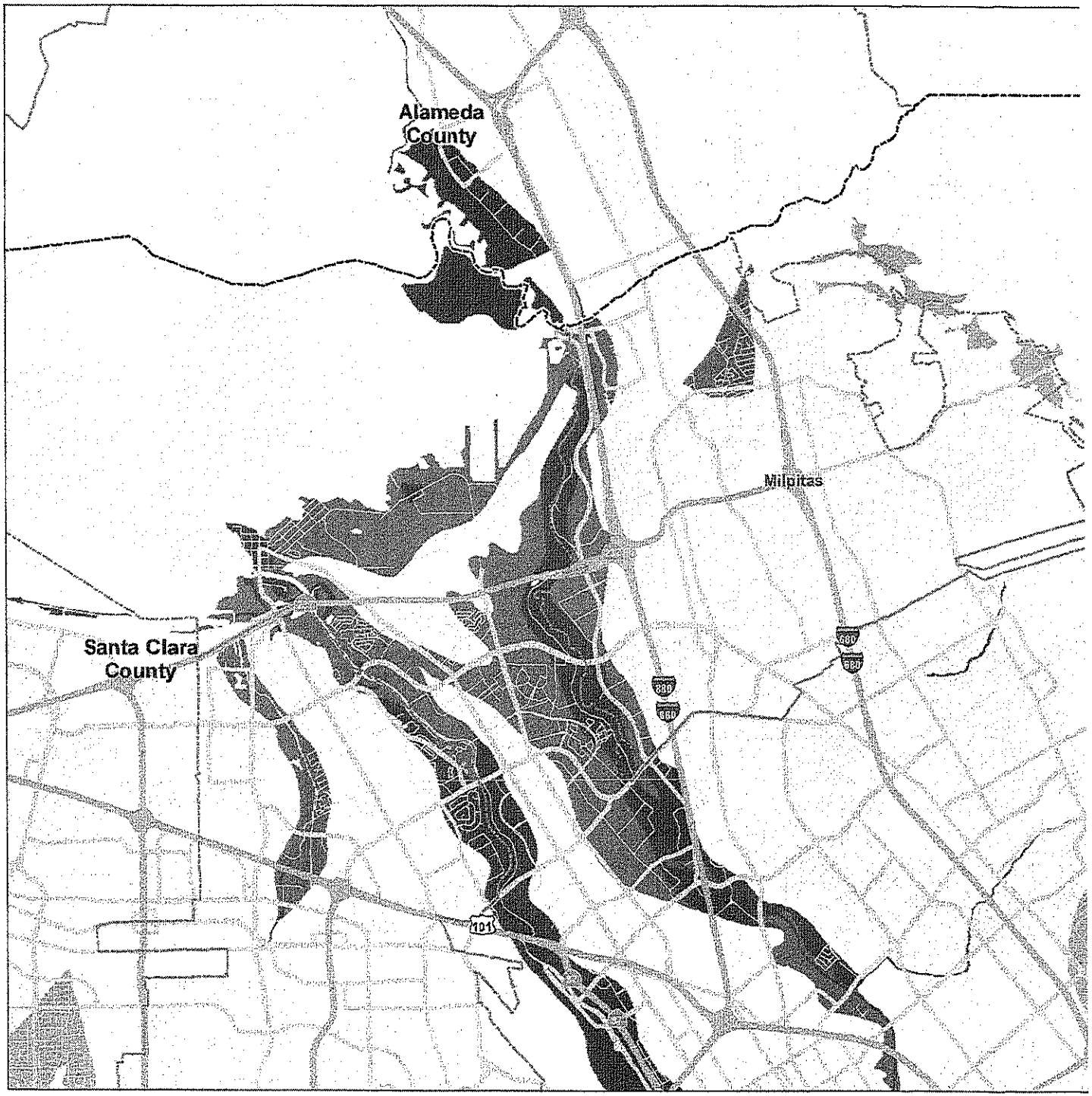
This map is available at
http://quake.abag.ca.gov

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/

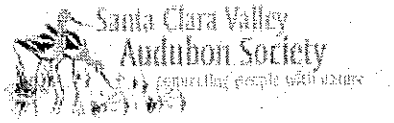
Map Prepared by the ABAG Earthquake Program.
June 2009.

ABAG GIS Geographic Information Systems









June 28, 2010

Matt Krupp, Project Planner
Water Pollution Control Plant Master Plan
Santa Clara San Jose Water Pollution Control Plant

Re: Water Pollution Control Plant Master Plan Alternatives

Dear Mr. Krupp,

We submit this position on the Water Pollution Control Plant Master Plan Alternatives on behalf of Santa Clara Valley Audubon Society, Committee for Green Foothills, Loma Prieta Chapter of the Sierra Club, Greenbelt Alliance, Save The Bay, Citizens Committee to Complete the Refuge, Santa Clara County Creeks Coalition, Santa Clara Valley Chapter of the California Native Plant Society, San Francisco Baykeeper, and the thousands of individuals we represent.

In May 2010, after a three-year effort, the planning team for the San Jose-Santa Clara Water Pollution Control Plant (WPCP) revealed three land use alternatives for the Plant Master Plan. While we appreciate the attempt to provide alternatives, the alternatives are so similar that they fail to provide an adequate range of alternatives for good planning. The proposed alternatives consist of the same elements at various proportions. We argue that the three presented alternatives fail to analyze an adequate range of possibilities for the treatment plant land, and fall short of the excellent planning we all hope for. All three alternatives inherently provide the same option – significant development unrelated to the water treatment purpose of the plant, and significant development unrelated to the current and historical ecology of the Bay, the land and nature in the area.

Proper planning requires the development of a truly different alternative. We urge planners to return to the drawing table and create an "Environment, Ecology and Water Alternative" that would allow developed land uses solely for development addressing the water treatment purpose of the plant. All other land uses should be based on the existing environment, view-sheds, ecology, connectivity, the historic Bay ecology and environment, and recreational uses consistent with the ecology and the nature of the land and its restoration.

Asking the public to select one of the three proposed alternatives channels the input by survey participants to a predetermined set of very similar outcomes. The undersigned organizations request that the planning team develop the fourth "Environment, Ecology and Water Alternative" and offer it to the public for review.

Respectfully,

Brian A. Schmidt
Legislative Advocate
Santa Clara County

COMMITTEE FOR GREEN FOOTHILLS

David Lewis
Executive Director
SAVE THE BAY

SAVE THE BAY

Charles G. Schafer
Chair, Executive Committee
Loma Prieta Chapter Sierra Club

SIERRA CLUB
FOUNDED 1892

Eileen P. McLaughlin
Advocate, San Jose Shoreline
Citizens Committee to Complete the Refuge

Michele Beasley
Senior Field Representative, South Bay
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GREENBELT ALLIANCE
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Mondy Lariz
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Santa Clara County Creeks Coalition

Shani Kleinhaus
Environmental Advocate
Santa Clara Valley Audubon Society

Kevin Bryant
Chapter Council Chair
Santa Clara Valley Chapter
California Native Plant Society

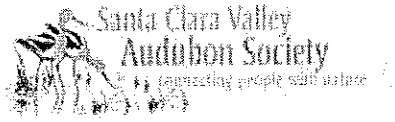
Deb Self
Executive Director
SF Baykeeper,

Hon. Clysta Seney
Former Director, District 3
Santa Clara County Open Space Authority

CC:
John Stufflebean, Director
City of Jose Environmental Services Department







January 29, 2010

John Stufflebean, Director
City of San Jose Environmental Services Department

Matt Krupp and Kirsten Struve, Project Planners
Water Pollution Control Plant Master Plan
Santa Clara - San Jose Water Pollution Control Plant

Re: **Water Pollution Control Plant Master Plan Recommended Alternative**

Dear Director Stufflebean, Mr. Krupp and Ms. Struve,

On behalf of Santa Clara Valley Audubon Society, Committee for Green Foothills, Loma Prieta Chapter of the Sierra Club, Greenbelt Alliance, Save The Bay, Citizens Committee to Complete the Refuge, Santa Clara County Creeks Coalition, Santa Clara Valley Chapter of the California Native Plant Society, San Francisco Baykeeper, and the thousands of individuals we represent, we reiterate our position that the public deserves to be presented with an alternative that would allocate all of the buffer lands of the Water Pollution Control Plant to uses that preserve and enhance the value of the land's natural resources.

During the public process of Spring 2010, our nine environmental organizations sent a letter to the WPCP planning team. In that letter, we asked the team to present the public with an "Environment, Ecology and Water Alternative" that would allow developed land uses solely for development that is directly required to address the water treatment purpose of the plant. We asked for an alternative in which all other land uses should be based on the existing environment, view-sheds, ecology, the historic Bay ecology and environment, and recreational uses consistent with the ecology and the nature of the land and its restoration. This requested alternative has yet to be presented to the public.

We recognize that in the currently Recommended Alternative for the Master Plan, planners incorporated expansive salt marshes and riparian habitats, and included a 190-acre dedicated

burrowing owl habitat. However, the Recommended Alternative retains hundreds of acres of commercial, industrial and educational development, new roads and bridges, and energy fields – all of which would consume precious public open space. We reiterate our request that the public be allowed to examine an alternative that is focused on environmental land uses, with no economic development.

Planners and decision makers explain that the recommended Master Plan balances economic, social and environmental objectives. **We maintain that to be sustainable and justifiable, growth must be considered in a regional context and balanced on a regional scale, not on a project footprint scale. We continue to argue that public land should be used for the protection and enhancement of public environmental resources, and not sacrificed for private benefit.**

We ask that:

1. The recommendation of the Master Plan must require that the resulting EIR present to the public the environmental alternative that we asked for in June 2010 and again in this letter. This **alternative would allow developed land uses exclusively for the needs of the Water Pollution Control Plant, and focus all other uses on the ecology, viewsheds and historical connotations of the South Bay environment**. Connectivity, trails and other recreation-oriented development should be consistent with the ecology and nature of existing and restored ecosystems.

2. The grasslands along Highway 237 form an important wildlife corridor extending from Coyote Creek's riparian areas across the property. The grasslands also comprise a rare refuge for plants and wildlife in the face of sea level rise, and provide one of the last viable burrowing owl habitats in the south bay. We urge the City of San Jose and its planning team to allocate the entire grassland area to environmental enhancement.

3. At this time of recession, with pervasive vacancy of industrial and retail space throughout the South Bay, growth must be considered in a regional context and balanced on a regional scale and not on a project footprint scale, and redevelopment of blighted areas should precede the development of open space. We argue that there is no urgency to the allocation of undeveloped public land to economic uses, but there is a great and urgent need to protect public open space and declining, threatened habitats and species.

Respectfully,

Shani Kleinhaus
Environmental Advocate
Santa Clara Valley Audubon Society

Santa Clara Valley Audubon Society
connecting people with nature

Brian A. Schmidt
Legislative Advocate
Committee for Green Foothills

COMMITTEE FOR GREEN FOOTHILLS

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Mondy Lariz
Director
Santa Clara County Creeks Coalition

Stephen Knight
Political Director
Save The Bay

Kevin Bryant
Chapter Council Chair
California Native Plant Society

Ian Wren
Staff Scientist
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State of California – The Natural Resources Agency
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7329 Silverado Trail
Napa, CA 94558
(707) 944-5500
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EDMUND G. BROWN JR., Governor
CHARLTON H. BONHAM, Director

February 25, 2013

Mr. Bill Roth
City of San Jose
200 East Santa Clara Street, Tower 3
San Jose, CA 95113-1905

Dear Mr. Roth:

Subject: San Jose/Santa Clara Water Pollution Control Plant Master Plan,
SCH #2011052074, City of San Jose, County of Santa Clara

The California Department of Fish and Wildlife (CDFW) has reviewed the Draft Environmental Impact Report (DEIR) provided for the Water Pollution Control Plant (WPCP) Master Plan (Project). CDFW is providing comments as a Trustee Agency and Responsible Agency pursuant to the California Environmental Quality Act (CEQA) Sections 15386 and 15381 respectively. As trustee for the State's fish and wildlife resources, CDFW has jurisdiction over the conservation, protection, and management of the fish, wildlife, native plants, and the habitat necessary for biologically sustainable populations of such species for the benefit and use by the people of California. As a Responsible Agency, CDFW will have discretionary approval authority over the project by issuing a Lake and Streambed Alteration Agreement (LSAA) and potentially a California Endangered Species Permit (CESA) Permit.

The San Francisco dusky-footed woodrat was rejected for further analysis likely due to the incorrect habitat description used in the January 2012 'Existing Conditions Report' prepared by ICF (Table 1, Page 5). In Santa Clara County, this species is found in many habitats, as well as structures and vehicles. The woodrat exhibits a strong preference for riparian areas however, and there is a strong possibility it is present in suitable habitat on the Project site. CDFW recommends that the analysis be revised after the site has been surveyed for the species.

The DEIR acknowledges the presence of Congdon's tarplant where it could potentially be impacted by Project activities and proposes avoidance and mitigation measures (Bio-1, page 4.7-29). The DEIR proposes surveys for the plant before initiating Projects in potential habitat, avoiding it where possible, and conduct mowing in areas occupied by Congdon's tarplant. The DEIR further proposes that if occurrences cannot be avoided, seed will be collected from the impact area and used to restore the site afterward and to seed new potential mitigation locations. CDFW recommends that the following tasks be clarified before we concur with this general approach:

Is the site mowing mentioned in the first three bullets a general site management technique to be carried out in all tarplant areas and take place in perpetuity or is it project specific, as with the other two bullets?

A two-year monitoring period is insufficient to provide any assurance that reseeding was successful. For this species, a minimum of five years should be the standard. The monitoring period should begin at the time of seeding; reseeding will reset the start of the monitoring period.

Does the stated 1:1 mitigation include both the restoration of the impact area and the mitigation site or just the mitigation site?

We recommend that the success standard of "occurring throughout the reseeded area." be more precisely defined. Groundcover, health and vigor should all factor into an evaluation of success.

The DEIR (Bio-2d) proposes buffers between bird nests and potentially disturbing activities as follows: 20-25' for ground nesting birds, 50' for other passerine species and 300' for raptors. CDFW recommends that buffers be consistent with those normally used in Santa Clara: 100' for non-raptors and 300' for raptors.

The DEIR documents the presence of the Burrowing owl on-site, evaluates likely impacts, and proposes mitigation in the form of 180 acres of burrowing owl habitat which would be managed and protected with a permanent conservation easement. The DEIR further proposes that additional, unspecified mitigation be provided if, in the future, the owl population on the mitigation area is not expanding.

CDFW believes the proposed burrowing owl mitigation is inadequate and should be developed to be consistent with the burrowing owl conservation strategy that is part of the Santa Clara Valley Habitat Conservation Plan/Natural Community Conservation Plan (HCP/NCCP). This would include conservation, enhancement and management of habitat sufficient to mitigation impacts to burrowing owl habitat at this important location.

The 180 acres of mitigation is based on projected impacts to 178.2 acres of burrowing owl habitat (Table 4.7-7). After review of the information contained in the Existing Conditions Report and the DEIR, CDFW concludes that the impact number is actually much larger.

Mitigation Measure Bio-2e states that burrowing owl habitat is defined as natural areas within 2 miles of nest sites (differentiating breeding and foraging habitats) and references Fig 4.7-3. CDFW recommends that for the purpose of determining impacts to burrowing owls, habitat types should include non-native grassland, alkali grassland (if not inundated) and disturbed/ruderal, as the species regularly use these habitats at WPCP, the remainder of Santa Clara County, the Bay Area and throughout the owl's range. Additionally, Figure 4 of the Existing Conditions Report documents continual and regular use of those types of habitats not only on the WPCP site but in the immediately surrounding area. The total

amount of useable habitat appears to be approximately 260 acres of non-native grassland, approximately 70 acres of alkali grassland, and approximately 273 acres of disturbed/ruderal habitat; a total of approximately 603 acres of burrowing owl habitat on the Project site.

Impacts to burrowing owl habitat should include any activity that degrades or removes any of these three habitat types. A rough count of impacts includes: Secondary Treatment Processes (Section 3.5.4 and Fig. 3-4), somewhere between 10 and 25 acres; Economic Development (Section 3.6.4 and Fig. 3-16), 395 acres; Park (Section 3.6.5 and Fig. 3-17), 40 acres; unknown additional amounts of impacts from the Filtration and Disinfection Area (Section 3.5.5 and Fig. 3-8); Solar Power Facility, Phase 1 (Section 3.5.7 and Fig. 3-10); and other improvements (Section 3.5.8 and Fig. 3-11). The total impacts to burrowing owl habitat from these components of the Project exceeds 450 acres. CDFW acknowledges that the numbers are rough, but are likely to be low since the acreage impacts from several categories of project are not calculated. These rough figures substantially exceed the 178.2 acres of impact identified in the DEIR. CDFW recommends that the acreage impacts be recalculated and precise numbers for all impacts to non-native grassland, alkali grassland and disturbed/ruderal be utilized in a revised impacts and mitigation proposal consistent with the HCP/NCCP burrowing owl conservation strategy.

Other impacts and factors that should be considered in a revised analysis are whether the entire currently proposed 180 acres and additional acres needed to adequately mitigate Project impacts are useable as habitat year round by burrowing owls, what impacts the trail use through the mitigation area will have and what impacts will result from an increase in competition for resources from all wildlife in a reduced foraging area.

Finally, while development of burrowing owl mitigation based on owl population growth is a potentially useful approach, the text as written does not contain enough detail and assurances to be acceptable as CEQA mitigation. The protocol for determining population trends should be reviewed and approved by CDFW prior to the designation of mitigation lands. Additionally, adaptive measures and thresholds for when additional mitigation will be required should be identified and subject to CDFW review and approval. When the HCP/NCCP is final and being implemented, Project mitigation should be coordinated with the HCP/NCCP Implementing Entity and CDFW.

The service area for the WPCP includes the cities of San Jose, Santa Clara, Campbell, Los Gatos, Monte Sereno, Cupertino, Milpitas, and Saratoga; and parts of Sunnyvale, Los Altos, and unincorporated Santa Clara County. The proposed WPCP plant expansion will result in growth inducement throughout the WPCP service area in jurisdictions both inside and outside of the City of San Jose (City) and the HCP/NCCP permit area. Increasing atmospheric nitrogen deposition from growth inducement (i.e., increasing vehicle trips) throughout the WPCP service area will result in the degradation and loss of serpentine grassland habitat for the Bay checkerspot butterfly and listed serpentine plants due to encroachment of invasive plant species. The City proposes to mitigate for the effects of growth inducement within the City by requiring the payment of a nitrogen deposition fee to

the HCP/NCCP based on increases in vehicle trips. However, the proposed WPCP plant expansion will also result in growth inducement and increased nitrogen deposition from sources outside of the City. According to the DEIR, this will result in "significant and unavoidable" impacts to serpentine grassland habitat for the Bay checkerspot butterfly and listed serpentine plants. To address the indirect and cumulative effects of nitrogen deposition, the City should develop a comprehensive compensation strategy consistent with the HCP/NCCP. Compensation should be commensurate with the effects and should result in the permanent protection and management of serpentine grasslands. Compensation may involve the payment of a nitrogen deposition fee prior to providing services from the expanded WPCP as part of a coordinated mitigation approach that protects and manages serpentine grassland.

If you have any questions, please contact Mr. Dave Johnston, Environmental Scientist, at (831) 464-6870; or Mr. Craig Weightman, Acting Environmental Program Manager, at (707) 944-5577.

Sincerely,

Scott Wilson
Acting Regional Manager
Bay Delta Region

cc: State Clearinghouse

Mr. Ken Schreiber, Santa Clara Valley Habitat Plan
Ms. Debbie Cauble, Santa Clara County Office of the County Executive
Mr. Joe Horwedel, City of San Jose
Ms. Cay Goude, U.S. Fish and Wildlife Service
Ms. Cori Mustin, U.S. Fish and Wildlife Service
Mr. Ryan Olah, U.S. Fish and Wildlife Service
Mr. Mike Thomas, U.S. Fish and Wildlife Service

February 25, 2013
CIWQS Place No. 255333

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)

Subject: Draft Environmental Impact Report for the San Jose/Santa Clara Water Pollution Control Plan Master Plan
SCH No. 2011052074

Dear Mr. Roth:

San Francisco Bay Regional Water Quality Control Board (Water Board) staff have reviewed the *Draft Environmental Impact Report for the San Jose/Santa Clara Water Pollution Control Plan Master Plan* (DEIR). The City of San José proposes to adopt the San Jose/Santa Clara Water Pollution Control Plant (WPCP or Plant) Master Plan (PMP) and to amend the San José General Plan to ensure that existing and proposed onsite uses are consistent with the City's land use goals, policies, and designations. The Master Plan addresses both the Plant improvement projects needed to reduce odors, accommodate projected population growth in the Plant's service area, and comply with changing regulations that affect the WPCP, and to develop a comprehensive land use plan for the entire project site. The phased development of the surrounding lands include the creation and restoration of habitats to support wildlife, parks, and amenities to foster a greater connection between the community and the coastal environment, as well as commercial, retail, light industrial development uses, and an institute. The City of San José and the City of Santa Clara co-own the San Jose/Santa Clara Water Pollution Control Plant; the City of San José manages the Plant and the surrounding lands, which together total approximately 2,680 acres. The Plant is located at 700 Los Esteros Road to the north of State Route 237 and west of Interstate 880. Water Board staff have the following comments on the DEIR.

Comment 1.
Riparian Habitat, Eastern Stormwater Channel (Section 3.6.3, Page 3-52)
The DEIR describes the creation of an eastern stormwater channel.

> ***Eastern Stormwater Channel.*** The City is also proposing to create a channel that would serve as an additional Plant outfall during major wet-weather events. In addition to discharging fully treated effluent, this channel would also serve as the stormwater drainage for development within the PMP planning area east of Zanker Road. The intent is that the channel would function similar to seasonal riparian corridors common to this region.

While the Water Board supports such treated effluent and stormwater management measures, we would like to point out that the proposed eastern stormwater channel would not be able to provide the City with any riparian mitigation credits if it is intended to be part of the WPCP or for stormwater treatment. State and federal mitigation policy requires that mitigation features be self-sustaining and not for stormwater treatment, since they are intended to compensate for impacts to natural, self-sustaining wetlands or riparian areas. Since the channel will be at least partially supported by treated effluent, it will not be fully self-sustaining.

The City should manage the channel in conformance with Water Board Resolution No. 94-102, *Policy on the use of Constructed Wetlands for Urban Runoff Pollution Control*. Under Resolution No. 94-102, wetlands that are created for the purpose of treating stormwater are not regulated as waters of the State, if they are actively managed in conformance with a management plan.

Stormwater treatment measures that are constructed and operated to provide compliance with the post-construction stormwater treatment requirements of the National Pollutant Discharge Elimination System (NPDES) Municipal Regional Permit (MRP) for the management of stormwater runoff (Order R2-2009-0074; NPDES Permit No. CAS612008) are enrolled under Resolution 94-102. Treating the proposed eastern stormwater channel as a non-jurisdictional treatment measure under Resolution 94-102 will allow the City of San Jose to maintain the flexibility to use the eastern stormwater channel for the discharge of treated effluent during major wet weather events.

Comment 2.
Fresh Water Wetlands (Section 3.6.3, Page 3-53)
The DEIR describes the creation of fresh water wetlands in the northeastern portion of the Plant Master Plan (PMP) planning area.

> Freshwater wetlands would be developed in the northeastern portion of the PMP planning area to store effluent and stormwater run-off prior to discharge to San Francisco Bay. The primary purpose of the wetland would be to create freshwater wetland habitat, a habitat historically present in the Plant vicinity that is now scarce regionally. Since the wetland would receive fully-treated effluent, the wetland would not be a treatment wetland, but may function as mitigation for development of the PMP. Based on projected 100-year sea level rise and the elevation of the Plant's existing discharge pipelines, the Plant's current gravity discharge into Artesian Slough will become infeasible at some point in the future, and the WPCP will have to pump effluent into the Bay. The wetlands would be created on the inland side of the proposed levee to store fully treated effluent prior to discharge into the proposed salt marsh and mud flat habitat. The design of wetlands and the effluent discharge would be based on the results of environmental engineering studies. The wetlands also have the potential to provide water quality benefits by removing trace materials and contaminants of emerging concern from the effluent. Passive recreational opportunities, such as bird watching, could be accommodated by viewing platforms associated with the proposed nature museum (described in Section 3.6.5).

Since mitigation wetlands must be self-sustaining and not for stormwater treatment, these proposed freshwater wetlands cannot be used to provide mitigation for impacts to jurisdictional wetlands associated with implementing the PMP. This point was clarified at the February 13, 2013, Inter-Agency Meeting that was hosted by the San Francisco District of the U.S. Army Corps of Engineers (Corps). At this meeting, representatives of the U.S. EPA, the Corps, and the

Water Board all pointed out that wetlands supplied by treated water could not be used as mitigation wetlands.

In addition, since sea level rise will eventually make the current gravity discharge of treated effluent to Artesian Slough infeasible, the City is proposing to use the created wetlands to store treated effluent, prior to discharging the treated effluent to the Bay by pumping. If the wetlands were mitigation wetlands, the City would not be able to use them to store large quantities of treated effluent in the future.

Proposed Mitigation Measure BIO-4b should be revised to clarify that the proposed fresh water wetlands in the northeastern portion of the PMP planning area cannot be used to provide mitigation for the PMP's impacts to jurisdictional wetlands.

Comment 3.
Flexible Space and Open Space (Section 3.6.4, Page 3-57)
The DEIR describes areas set aside for flexible space and open space in the eastern portion of the Plant Master Plan (PMP) planning area.

> The Master Plan reserves 247 acres of the PMP planning area as flexible space to serve future land use needs. As shown in Figure 3-1, the flexible space is located in the eastern portion of the planning area north of the proposed light industrial area. The flexible area provides space for a range of potentially compatible uses including light industrial, recreation, or habitat. Development of the flexible space area would be determined by community needs and market demands. For the purposes of the environmental analysis, it is assumed that the maximum of about 132 acres (3.2 million square feet of industrial building space) may be developed in this area.

Since the current area that is proposed for the Plant Expansion Area is located in an area with about 51 acre of jurisdictional wetlands, the City should evaluate the feasibility of moving the Plant Expansion Area to the Flexible Space and Open Space Area. The evaluation of feasibility should include a full assessment of required mitigation for the fill of 51 acres of jurisdictional wetlands. Since the proposed freshwater wetland in the northeastern portion of the PMP planning area cannot be used to provide mitigation for impacts to jurisdictional wetlands, the current Plant Expansion Area appears to require an amount of mitigation that San Jose has not yet identified. Without identifying viable mitigation options for the fill of 51 acres of wetlands, the DEIR does not demonstrate that mitigation is possible for these impacts.

Comment 4.
Table 3-11, Other Agencies – Potential Review and Approval Actions (Section 3.9.1, Page 3-65)
Table 3-11 in the DEIR states that permits required from the Water Board will include Waste Discharge Requirements (WDRs) for the Operation of Pond A18. Table 3-11 should be revised to note that WDRs will also be required for the fill of 51 acres of wetlands in the inactive biosolids lagoons, along with the Clean Water Act Section 401 water quality certification for the fill of those wetlands. In addition, if any wetlands that are not subject to federal jurisdiction are filled, WDRs will be necessary from the Water Board.

The Water Board has been providing the following comment on CEQA documents prepared by the City of San Jose for over a decade.

> The Water Board has jurisdiction over activities in waters of the United States pursuant to the Federal Clean Water Act (CWA); the Water Board issues Water Quality Certifications

(certifications) under CWA Section 401, in conjunction with the issuance of CWA Section 404 permits by the Army Corps of Engineers (ACOE). When the Water Board issues Section 401 certifications, it simultaneously issues general Waste Discharge Requirements (WDRs) for the project under the Porter-Cologne Water Quality Control Act. The Water Board has jurisdiction over activities in waters of the State even when they are outside of the jurisdiction of the ACOE (e.g., isolated wetlands, vernal pools, or stream banks above the ordinary high water mark) under the authority of the Porter-Cologne Water Quality Control Act. Activities that lie outside of ACOE jurisdiction may require the issuance of either individual or general WDRs from the Water Board.

It is our hope that this comment will eventually become part of the institutional knowledge of the Department of Planning, Building & Code Enforcement

Comment 5.
Potential Jurisdictional Areas (Section 4.7.1.2, Page 4.7-12)
Text in this section notes that, "Activities that involve placement of fill into USACE jurisdictional wetlands and other waters would need to be in compliance with permit requirements of the USACE pursuant to CWA Section 404 and Section 10 of the Rivers and Harbors Act." Applications for fill of acres of wetlands will be required to submit a CWA Section 404(b)(1) alternatives analysis. As part of this analysis, applicants are required to demonstrate that fill of jurisdictional waters have been avoided to the maximum extent practicable, and that any remaining fill has been minimized to the maximum extent practicable. Only when all opportunities for avoidance and minimization have been exhausted can fill of wetlands be approved with appropriate mitigation. The Water Board applies the same principal when reviewing requests for CWA Section 401 certification and/or WDRs for the fill of waters of the State.

At the February 13, 2013, Inter-Agency Meeting that was hosted by the the Corps, representatives of the U.S.EPA., the Corps, and the Water Board concurred in considering the wetlands that have developed in the inactive biosolids lagoons to be jurisdictional. The agency representatives noted that applications for fill of those wetlands would be subject to the standard protocol of exploring all options for avoidance and minimization of impacts, prior to allowing any of those wetlands to be filled. Any wetlands that are allowed to be filled will require mitigation at a ratio of at least 1:1.

At present, the City does not appear to have placed sufficient emphasis on avoiding and minimizing impacts to jurisdictional wetlands (See Comment 10).

Comment 6.
California Porter-Cologne Water Quality Control Act (Section 4.7.2.2, Page 4.7-19)
Text in this section notes that that the Water Board has developed a Basin Plan pursuant to the requirements and authority of the Porter –Cologne Act. This subsection of the DEIR should be improved be noting that the *San Francisco Bay Region Water Quality Control Plan* (Basin Plan) identifies Beneficial Uses for waters within the jurisdiction of the Water Board. The Beneficial Uses that have been established for waters of the State that are located within PMP planning area include: estuarine habitat; wildlife habitat; preservation of rare and endangered species; non-contact water recreation; and contact water recreation. Activities that may impact these Beneficial Uses may be subject to the jurisdiction of the Water Board.

Comment 7.
Mitigation Measure BIO-3b: Riparian Woodland Habitat Restoration (Section 4.7.3.4, Page 4.7-49)
Text in this mitigation measure states that:

> If impacts to riparian woodland habitat cannot be avoided, the project proponent shall obtain all required permits. In order to ensure that implementation of the Master Plan results in no net loss of riparian habitat functions and values, the project proponent shall compensate for the loss of riparian habitat through on-site restoration and creation and/or off-site protection and enhancement of riparian habitat. Mitigation shall be implemented by the project proponent in amounts acceptable to the Army Corps of Engineers, California Department of Fish and Game, and San Francisco Regional Water Quality Control Board. The size and location(s) of the area(s) to be restored, created, enhanced, or preserved shall be determined based on appropriate mitigation ratios derived in consultation with CDFG and USACE. The project proponent shall also prepare, in consultation with CDFG and USACE, a mitigation plan that includes monitoring requirements and success criteria.

The DEIR should provide locations of proposed onsite riparian mitigation so that the suitability of the proposed mitigation can be assessed by the resource agencies and other stakeholders.

Comment 8.
Impact BIO-4: Loss or Damage of Wetlands and Other Waters as a Result of Implementing the PMP (Section 4.7.3.4, Page 4.7-50)
Impact BIO-4 covers the loss or damage of wetlands and other waters as a result of implementing the PMP. As is noted in the discussion of Impact BIO-4, the majority of program-level impacts to wetland resources would occur in the inactive biosolids lagoons. About 51 acres of jurisdictional wetlands are located in the inactive biosolids lagoons. According to text in Section 3.5.6 and proposed land uses illustrated in Figure 3-14, the Project proposes to fill these wetlands to make the land area available for expanded WPCP facilities. However, the DEIR does not provide adequate documentation of efforts to avoid or minimize these impacts.

Text on page 4.7-50 of the discussion of Impact BIO-4 dismisses the significance of impacts to wetlands in the inactive biosolids lagoons by stating that, "these existing wetland resources currently consist of degraded wetland areas." The current condition of a wetland cannot be used as a justification for filling of the wetland. The Water Board presumes that degraded wetlands can be restored. Restoration of degraded wetlands is often easier than creating new wetlands, since the existing, degraded wetlands already have the appropriate topography and hydrology to sustain wetland conditions.

Comment 9.
Mitigation Measure BIO-4b: Wetlands Restoration for Project-Level Impacts (Section 4.7.3.4, Page 4.7-58)
Text in this mitigation measure states that:

> If it is determined during the design phase that impacts on wetland habitat cannot be avoided, the proponent shall obtain permits and approvals from the USACE, RWQCB, and CDFG. In order to ensure that the proposed project results in no net loss wetland habitat functions and values, the project proponent shall compensate for the loss of wetland resources through either on-site restoration/creation and/or off-site protection and enhancement of riparian and wetland habitat. The size and location(s) of the area(s) to be

restored/created will be determined based on appropriate mitigation ratios derived in consultation with CDFG, USACE, and the San Francisco Bay RWQCB. The City shall prepare a mitigation plan, which will include monitoring requirements and success criteria in consultation with CDFG, USACE, and the San Francisco Bay RWQCB.

The PMP appears to have already decided that impacts to the 51 acres of wetlands in the inactive biosolids lagoons cannot be avoided, so a concrete mitigation proposal for these impacted wetlands should be included in the DEIR. As was noted in Comment 2, above, the proposed 35-acre wetland in the northeastern region of the PMP planning area cannot be used as mitigation, since it will be supported with treated effluent. Even the proposed 35-acre treated effluent wetland would not have provided adequate mitigation for the fill of 51 acres of wetlands, since it would have provided less than 1:1 mitigation. Since the treated effluent wetland is not acceptable as mitigation, the PMP appears to have a significant deficit of proposed wetland mitigation. Therefore, based on the information provided in the DEIR, proposed Mitigation Measure BIO-4b fails to demonstrate that impacts to wetlands can be reduced to a less than significant level.

Comment 10.
Alternatives Considered but Eliminated From Further Analysis, Wetland Focused Alternative (Section 7.5, Page.7-36)
This alternative is described in the DEIR as follows:

Implementation of the proposed project would result in the loss of approximately 51 acres of degraded brackish wetland habitat within the inactive biosolids lagoons; the project would also include the creation of 35 acres of freshwater wetlands. An alternative was considered that would preserve these 51 acres of wetlands. This alternative was eliminated from further consideration, however, because it would be infeasible or cause more adverse impacts than the project while impeding achievement of project objectives, as well as the limited habitat benefit it would provide. As shown in Figure 4.7-3 (in Section 4.7, Biological Resources) the 51 acres of affected wetlands within the inactive biosolids lagoons are highly fragmented throughout the 214-acre inactive lagoons area. In order to preserve these degraded, fragmented wetlands, therefore, none of the proposed WPCP improvements north of Los Esteros Road could be implemented in the proposed location. Under this alternative, the proposed biosolids treatment facilities would need to be located either east or south of the existing WPCP operational area. Locating the proposed biosolids treatment facilities east of the operational area would be infeasible, however, because that is the location of the existing active biosolids lagoons and drying beds. Retirement of the existing active lagoons and drying facilities needs to account for the residence time required for this phase of biosolids treatment and the fact that replacement facilities must be available before retirement of the active lagoons and drying beds can be initiated. The proposed replacement facilities, therefore, cannot be constructed at the same location and simultaneous with the retirement of the eastern lagoons and drying beds. Locating the proposed biosolids treatment facilities south of the existing WPCP operational area would place them in the area that currently serves as bufferlands, closer to receptors sensitive to odors to the south and east. Locating the treatment facilities here would also have adverse impacts on the proposed owl habitat, and would displace the recreation, economic development, and habitat land uses proposed for this area. This alternative would largely fail to meet objectives related to those uses.

The U.S. EPA, Corps, and Water Board have informed the City of San Jose that the wetlands in the inactive biosolids lagoons are jurisdictional and that the proposed 35-acre, treated effluent supplied wetland will not provide mitigation for impacts to jurisdictional wetlands. Therefore, the PMP appears to have a significant deficit of available wetland mitigation measures. Providing adequate mitigation for the fill of 51 acres of wetlands may represent a significant cost to the implementation of projects under the PMP. Therefore, the Water Board encourages the City of San Jose to revise the alternatives analysis to include the Wetland-Focused Alternative.

The DEIR suggests that impacts to wetlands can be mitigated either onsite or at unspecified offsite locations. As the Port of Oakland discovered in its recent search for mitigation of impacts to about 20 acres of wetlands, it is difficult to find opportunities for mitigation of large acreages of wetlands in the South Bay. In order for the DEIR to be adequate, the DEIR should have identified actual opportunities to mitigate for the fill of about 51 acres of jurisdictional wetlands. Without this level of detail, it is impossible for reviewers of the document to assess whether or not all impacts to jurisdictional wetlands can be mitigated to less than significant levels

Please contact Brian Wines at (510) 622-5680 or bwines@waterboards.ca.gov if you have any questions.

Sincerely,

Shin-Roei Lee
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Shin-Roei Lee, Chief
Watershed Management Division

cc: CDFG, Bay Delta Region, Attn: Marcia Grefsrud (mgrefsrud@dfg.ca.gov)
USACE, Cameron Johnson (Cameron.L.Johnson@usace.army.mil)
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CCCR

CITIZENS COMMITTEE TO COMPLETE THE REFUGE

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March 13, 2013 *via E-mail*

Department of Planning, Building & Code Enforcement
City of San Jose
200 E. Santa Clara St., 3rd floor
San Jose, CA 95113
Attn: Bill Roth

RE: Comments, Draft Environmental Impact Report, File. No. PP11-043

Dear Mr. Roth:

This letter responds to the Draft Environmental Impact Report (DEIR) of the San Jose/Santa Clara Water Pollution Control Plant Master Plan (PMP or WPCP). We appreciate the opportunity for public comment and for the extension of the comment period to March 13, 2013.

The Citizens Committee to Complete the Refuge (CCCR) works to secure and protect lands within the acquisition boundary of the Don Edwards San Francisco Bay National Wildlife Refuge (Refuge). While doing so, we advocate for the health of the Bay's habitats and wildlife broadly and in protection of existing Refuge lands. For PMP land, shared boundaries establish the Refuge as its majority neighbor. The substantial land expanse involved and the type, duration and impacts of proposed changes correlate directly with CCCR interests. It was for that reason that CCCR was pleased to participate on the Community Advisory Group during the three years of development of the Master Plan.

With that background we knew how important it was for this DEIR to get it right. To be blunt, it failed. Abysmally. This document cannot serve as a Program EIR. It cannot serve as Project EIR. It spoke of different levels of detail, program and project, and then didn't supply enough detail to make even the program EIR credible. Making it all so much worse, the document's intertwined presentation of program and project and WPCP and not-WPCP made the head spin. The only insightful conclusion produced was that the Proposed Project would generate a suite of onerous environmental impacts that were significant and unavoidable. 1

Below we will provide comments about this DEIR, information we believe suitable for document revision and recirculation This EIR process needs to regroup and start over.

Project Background: The City of San Jose (City), as manager of the San Jose/Santa Clara Water Pollution Control Plant (Plant or WPCP) and its buffer lands, proposes (1) major Plant improvements and (2) changed land use requiring amendments to Envision San Jose 2040 (General Plan) and the Alviso Master/Specific Plan (Alviso MP) and zoning changes for buffer lands no longer needed by the Plant. The site includes ~2680 acres, inclusive of ~653 acres reserved for Plant use, ~860-acre retired salt pond A18 and ~247 acres of "Flexible Space" (final use undetermined). It is located on the City's San Francisco Bay shoreline north of Highway 237, adjoining Coyote Creek, the Refuge and both developed and undeveloped lands that include the Alviso community. The PMP is a ~28 year plan for lands owned by the cities of San Jose and Santa Clara and that are 2

currently reserved for water treatment purposes for a service area that includes the cities of Campbell, Cupertino, Los Gatos, Milpitas, Monte Sereno, San Jose, Santa Clara and Saratoga , and parts of Sunnyvale, Los Altos and unincorporated Santa Clara County. 2 cont'd

Additional significant background, *not discussed in this DEIR*, is that the DEIR is expected to provided tiered analysis for ~200 projects with estimated costs to ratepayers in excess of $1.5 Billion in the course of the PMP.[1] 3

Overriding Issues of Concern

The following discussions highlight CCCR's major concerns about:

1. CONFUSING AND CUMBERSOME PRESENTATION OF CONTENT: As already mentioned, the DEIR makes topics extraordinarily difficult to follow. The document's organization becomes the reader's major obstacle, Right there it fails an environmental document's primary purpose—to inform. True enough, it is for a complex project i.e. the odd-couple pairing of water treatment improvements and land use planning to be analyzed together at both program and project levels. But those were City decisions that do not excuse the City from delivering a document that meets the requirement to inform, to deliver discussion, data and conclusions in a format that can be readily reviewed by the public.

But the DEIR made no effort to do so. Although program versus project was a major cause of the confusion, it put no time into providing an overview of the dual program-project role. There is no discussion about how a Program EIR applies over time. There is no place were program, project, level of detail, and tiering are presented as a unit showing how they may relate or differ. There were no guidance tools in the document, such as marked pages, that could be used to follow, let's say, just the program- or project-level impacts and mitigation on one topic like a dewatering facility or burrowing owls. There are no tables or charts that compile related impact and mitigation findings on one topic, in one place. 4

Given the purpose of being a Project EIR for some 11 projects, the DEIR shot itself in the foot. Readers need a compilation of all the required Project EIR analysis, such as would be available in a single-project EIR. But instead the DEIR's dispersed format spread that information throughout the document, intertwined in every Section in sequential discussions of all the projects in rotations of WPCP and non-WPCP and of Project and Program. Lacking any textual roadmap, it is virtually impossible to review any one project uniquely. A reader who might wish to review, for example, Project H1, but would be required to search section by section and page by page through the entire DEIR. CEQA Guidelines reinforce that point.

> 14 CCR § 15126 Consideration and Discussion of Environmental Impacts.
>
> All phases of a project must be considered when evaluating its impact on the environment: planning, acquisition, development, and operation. The subjects listed below shall be discussed as directed in Sections 15126.2, 15126.4 and 15126.6, preferably in separate sections or paragraphs of the EIR. *If they are not discussed separately, the EIR shall include a table showing where each of the subjects is discussed.* (emphasis added)
>
> (a) Significant Environmental Effects of the Proposed Project.
> (b) Significant Environmental Effects Which Cannot be Avoided if the Proposed Project is Implemented.
> (c) Significant Irreversible Environmental Changes Which Would be Involved in the Proposed Project Should it be Implemented.

[1] Multiple public statements, former CSJ Environmental Services Director J. Stufflebean, 2010 and 2011

(d) Growth-Inducing Impact of the Proposed Project.
(e) The Mitigation Measures Proposed to Minimize the Significant Effects.
(f) Alternatives to the Proposed Project.

4 cont'd

Overall, it was difficult throughout the DEIR to find information on any topic and even harder to confirm if the required information is included or if there are conflicts in content in different parts of the document. Other instances demonstrating content confusion are discussed in subsequent comments.

2. DEIR CONTENT IS PERVASIVELY FLAWED.

From beginning to end, discussion and findings in the DEIR are plagued with inadequacies, omissions and impermissibly deferred analysis. As result, under CEQA, the document is fatally flawed. Subsequent discussion will discuss numerous examples in some detail.

The DEIR seemed to break every information requirement. Program-level analysis cannot be assumed to require less detail when the topic involves existing conditions like levees, geological impacts and "flexible space." Program EIRs cannot defer existing conditions but must fully analyze them, establish baselines and use goals to create the mitigation that will guide tiered projects. No EIR can omit available data nor preparation of new studies that are needed to inform impact analysis and mitigation such as for Project B1 and odor impacts within PMP lands. Analysis cannot be assumed to apply equally to similar entities as a group, such as habitats, when each impact may affect each entity differently. Impacts subject to regulation cannot be assumed to be correctly mitigated if the mitigation proposed does not comply with regulations e.g. of the Clean Water Act and the Endangered Species Act.

5

The list could go on and on. The DEIR must be extensively revised and then recirculated.

3. STARTLING LIST OF SIGNIFICANT AND UNAVOIDABLE (SU) FINDINGS.

It is not possible to review the DEIR findings of "Significant and Unavoidable" (SU) impacts without wondering how it is possible to ignore those findings and recommend approval of the Proposed Project. It is clear that the Economic development proposals, introduced at Program-level, consistently push these impacts over the top, introducing irreparable and irreversible harm. The table summarizes the SU findings of the DEIR:

Impact	Finding(s)	Brief Summary
TR-8	SU for non-WPCP Program level uses	Conflict with established measures of effectiveness for the performance of the traffic circulation system, including all modes of transportation
AQ-1	SU for *all* Project and Program levels	Conflict with the 2010 Clean Air Plan
AQ-2	SU for *all* Project and Program levels	Construction could contribute substantially to existing ozone standard violations.
AQ-3	SU for non-WPCP Program level uses	Project operations could contribute substantially to existing criteria pollutant standard violations.
GHG-1	SU long-term (after 2020) for *all* Project and Program levels	Would generate GHG emissions that may be inconsistent with AB32 reductions goals.
UT-1	SU for non-WPCP Program level uses	Potential for the project to result in the construction of new or require expansion of existing water treatment facilities.
UT-2	SU for non-WPCP Program level uses	There would be insufficient water supply available to serve the project.

6

AES-1	SU for non-WPCP Program level uses	Result in permanent impacts on scenic resources, the visual character, or quality of the site and its surroundings.
G-1	SU for non-WPCP Program level uses	(Section 5 Growth Inducement and Secondary Effects of Growth, pp. 5-34) Would not directly contribute to creation of housing/jobs. Expanded, improved Plant capacity would indirectly support regional growth by removing the obstacle of inadequate water treatment capacity.

6 cont'd

The conclusion of greatest concern is that most of these impacts affect the region broadly, well beyond the boundaries of the PMP and the City of San Jose. It is possible that a case can be made that a conclusion of overriding consideration (with vigilant mitigation) could be justified for critical Plant improvements. The same conclusion cannot be drawn for the conversion of undeveloped buffer lands into sites of new Economic development. Any economic benefit is highly uncertain at best and would unevenly accrue to the Plant's service area thereby providing no justification for the excessive impacts that development would bring to the South Bay region.

4. THE DEIR's ALTERNATIVES DO NOT PROVIDE A RANGE OF REASONABLE ALTERNATIVES. Our review of the Alternatives and of the Proposed Project found that they are limited to proposals that fulfill the Economic Goal and its objectives. This implied requirement thereby omits comparison to Alternatives that fulfill all of the other PMP Goals and Objectives. In effect the narrow selection criteria prioritize the Economical goal above the PMP's Environmental goal that would "...minimize impacts to the local and global environment". As we said in our response to the Notice of Preparation, we believe that the WPCP Improvement/No Economic development Alternative" was needed and would fulfill this purpose for public review. Given the extent of Significant and Unavoidable impacts of the Proposed Project, this Alternative would provide a comparison showing that there is a way to avoid and/or minimize the impacts and fulfill most of the PMP's Goals and Objectives. The value of these qualities in the Range of Alternatives is described in CEQA Guidelines. 7

> 14 CCR § 15126.6 **Consideration and Discussion of Alternatives to the Proposed Project.**
>
> (a) Alternatives to the Proposed Project. An EIR shall *describe a range of reasonable alternatives to the project,* or to the location of the project, *which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.* An EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decisionmaking and public participation. (emphasis added)

To explain why the Alternative that CCCR and others suggested was eliminated, the DEIR discussion (Sec. 7.5, p. 7-33) states that it cannot be considered because it would violate the City's General Plan Policy IP – 3.4 which requires that any General Plan amendments "...maintain or increase, but not diminish the total planned job growth capacity for the City." We cannot agree that the Policy is adequate as justification of Alternative elimination when, throughout the DEIR and in the SU impacts listed above, all of the existing Alternatives are in conflict with multiple Goals and Policies of the General Plan, including Air Quality, Environment, Green House Gas, Transportation and Utilities. 8

We also raise the question that if Policy IP-3.4 prohibits amendments that do not meet the jobs threshold, does that mean that the amendment restriction also applies to itself? Or could the Policy be amended to include an exemption when there are onerous impacts to the environment? The General Plan includes an extensive set of Goals and Policies which, to our view, need to play a *balanced* role in development plans. In effect, under Policy IP-3.4, application of the General Plan's

Air Quality, Environment, Green House Gas, Transportation and Utilities Goals and Policies to the PMP DEIR are moot and gutted. We are confounded and amazed. 8 cont'd

Inclusion of the WPCP Improvement/No Economic Development Alternative would fulfill the CEQA expectation of a reasonable range of Alternatives and serve the public, agencies and City Council as a basis of feasible comparison. Every Alternative considered is subject to analysis and discussion. A WPCP Improvement/No Economic Development Alternative would be subject to the same scrutiny while providing the public and the City Council with information that is otherwise excluded from the current DEIR. 9

To inform the public, agencies and City leaders on such issues, we conclude that the DEIR fails to serve its purpose without the Alternative discussed here and which we, with others in 2010, had labeled the Environment, Ecology and Water Alternative.

5. THE DEIR CANNOT BASE NOR DEFER ANALYSIS ON A LEVEE THAT DOES NOT EXIST. The concept of a new Alviso levee, currently undergoing a feasibility analysis in the South Bay Shoreline Study, is cited repeatedly by the DEIR as a basis for planning. Doing so refers to a project that is not yet fully analyzed, available for public review, approved or funded. As it is NOT an existing condition, a new levee cannot be used as a baseline for impact analysis in this DEIR nor can analysis of the levee be deferred to a undetermined time in the future when a new levee *may* exist. The analysis baseline for the DEIR's analysis must be the existing levee, impacts of which can and must be analyzed in this document on the Program level and applied to all project level proposals particularly in regards to levee failure or sea level rise impacts. If/when there is an approved and funded levee project, additional environmental review under this Program EIR can be initiated. 10

> 14 CCR § 15125 Environmental Setting.
>
> (a) An EIR must include a description of the physical environmental conditions in the vicinity of the project, *as they exist at the time the notice of preparation is published*, or if no notice of preparation is published, at the time environmental analysis is commenced from both a local and regional perspective. *This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.* The description of the environmental setting shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives. (emphasis added)

6. BIOSOLIDS PLANNING FOR PHASE 1 MAKES NO SENSE. This concern arises from Project timelines (Figure 3-19) and other DEIR discussion about building new biosolids processing facilities on lands that are subject to Project B1, Rehabilitation of the Inactive Biosolids Lagoons. There are several domino-like dependencies not analyzed in the DEIR but evident in DEIR discussions.

Project B1 would resolve contaminant issues known to exist and involve most of the inactive lagoons in the ~214 acres proposed as the Plant Expansion area. As discussed with some detail in Section 4-11, Hazardous Materials and Hazards, the record of over 20 years of studies document the presence and excessive levels of a certain hazardous materials in the legacy biosolids present in the lagoons. As mitigation, the DEIR concludes that the City will need to enter into a Voluntary Clean-up Agreement and fulfill associated regulatory requirements. While no lagoon hazard map was provided, it appears that the entire inactive lagoon area is involved. 11

A puzzler is that the timeline indicates that B1 will begin *after* Project B1-P1 (Dewatering), a facility planned for the lagoon area. Further, B1 is represented on the timeline as still underway as all other Phase 1 biosolids projects begin on lagoon locations. Why? Isn't it obvious that, until the specific

nature and timing of the B1 actions are known, as determined by studies and regulators, nothing can be built on these lagoons?

Worries about the lagoons also arise from recent agency comments in responses to this DEIR[2] raising concerns that these lagoons may be jurisdictional wetlands and include critical habitat for the endangered salt marsh harvest mouse. The combination of hazards, wetlands and habitat make it critical that these lagoons be subject to thorough technical and agency study before there can be any consideration of use of this acreage for expansion. If to be so used, there will need to be finalized determinations detailing what mitigation is needed or is even available to address hazard, biological and possibly other impacts. 11 cont'd

It comes down to a great uncertainty, clearly known by the Plant, about whether or not any or all of these lagoons can be made available for Plant expansion. Why, if Phase 1 projects depended upon lagoon availability, weren't lagoon studies, contaminant maps and a final clean-up plan provided in the released DEIR?

Another dependency arising from this situation is the designation of existing buffer lands for non-Plant uses. If the Biosolids facilities can't be placed on the lagoon area, where would they be placed? Clearly any land use decision allotting buffer lands for other uses is premature until the B1 Project is resolved. As the buffer lands are held primarily to serve the Plant, for the time being all other proposed land uses are moot. With botched planning and the domino-dependencies, the DEIR's analysis is inadequate, insufficient and surprising in the omission.

Comments Responding to Specific Content

SUMMARY SECTION: There are several omissions in the Summary section. S.1 Summary Project Description needs to mention that the Project in question has Program and Project levels. Table S-1 columns are titled "Project Level" and "Program Level" without explanation of what those terms mean even though this may be the first time they are used in DEIR text or titles. Table S1 is incomplete as it does not include Impact G-1. 12

Conclusion, Summary Section: Modify the section to include omissions mentioned.

1.1 PURPOSE OF THE ENVIRONMENTAL IMPACT REPORT: This section does not explain the purpose of the Program level of the document and it should. 13

Conclusion, 1.1: Modify the section to discuss the purpose of the Program level.

3.3.2, p.3-10 and 3.6.4, p. 3-54, Economic Development: Section 3.3.2 includes the statement: " The leasing of Plant lands for development could also benefit rate payers by generating a supplemental revenue stream to offset some of the Plant's operating costs." In 3.6.4, "to generate revenue" is given as one of the intents for Economic development. However, the DEIR provides no financial analysis of a revenue benefit nor discussion of to whom it would accrue. During the final stages of the three-year Master Plan Process, presentation of such data by then-Director Stufflebean concluded that (1) lease revenue, accrued to cities served, would be minimal at best, off-setting very little of the Plant's costs and (2) retail sales tax revenue would accrue to San Jose's General Fund i.e. providing no benefit to the Plant or to non-San Jose ratepayers. 14

[2] Regional Water Quality Control Board, 2/25/13; US Fish & Wildlife Service, 2/22/13

It is possible that the WPCP may develop some new revenue streams associated with processing wet organic waste (food, oil and grease) or biosolid products. This potential revenue is not discussed in the DEIR and should be.

If revenue is given as a potential benefit derived through economic development or expansion of Plant services, the DEIR needs to include financial analysis projections by type of income accrued and to whom it accrued (Service area rebate, City of San Jose General Fund, Plant operations) for public review. 14 cont'd

Conclusion 3.3.2 and 3.6.4: The DEIR needs to provide a discussion of existing and projected PMP revenue streams, provide financial analysis of revenue accrued and describe distribution of accruals.

3.6.2 WPCP and Recycled Water Facilities; Effluent Release: This section mentions the existing Artesian Slough effluent outfall channel but does not mention the PMP's proposed effluent-fed freshwater pond and Artesian Slough Riparian Corridor nor the second effluent release channel proposed in the DEIR. This is inconsistent with other discussions in section 3.6 and is insufficient for information purposes. 15

Conclusion 3.6.2: Amend this section to include the proposed effluent routing and use.

3.6.3 Flood Protection Levee, pp. 3-49 to 3-50: This section discusses the levee that is undergoing a feasibility in the South Bay Shoreline. The DEIR states: "The Shoreline Study is expected to result in the construction of a levee along the southern levee of Pond A18 to provide adequate protection from future sea-level rise and flooding...The levee alignment shown in the proposed site plan is subject to change as the Shoreline Study is in the planning phase... The current schedule for the South Bay Shoreline Study calls for construction of the levee beginning in 2017."

Please clarify how delay of the levee construction or changes to the alignment may impact construction of the proposed project including compensatory mitigation. 16

We must restate here that the analysis of a possible future levee does not belong in this DEIR. Flood protection discussion and findings must be based on existing conditions. Further the DEIR at the program-level must provide and cannot defer a full and complete analysis of the existing levee.

Conclusion 3.6.3a: Amend this DEIR section to discuss the existing levee and its potential impacts derived from the proposed project. In addition, all other sections of the DEIR that must base discussions upon the levee, must be revised to use the existing conditions.

3.6.3 Marsh, Mudflat and Upland Habitat, pp. 3-50 to 3-52: The DEIR discusses the impacts of construction of Plant improvements but fails to provide any discussion of the consequences of different levee alignments on the construction of marsh, mudflat, and upland habitat. For the conceptual design provided the DEIR suggests, "With the projected 100 year sea level rise, the habitat islands and mud flat and salt marsh terraces would ultimately be inundated, and only the upland habitat would remain." Approximately how much "upland" area is envisioned under the conceptual plan? Under the conceptual design would transgression of tidal marsh species be possible? If so, would there be sufficient separation between trails on top of the engineered flood protection levee and tidal marsh species habitat? 17

The discussion is limited to conceptual plans of terraced habitat in pond A18. It should also describe existing marsh, mudflat and upland habitats on PMP lands. For instance, data in Appendix J reports that 160.8 acres of wetland habitat currently exist on PMP lands. These locations should be discussed in the DEIR. Owl habitat described subsequently in this section also serves as upland habitat and should be included in this section's discussion as well. 17 cont'd

The DEIR also discusses the possibility of reuse of biosolids as fill for construction of terraces. Even with consultation on fill quality with regulators, CCCR has serious concerns of contaminants that may be present and may impact wildlife and, through the food chain, potentially impact people. Please see more detailed comments responding to Section 4-11, Hazardous Materials and Hazards.

Conclusion 3.6.3b: Amend this section to describe the potential of alternate habitat configurations and describe existing marsh, mudflat and upland habitat more fully.

3.6.3 Riparian Habitat, Artesian Slough Riparian Corridor, p. 3-52: The "restoration" of riparian habitat along Artesian Slough appears to provide a service for the Plant lands rather than provide for wildlife associated with riparian habitat. This is corroborated by the description of the corridor as an "aesthetic feature" that will serve as a buffer between burrowing owl habitat and intense recreational uses (community park and sports fields), and as an "additional Plant outfall." Is this area proposed as mitigation for mitigation to riparian habitat? If so, it would likely fail to provide true riparian wildlife functions due to the high level of disturbance immediately adjacent in the sports fields as may include human disturbance, possible disturbance by domestic pets, attraction of nuisance species, increased noise levels, etc. 18

This discussion is introduced with comments that the existing riparian areas along Coyote Creek will be preserved but omits any detail on the location relationship of those areas to proposed development of roads, a bridge and light industry. That description should be included.

Conclusion 3.6.3c: Rewrite this section to provide separate discussion of existing wild riparian habitat from planned, quasi-riparian habitat providing park-like benefits to wildlife and to more accurately describe the setting of the Coyote Creek riparian area.

3.6.3 Freshwater Wetlands, p. 3-53: The DEIR states: "Since the wetland would receive fully-treated effluent, the wetland would not be a treatment wetland, but may function as mitigation for the development of the PMP." However, that same section of the DEIR states:

"Based on projected 100-year sea level rise and the elevation of the Plant's existing discharge pipelines, the Plant's current gravity discharge into Artesian Slough will become infeasible at some point in the future, and the WPCP will have to pump effluent into the Bay. *The wetlands would be created on the inland side of the proposed levee to store fully treated effluent prior to discharge into the proposed salt marsh and mud flat habitat...*" "*...The wetlands also have the potential to provide water quality benefits by removing trace materials and contaminants of emerging concern from the effluent.*" (emphasis added) 19

Please explain why these wetlands would not be considered a treatment wetland? If these wetlands are created to provide storage for fully treated effluent before being discharged to the bay, will they be subject to maintenance activities to retain their storage capacity?

Conclusion 3.6.3d: The DEIR's discussion of the Freshwater wetlands needs to be reframed to accurately describe the functional purposes of this wetland and of the ways wildlife may use it. 19 cont'd

3.6.3 Owl Habitat, p. 3-53: This sections states: "Approximately 180 acres would be reserved for nesting and foraging habitat. The intent of this area is to meet mitigation requirements for the PMP and potentially other development within Santa Clara County." This proposal is completely inadequate given the "Total Habitat Loss from Program Level Improvements and Other Proposed Lands Uses" (Table 4.7-7) is estimated to be 256.2 acres. Santa Clara Valley Audubon Society and other experts believe the extent of impacts to be substantially greater than 256 acres. The DEIR acknowledges (4.4.3.4, p. 4.7-37):

> "Other proposed PMP land uses planned to occur within these habitats that could affect these species are arterial road construction, restoration of Artesian Slough, restoration of the eastern stormwater channel, community park construction, industrial and commercial development, and institute construction. These land use changes would result in a significant *particularly more severe to western burrowing owl since the project site is one of only a few remaining nesting areas for this species in the South Bay Area.'* (emphasis added). 20

It is therefore, incomprehensible, that the DEIR should propose only 180 acres as mitigation for burrowing owl. The DEIR makes the following statement without providing any scientific rationale: "The temporal benefit of protecting and managing 180 acres of burrowing owl habitat well in advance (likely 10 years or more) of impacts from program-level WPCP improvements and other proposed land uses occurring is expected to adequately offset the future loss of burrowing owl nesting and foraging habitat." The DEIR erroneously concludes the impacts to the burrowing owl are less than significant with the implementation of the mitigation measure, again without providing scientific rationale to support this conclusion.

Conclusion 3.6.3e: This section and the PMP proposal overall must be changed to apply the appropriate analysis in defining the acreage that must be reserved for burrowing owls.

3.6.4 Economic Development, Introductory comments, pp. 3.54: As stated previously, CCCR opposes the development discussed in this DEIR. If any development is permitted, it will be essential that the actions provide maximum safeguards for wildlife, particularly in light of varied, sensitive habitats of and beyond the Plant lands. The project description should include a discussion of development requirements that will be necessary to respect the nature of this setting. Building, infrastructure and landscape design need to incorporate wildlife-safe features. Night lighting must be directed downward and turned off when not needed. Window treatments must be bird-safe to prevent collisions. Landscaping needs to utilize native species primarily and avoid grass lawns. Pesticides or herbicides, if used, must be wildlife-safe with measures taken to avoid storm water runoff contamination. Buildings and landscape features should include deterents to prevent perching or nesting by avian-predators. 21

Conclusion 3.6.4a: Amend the DEIR to incorporate the wildlife-safe protections for any structure and landscape development or improvement, as described above.

3.6.4 Economic Development, Flexible Space and Open Space, pp. 3.54: This discussion represents a major flaw in the DEIR at the program level. As "Flexible Space" is NOT a land use, the section impermissibly defers required land use analysis to some future date. The DEIR did provide a list of possible land uses, each of which must be analyzed to fulfill the requirements of adequate 22

environmental review. Table 3-9, Figure 3-14, and page 3-57 use of the term designate certain lands east of Zanker Road as "flexible space." This use is overly vague and prevents a reasonable understanding of future uses of 247 acres of the project area. Light industrial development, recreation, habitat, and/or other open space uses do NOT have similar impacts to aesthetic, hydrological, water quality, or biological resources. The different uses mentioned each require unique analysis of impacts. Even at a program level, the DEIR needs to provide more specificity regarding the types of impacts that could occur at specific locations for the different uses and to identify, assess, and propose mitigation measures for those impacts to existing resources. Recreation is a broad term. There could be substantial variability in the magnitude of impacts to biological resources amidst active and passive recreational uses As this "flexible space" is located along the Coyote Creek corridor, a highly sensitive bird nesting area, identification of the suite of activities that will occur immediately adjacent is extremely important, particularly in assessing the adequacy of avoidance, minimization and compensatory mitigation measures. 22 cont'd

Conclusion 3.6.4b: Amend the DEIR discussion to provide a basis for Program level analysis of each of the possible uses and potential impacts in the land area called "Flexible space."

3.6.5 Recreation, Community Park and Sports Fields: The DEIR states the fields will have night lighting. Lighting is just one of the impacts that sports fields have on wildlife-sensitive areas like the PMP buffer lands. The fields also introduce noise, trash and movement impacts. All impacts should be avoided by not placing fields in such a location, particularly as critical habitat for burrowing owls. 23

Conclusion 3.6.5: Amend the DEIR to analyze all the impacts of sports fields on sensitive habitats and wildlife.

3.10.1 Regional Plans and Policies, pp. 3-67 to 3-69: Two plans should be added to this section as both are or will be relevant to the PMP.

- Santa Clara Valley Habitat Conservation Plan and California Natural Communities Conservation Plan (FWS) 24
- Recovery Plan for Tidal Marshes of Northern and Central California (FWS)

Conclusion 3.10.1: Add the above mentioned plans mentioned above to the DEIR.

4.2.1.2 Land Uses in the Vicinity: The land uses in this section include the Refuge, mentioned here and elsewhere in the DEIR. For the reference value of planners, contractors and to suitably inform the public, the description of the Refuge should be improved.

While handled somewhat differently, the most effective Land Use description of this Refuge that has been used locally was written by the City's planning office for the First Amendment of Final EIR for the Newby Island Landfill Expansion. The particular text is included in the comment package. 25

Another attachment is a map of the Refuge. Repeatedly through the DEIR, maps and descriptions understate the Refuge's presence along PMP boundaries. For instance, lands within Coyote Creek Bypass Channel that separate A18 from Newby Island are part of the Refuge, from the Recycling facility to Coyote Creek. Understatement of the Refuge's presence can misinform DEIR readers (and future reference users) about a location's ecological sensitivities and the Refuge's responsibilities and jurisdiction. As the Refuge shares the longest boundary with the PMP lands of any neighbor, better information will improve the DEIR's effectiveness.

This section should describe the human uses of the Refuge's Alviso site. School trips bring thousands of students there annually to participate in the environmental education programs. Weekends provide drop-in interpretative programs for the general public.Trails are available on any day to explore the wetlands and enjoy wildlife. This location, with in-progress restoration, is a designated demonstration site for the South Bay Salt Pond Restoration Project (Salt Pond Project) and, as such, is a tourist destination. 25 cont'd

Conclusion 4.2.1.2: Improve the description of the Refuge in this section and throughout the DEIR where appropriate.

4.1.3 Project-Level Versus Program Level Evaluation: As discussed earlier, the DEIR failed to provide any easy to understand guide to how the DEIR functions as a Program EIR that serves also as a Project EIR and Tiering EIR nor to define the terms (program, project, levels of detail, tiering) nor the functional relationships of program-project across levels. The DEIR needs a place to provide that thorough discussion. This section seems like the place to do it, at the outset of applying Program and Project in the analysis of Environmental Setting, Impacts and Mitigation Measure. 26

There is a need too for the DEIR to have a place where it compiles all the resulting Program and Project components in chart form, demonstrating impact dependencies and relationships. Although this section may not be the place for such information, it could inform readers where to find it, possibly as an Appendix.

Conclusion 4.1.3: Convert this section's discussion to one meant to be the reader's complete and easy-to-understand guide to the Program-Project topic.

4.2.3.4 Impacts and Mitigation Measures, SCVWD Permits and Guidelines & Standards for Land Use Near Streams, p. 4.2-27: The DEIR states: "As the roadway would pass directly through habitat mitigation sites established through conditions in permits and other approvals held by SCVWD, the City would need to work with SCVWD and the regulatory agencies to determine the conditions by which the road would be allowed and the necessary modifications to existing permits and management requirements." his statement in adequately informs the reader.

What regulatory agency/agencies required the creation of the mitigation site - is this referring to the federally-listed salt marsh harvest mouse mitigation site? If this area was required as mitigation for previous impacts to the species and/or waters of the U.S., impacts should not be permitted, as this results in additional adverse impacts to the habitat and species, including temporal losses. The DEIR concludes that coordination with agencies would render this impact less than significant, and that no mitigation is necessary. Impacts should not be authorized in a mitigation area as these areas are usually required to be protected in perpetuity. If the agencies were to concede and permit impacts, there should definitely be an expectation of a requirement for mitigation and it should be substantially greater than a 1:1 ratio. The DEIR should not understate a likely significant impact to mitigation, as implied in its text here. 27

Conclusion 4.2.3.4: The DEIR must rewrite this section to accurately represent the impact liability that would be incurred by the proposed roadway.

Table 4.2-4, Plant Master Plan Consistency with Relevant Plans and Policies, City of Milpitas General Plan, p. 4.2-25: Under Consistency with the Plant Master Plan, the table states: "Development of a trail along the west bank of Coyote Creek is not possible due to a highly 28

sensitive bird nesting area." Given that sensitivity, please also explain how an arterial roadway and proposed light industrial park would be protective of "a highly sensitive bird nesting area?" 28 cont'd

Conclusion Table 4.2-4: The DEIR needs to amend the Table 4.2-4's content to include all impacts the PMP proposals would incur or avoid to protect this highly sensitive bird area.

4.4 Noise and Vibration: The most obvious problems with this Section of the DEIR are its multiple omissions.

■ Sensitive receptors (human): The Refuge Environmental Education Center (EEC) needs to be listed as an adjacent sensitive receptor. Located just across Artesian Slough from the lowlands of the PMP's Nine Par Site, this public facility annually hosts thousands of children participating in indoor/outdoor environmental programs on weekdays. On any day, visitors come to the refuge for the quiet enjoyment that is expected on Refuge trails. Increases in background noise through changes in day-to-day operations at the WPCP, or from construction related activities, will certainly have an adverse impact on those experiences, and in fact, visitors to the EEC may be more sensitive to increases in noise from any activities at WPCP due to their desire to escape from the urban environment. In both cases noise and vibration on PMP lands can be disruptive to the quality of human experiences and, perhaps, harmful. 29

Conclusion 4.4a: Add the Refuge's EEC to the list of sensitive receptors to be included in impact analysis of noise and vibration.

■ Sensitive receptors (wildlife): Given the extensive and varied wildlife habitats within and adjoining PMP lands, construction and operations on PMP lands have high potential of noise and/or vibration impacts on a broad spectrum of wildlife, disrupting nesting, foraging and other activities.

The DEIR does not adequately analyze the adverse impacts of operational noise on existing wildlife and does not analyze the adverse impacts of construction noise or vibration at all. Noise impacts to wildlife including wintering, migratory, and breeding birds, and salt marsh mammals are not adequately mitigated. This is a significant flaw in the EIR and must be rectified and fully mitigated. Species utilizing areas away from human activity, may not be as impacted. However, the normal behavior of species currently utilizing habitats within the vicinity of proposed construction may be adversely impacted. Studies of the impacts of the effects of anthropogenic noise suggest the noise interferes with territorial vocalization (i.e. impacts to birds in breeding season) and the density of passerines occupying suitable habitat. These studies provide evidence that anthropogenic noise and vibration impacts on wildlife are not speculative, can be significant, and should be analyzed and avoided or fully mitigated.[3][4] 30

Conclusion 4.4b: The DEIR needs to provide analysis of the impact of noise and vibration on wildlife species. The analysis must take varied locations into consideration to provide for species in all ecosystems present and nearby inclusive of the creek, various wetlands and upland habitats

■ Pile Driving: Pile driving impacts are not analyzed nor are impacts defined and mitigations developed. Section 3.5.9 of the DEIR states that "Pile driving for structural foundations may also be 31

[3] Fuller, Warren, and Gaston. 2007. "Daytime noise predicts nocturnal singing in urban robins." Biol Lett 2007 August 22: 368-370.

[4] Bayne, Habib, and Boutin, October 2008. "Impacts of Chronic Anthropogenic Noise from Energy-Sector Activity on Abundance of Songbirds in the Boreal Forest." Conservation Biology 22 (5): 1186-1193.

needed..." and "...pile driving up to approximately 25 feet in depth may be required..." The omission of pile driving noise and vibration analysis must be added and, if impacts cannot be avoided, appropriate mitigated. The analysis must address impacts to humans and to wildlife. 31 cont'd

Conclusion 4.4c: The DEIR must perform an analysis of pile driving impacts, both noise and vibration, on wildlife receptors and create a construction management plan specific to avoiding, minimizing and/or mitigating impacts created.

4.5 Air Quality (Odor): There is a significant program-level omission in this section's discussion of odor that cannot be deferred. The analysis solely discusses sensitive receptors *outside* PMP land boundaries. It does not analyze nor propose a plan for monitoring odor impacts *within* PMP lands and for those locations planned for public use or development. Plant staff has informally acknowledged that it does not expect that odors can ever be fully eliminated. In that case, there is a need to know where and when odors are and will be evident on PMP lands, information that is needed quantitatively to measure the effectiveness of Plant actions intended to reduce odors. This is a Program-level issue requiring a PMP lands monitoring plan that will provide the baseline that can be used to determine the locations, intensity, frequency and date/time of odors and monitor the success of Plant improvements. This action will be necessary to establish when/if odor levels are low enough to consider any development, including open space public access. Baseline criteria gathered can be used to develop gating or trigger metrics to guide subsequent, tiered projects. 32

Conclusion 4.5: The DEIR needs to develop an odor monitoring and reporting plan within PMP lands and use it to establish Program-level measures to be applied to tiered projects.

4.7.2.1 Federal Regulations, Federal Clean Water Act (Sections 401 and 404): This section of the DEIR did not include certain information that is highly relevant in this DEIR, particularly pertaining to the plan to build a bridge over Coyote Creek. The 404 (b) (1) Guidelines (40 C.F.R. 230.10) require that applicants who wish to dredge or fill wetlands must rebut the presumption that a practicable alternative exists that is less environmentally damaging. *The preamble to the Guidelines states that it is the applicant's responsibility to rebut this presumption.* This DEIR needs also to consider that the Memorandum of Agreement between EPA and the Corps concerning mitigation under the CWA 404 (b)(1) Guidelines (Mitigation MOA) states:

1. Section 230.10(a) allows *permit issuance for only the least environmentally damaging practicable alternative.* The thrust of this section on alternatives is avoidance of impacts. Section 230.10(a)(1) requires that to be permittable, an alternative must be the least environmentally damaging practicable alternative *(LEDPA).* In addition, Section 230.10(a)(3) sets forth rebuttable presumptions that 1) alternatives for non-water dependent activities that do not involve special aquatic sites are available... 33

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

Sequencing requires the applicant must first *avoid* impacts to wetlands, next *minimize* those impacts, and only after avoidance and minimization of impacts has occurred, compensate for any unavoidable impacts.

If the PMP proceeds to the point where it would initiate actions to build roadway to Dixon Landing Road, these rules will be a significant obstacle. 33 cont'd

The City will have to rebut the presumption that a practicable alternative exists that is less damaging to wetlands or special aquatic sites.

Conclusion 4.7.2.1a: (Federal Clean Water Act (Sections 401 and 404)): To present the regulatory issues factually, and as would be significant for this project, the DEIR should include an explanation of the Clean Water Act's presumption rebuttal and sequencing rules.

4.7.2.1 Federal Regulations, Federal Migratory Bird Treaty Act: The language in the DEIR should be amended to clearly state the intent of the MBTA. The County of Ventura has a fact sheet with language that we suggest the DEIR use. (http://www.ventura.org/rma/planning/pdf/bio/Protection_of_Nesting_Birds.pdf)

> "Under the provisions of the MBTA, it is unlawful "by any means or manner to pursue, hunt, take, capture (or) kill" any migratory birds except as permitted by regulations issued by the U.S. Fish and Wildlife Service (FWS). The term "take" is defined by FWS regulation to mean to "pursue, hunt, shoot, wound, kill, trap, capture or collect" any migratory bird or any part, nest or egg of any migratory bird covered by the conventions, or to attempt those activities." 34

Conclusion 4.7.2.1b: Improve this section of the DEIR by replacing current explanation with text suggested above.

4.7.2.4 Local, Envision San Jose 2040 Plan (General Plan) Policies: Table 4.7-1 lists the Environmental Goals and Policies of the General Plan that are relevant to Biological Resources. Among them are Goals and Policies with which the Proposed Project conflicts, such as:

ER-3	Preserve and restore natural characteristics of the Bay and adjacent lands, and recognize the role of the Bay's vegetation and waters in maintaining a healthy regional ecosystem.
ER-3.1	Protect, preserve and restore the baylands ecosystem in a manner consistent with the fragile environmental characteristics of this area and the interest of the citizens of San Jose in a healthful environment.
ER-3.2	Cooperate with the County, USACE, EPA, CDFG, BCDC and other appropriate jurisdictions to prevent the degradation of baylands by discouraging new filling or dredging of Bay waters and Baylands.
ER-3.4	Avoid new development which creates substantial adverse impacts on the Don Edwards San Francisco Bay National Wildlife Refuge or results in a net loss of baylands habitat value.
ER-4	Preserve, manage, and restore habitats suitable for special status species, including threatened and endangered species.
ER-4.1	Preserve and restore to the greatest extent feasible, habitat areas that support special-status species. Avoid development in such habitats unless no feasible alternatives exist and mitigation is provided of equivalent value.
ER-6	Minimize adverse effects of urbanization on natural lands adjacent to the City's developed areas.

35

The proposed economic development of the WPCP bufferlands and areas to be retired, the sports fields in their current location adjacent to burrowing owl habitat, and the future plant expansion area (if there are impacts to wetlands or special status species) are among the DEIR's conflicts with Environmental Goals and Policies of the General Plan. 35 cont'd

Conclusion 4.7.2.4a: We ask that proposals in this DEIR that are in conflict with the General Plan's Environmental Goals and Policies be are changed or deleted to achieve compliance.

4.7.2.4 Local, City of San Jose Council Policies, Streetlights, Outdoor lighting: A very significant impact on wildlife is produced by night lighting, exposing small nocturnal animals to predators, confusing migratory flocks passing above, and stressing species in a myriad of ways. This impact is not addressed in City policies but implied in General Plan Goals ER-3 and ER6.

Fly out of San Jose Airport after dark and sit on the right side of a plane, you will quickly see a shock of intense lighting as the plane nears the Bay. The light emanates from the Plant's 24 hour operations and stands out dramatically against the generally darkened spaces between SR 237 and the shoreline. The fact that that visual impact exists stands in stark contrast to the City Council lighting policies described in the DEIR. Those policies do not apply to the Plant nor does either address avoidance of impacts on wildlife. Nor does the DEIR discuss lighting impacts on wildlife, which it should.

Light pollution is documented to have serious adverse impacts for a wide range of wildlife ranging from invertebrates to mammals. It disrupts migratory patterns, foraging capabilities, predation, nesting, breeding, etc.[5] Longcore and Rich report the findings of Buchanan[6] in which three different species of amphibians forage at different illumination intensities. As an example the squirrel treefrog (*Hyla* squirrela) forages only between 10^{-5} lux and 10^{-3} lux under natural conditions, while the western toad (*Bufo boreas*) only forages at illuminations between 10^{-1} and 10^{-5} lux. Will either succeed when humans turn the lights on? 36

Evidence suggests light pollution affects the choice of nesting sites in the black-tailed godwit, with choice locations being the farther away from roadway lighting (De Molenaar et al 2000, in Longcore and Rich). Buchanan found frogs he was studying stopped their mating calls when the lights of a nearby stadium were turned on.

Sufficient evidence exists that demonstrates artificial lights have adverse impacts on wildlife. As is evident in the City Council policies, the City is well aware of the energy waste and urban glare impacts that are of concern to humans. That awareness needs to be extended to wildlife, particularly in the habitat-rich location of this Project where every attempt should be made to avoid habitat-intrusive light-shed. Whether it is the overnight lighting of the Plant, the placement of lighted playing fields, or parking lots of light industrial buildings placed near Coyote Creek, light pollution is an impact that must be addressed at the Program-level in the DEIR and be applied throughout the lands of the Proposed Project.

Conclusion 4.7.2.4b: On the Program-level, the DEIR must analyze existing and potential light pollution, especially as it may impact wildlife, and is associated with the Proposed Project. The DEIR must set mitigation standards to be applied to all current and tiered projects on the lands involved.

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[5] Longcore and Rich, "Ecological Light Pollution" Front Ecol Environ 2004, 2(4): 191-198

[6] 1998 "Low-illumination prey detection by squirrel treefrogs," J Herpetology 32: 270-74

4.7.3.4 Biological Resources, Impacts and Mitigation Measures

4.7.3.4a Biological Resources, Quality of Content and Presentation:. The discussion of project impacts as they pertain to biological resources makes the distinction between project-level and program-level impacts. This entire section of the DEIR (excepting the discussion of Congdon's tarplant) is extremely difficult to follow. Clearly an attempt was made to differentiate between the requirements of a project-level EIR and those of a programmatic-level EIR, however, the discussion of biological resource impacts and mitigation measures, in large part, fails on either level. In text below, we provide discussion and recommendations for improvements to Section 4.7, Biological Resources, of this DEIR.

A description the impacts should provide sufficient information for the public and decision makers to understand the nature of the impacts (including whether the impacts are permanent-temporary, direct-indirect, location, timing, etc.) and the magnitude of those impacts on the resource. If we consider the impacts to riparian habitat of Coyote Creek, as an example, light industrial development, recreation, habitat, and/or other open space uses would not have similar impacts or magnitudes of impact on the riparian habitat. Light industrial development could have much greater impact than any of the other proposed uses both in the intensity of the impact and the type of impact e.g. significant increase in human disturbance, traffic, light pollution, introduction of impervious surfaces, polluted runoff, and construction related impacts of noise, vibration, etc. Consideration of each land use in turn, necessitates the development of different mitigation measures. 37

The impacts to waters of the U.S., waters of the State, and special status species both at the project-level and at the program-level should be depicted on a map of the project area.

Tables 4.7-4 and 4.7-5 describe the species-habitat associations and the project and program-level habitat impacts. "Salt marsh" and "salt panne" habitats are not included on those tables, but the text of the DEIR suggests impacts could occur in these habitats. The text also differentiates between "inactive biosolids lagoons" and "drying beds" - are they lumped together in these tables? The discussion regarding "marsh-associated birds" mentions "freshwater marsh" near Coyote Creek in addition to several other habitat types, then states, "Project activities planned to occur within these habitats that could affect these species are..." Will project activities impact freshwater wetlands?

Conclusion 4.7.3.4a: Improve Section 4.7 impact discussion by utilizing suggestions provided and/or otherwise rewriting to clarify program versus project usage and generally make the discussions easy to follow. The improvements will better inform readers and also future staff who turn to the document as reference.

4.7.3.4a Impacts and Mitigation Measures

General comment, Impacts and Mitigation Measures: *Mitigation Measures for Special Status Species are not Less than Significant after Mitigation.* The DEIR should provide details not only of how the impacts will be avoided or minimized, but also of any proposed compensatory mitigation (including location and timing). The DEIR improperly reaches less than significant determinations for salt marsh mammals, raptors, and marsh associated birds. Project-level improvements would adversely affect approximately 0.70-acres of alkali grassland, 47.19 acres of developed/landscaped land cover, 0.40-acres of non-tidal marsh, 9.41 acres of ruderal land cover, and 35.4 acres of inactive biosolids lagoons. 38

Note: In the Biological Resources comments that follow, our conclusions are contained within the particular discussions, differing from elsewhere in this letter, so that important context is retained. 38 cont'd

MM BIO-1, Reduce Impacts to Tarplant: This measure calls for the collection and application of Congdon's tarplant seed either alone or as a component of the revegetation mix to areas of temporary impacts or to a replacement area to be determined in consultation with resource agency personnel. The description produces significant questions.

- Will an adequate amount of seed be collected without detriment to the existing population?
- What is meant by "revegetation will be considered successful if the species is found to be occurring throughout the reseeded areas. If unsuccessful..." What constitutes success? What is the predicted size of the areas of temporary or permanent disturbance? What number of plants would constitute "success" and in what density?
- "During the second year of monitoring, if seeding of previously unoccupied habitat is successful [an area that was unsuccessful in the first year?], mitigation will be deemed successful and no additional monitoring will be required." Is period of monitoring acceptable to the resource agencies?
- "Conduct weed control activities, at least annually, in areas of occupied Congdon's tarplant habitat adjacent to the proposed trail." Only there? Shouldn't this be required in all areas occupied by Congdon's tarplant? 39

The text also says: "Install informational and warning signs along trail in areas adjacent to habitat occupied by Congdon's tarplant instructing trail users to stay on the trail." Signage has been demonstrated to be completely ineffectual in reducing trespass into areas supporting populations of sensitive or listed species. Recent studies by USGS scientist Kevin Lafferty[7] at the Coal Oil Point U.S. Reserve in Santa Barbara concerning human impacts to shorebirds on a beach showed that after a year of very adequate signage there was no improvement in the public's adherence to staying out of restricted areas. However, once a steward/docent program was in place on the beach, the public's compliance with restricted zones increased exponentially. While a docent program may not be possible, monitoring of public compliance with signage and an enforcement program must be implemented.

MM BIO-2a, Special-status Fish Measures: As written, the mitigation measure does not reduce the project/program-level impacts to a Less than Significant level. Additional protections need to be added to this mitigation measure. The project proponent should be required to provide pre- and post-construction documentation of stream bottom topography if temporary structures are placed within the creek (e.g. cofferdams, etc.). If stream banks are disturbed, not only should they be replanted with native plant species, they should also be completely stabilized to avoid erosion during the rainy season. 40

MM BIO-2b, Western Pond Turtle Measures: As written, the mitigation measure does not reduce the project/program-level impacts to a Less than Significant level. This mitigation measure should be amended to state that a qualified biologist will be on-site during any construction activity in suitable western pond turtle habitat (aquatic and upland), as turtles may be present hut may be missed due to their cryptic nature, during the preconstruction survey. 41

MM BIO-2c, Salt Marsh Harvest Mouse (SMHM) and Salt Marsh Wandering Shrew (SMWS): 42

[7] Lafferty, Kevin. 2005 Final Report on the Western Snowy Plovers; Restoration of breeding by snowy plovers following protection from disturbance, Biodiversity and Conservation 92006 15:2217-2230

Measures specific to construction related activities proposed: 42 cont'd

- No construction during the breeding season (March-November for the SMHM and February-June for the SMWS)
- Preconstruction survey by a permitted biologist
- Surveys no more than 24 hrs in advance of construction
- If SMHM or SMWS found within the work footprint and impacts to the occupied area cannot be avoided, the project proponent will contact USFWS for appropriate protection measures

No mitigation measures are proposed post construction, and worse, there is no proposed restoration, enhancement, or preservation of SMHM/SMWS habitat to offset the losses of habitat to construction and/or development activities, or for potential take of SMHM due to construction related disturbance or mortality. Inconceivably, the DEIR arrives at a determination of "less than significant impacts." Similar substantive concerns exist for any program-level impacts to SMHM/SMWS.

The February 22, 2013 comment letter from USFWS, responding to the DEIR, states:

> ."..the Service believes the salt marsh harvest mouse is likely to occur within all non-tidal wetland vegetation and adjacent uplands within the inactive biosolids lagoons. The salt marsh harvest mouse is also likely to occur within all tidal marsh and salt marsh vegetation and adjacent upland refugia within and adjacent to the Plan area. . Therefore, the City should minimize the effects of capping and filling the inactive biosolids lagoons and other Plan activities on the salt marsh harvest mouse and propose suitable compensation such as the restoration, enhancement, and/or preservation of suitable tidal marsh and upland transition zone for the salt marsh harvest mouse within the Central/South San Francisco Bay recovery unit identified in the Service's Recovery Plan for *Tidal Marsh Ecosystems of Northern and Central California.*"

MM-BIO-2d, Raptor and Migratory Bird Nest Measures: As written, the mitigation measure does not reduce the project/program-level impacts to a Less than Significant level. How were the buffer zone widths determined for nesting birds? Projects in other areas of the state have utilized 250' for non-raptor nests and 500' for raptor nests, as seen at: 43

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=11&ved=0CDIQFjAAOAo&url=http%3A%2F%2Fwww.sjcog.org%2Fprograms-projects%2Fhabitat_files%2FSpecies%2FGolden%2520Eagle.pdf&ei=1rYrUZ33Aa_uigLr0YDgCg&usg=AFQjCNH5FVKtAaJYWXsKchl8mAhG6tTN7Q&sig2=GaGVUOACM4JSvKdIxm4Atw&bvm=bv.42768644,d.cGE&cad=rja

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http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CEIQFjAC&url=http%3A%2F%2Fwww.slocounty.ca.gov%2FAssets%2FPW%2FLOWWP%2Fdocument%2Blibrary%2FEvironmental%2BDocuments%2FCOA%24!27s%2FCOA%2B69.pdf&ei=ZrYrUaOTKa7RigLsgoDQBg&usg=AFQjCNGf-kv65Oo2ERyVGPkIhr6eRQxDvw&sig2=c_F722UznPtcwqJqmrcuHw&bvm=bv.42768644,d.cGE&cad=rja

The buffer zone widths must be substantially increased to ensure no take of nesting raptors or migratory birds. 43 cont'd

A requirement must be added that a qualified biologist be on-site if construction cannot be stopped, and an active nest has been located to monitor the behavior of the nesting birds, to assess whether the buffer zone width is adequate, and to ensure the nest is not abandoned by encroachment into the buffer zone.

MM BIO-2e, Western Burrowing Owl (BUOW) Measures: The measures proposed are simply inadequate. Table 4.7-7 Burrowing Owl Habitat Impacts and Mitigation, indicates the project-level and program-level impacts to BUOW habitat could result in the loss of 256.2 acres. The proposed mitigation is only 180 acres. The DEIR states, " This habitat loss would be particularly more severe to western burrowing owl since the project site is one of only a few remaining nesting areas for this species in the South Bay Area," yet proposes preserving considerably less habitat, while significantly increasing the human and other disturbance factors (direct and indirect impacts). CCCR supports the comments submitted by Santa Clara Valley Audubon with respect to BUOW impacts regarding the need to preserve greater acreage for BUOW. 44

We reiterate, the implementation measures proposed in the DEIR are insufficient, and the significant adverse impacts to avoid or mitigate (???) for the loss of special status species will not reduce the project/program-level to a Less than Significant level with mitigation.

BIO 3a, Impacts to Riparian Habitat: The DEIR (p.4.7-48) acknowledges, "Construction and maintenance of the northeast section of the proposed arterial road (i.e. the Dixon Landing connection) however, would potentially affect valuable riparian woodland habitat along Coyote Creek." The DEIR then mentions the creation of the Artesian Slough Riparian Corridor, Eastern Stormwater Channel, and preservation of existing habitat along Coyote Creek as being beneficial as it would "increase the extent of this sensitive natural community in the project site." We have already expressed our concerns regarding the wildlife functions of the Artesian Slough Riparian Corridor as the DEIR describes its purpose as aesthetic and as providing a buffer between the proposed development (Community Park, active sports fields, institute) and the BUOW preserve. 45

- We have also expressed our concerns regarding the adverse impacts of the proposed light industrial development on the riparian corridor of Coyote Creek.
- We wonder who constructed the trail along the eastern side of Coyote Creek. Were any restrictions placed over the alignment of trails on the west side of Coyote Creek when the eastern trail was established?

MM BIO-3a, Riparian Woodland Habitat Preservation-Program Level WPCP Improvements: Please define the suite of activities that are considered "maintenance activities." Please explain the circumstances under which "trimming of riparian trees" would be necessary. Is "maintenance" an ongoing activity or only anticipated during Landscape and Road Work? 46

Special Note re MM BIO-3b and MM BIO-3d: The position of Mitigation Measures BIO-3b and 3d should be swapped. Under the EPA's 404 b 1 Guidelines, impacts to waters of the U.S. must first be avoided, then minimized. Only after the impacts to waters of the U.S. have been avoided and minimized to the greatest extent practicable, is compensatory mitigation considered. 47

MM BIO-3b (henceforth 3c or 3d), Riparian Woodland Habitat Restoration: This measure appears to illegally defer mitigation. There is no explanation of why mitigation guidelines cannot be specified 48

utilizing the mitigation measure. For example, the use of deep dynamic compaction to construct the light industrial development might have adverse impacts on the riparian habitat, and also on the integrity of the banks of Coyote Creek. The use of stone columns might be cost prohibitive, etc. All these bits of information in turn, help determine the feasibility and practicability of the proposed light industrial (as an example). 54 cont'd

Conclusion 4.8: Insufficient information has been provided in the DEIR to determine the threat of seismic hazards has been reduced to a level that is Less than Significant.

4.9 Hydrology, 4.10 Water Quality, and Sea Level Rise:

It is of substantial concern that the PMP proposes to route untreated site storm water runoff through the proposed effluent channel to Pond A18. Given the "business" of the Plant and the contaminant threats of stormwater runoff, it is an environmentally careless action. Other development sites are finding ways to pretreat all runoff from impervious surfaces, a process that can surely be provided by core services of the Plant. 55

Conclusion 4.9, 4.10: The DEIR should discuss pre-treatment options for storm water runoff from the eastern side of the PMP lands.

4.11 Hazards and Hazardous Materials

The DEIR mentions the San Jose Police bomb disposal station without any further detail. Due to the nature of that operation, the question arises…what plans, if any, are in place to assess the site for contaminants once the site is abandoned by the Police?

Conclusion 4.11a: The DEIR should discuss the nature of the bomb disposal operation and any associated contaminant or hazard impacts that may exist at that location as a result. If there are impacts the DEIR must analyze and resolve through mitigation.

Related to possible reuse of Biosolids, the text reports: 56

> "...inactive biosolids are contained in a series of 25 lagoons that cover approximately 214 acres. As described in Chapters 2 and 3, the San José Police Department operates a bomb disposal facility within the inactive biosolids lagoons area but, with implementation of the PMP, this facility would be removed. Environmental sampling and analysis indicates that concentrations of chromium, cadmium and lead exceed the California soluble hazardous waste thresholds (STLCs), and various other constituents exceed ESLs and CHHSLs. The eastern lagoons and drying beds are likely to contain similar materials, but have not yet been investigated because they are currently in use. Because metals concentrations in the inactive lagoons exceed state hazardous waste thresholds, regulatory agency oversight would be required to ensure that biosolids are handled in accordance state regulations, to prevent harmful exposures to contaminants, and to avoid runoff or leaching of contaminants into nearby waterways and the San Francisco Bay."

In addition to the issue of metal contaminants, there is growing concern in the scientific literature regarding the presence of endocrine disrupting chemicals (EDCs) (aka disrupting chemicals, and pharmaceutical and personal care products -PPCPs) in biosolids. A 2010 paper, "Drugs in Water: A San Francisco Bay Case Study[8] reports that USGS scientists found antidepressants "discharged to 57

[8] Levy, Morgan. 2010. Drugs in Water: A San Francisco Bay Case Study. UC, Berkeley, Energy & Resources Group http://www.thesustainabilityreview.org/2010/11/24/drugs-in-water/

streams by wastewater treatment plants are taken up into the bodies of fish living downstream of sewage plants." And that "Researchers in the UK found that shrimp exposed to the antidepressant fluoxetine (Prozac) radically alter their behavior, endangering their own survival." Levy reports the SJWPCP found chemicals such as ibuprofen were significantly reduced by the plant's treatment processes, but chemicals such as Prozac virtually passed through the process untouched or even increased. Even more concerning, Levy reports, "In studies of soil fertilized with sludge product from wastewater treatment plants, researchers found that earthworms and vegetables had absorbed pharmaceutical compounds, thus posing a potential threat to food chains. EDCs have also been found to alter sexual expression in fish, and some of these chemicals can bioaccumulate and move up food chains just like mercury. 57 cont'd

Conclusion 4.11b: Unless the WPCP can demonstrate its biosolids do not contain EDCs/PPCPs, we do not recommend the use of biosolids in the proposed engineered levee or as terraces.

6.1.4.2 Cumulative Analysis, Transportation: It is a concern that we have been unable to find a transportation analysis of the DEIR that accounts for the heavy truck traffic data from all sources involving local and State Route impacts. Truck traffic along Zanker Road/Los Esteros Road must consider the sum of all heavy truck traffic *existing, or known as planned,* and the related Level of Service impacts at the SR 237/Zanker Road intersections. We provide here a list of truck-dependent operations along this roadway and that *we have not seen compiled as a group* in the DEIR. The cumulative impact of these operations must be analyzed for impacts in conjunction with construction traffic impacts, ongoing operations and planned operations.

GreenWaste businesses on Los Esteros Road
- Zanker Landfill, waste receiving
- Zero Waste dry fermentation digester (under construction)
- Zanker Road Materials Processing Facility (MPF) (landfill/sorting ops, currently)[9]

58

WPCP proposed trucking operations
- Anaerobic digestion wet organics receiving (fats, oils and grease)
- Biosolids processing, products distribution

Conclusion 6.1.4.2: The cumulative trip totals, air quality impacts, GHG emissions, roadway quality, local traffic disruption and SR237 impacts of large, diesel truck traffic must be analyzed in the DEIR to more completely understand the impact of the planned WPCP actions under the PMP. The DEIR is inadequate under CEQA without this analysis.

As is evident, the facts add up to a fatally-flawed DEIR. It must be revised throughout and fully recirculated. There is no other remedy. It can be the time to re-assess the decision to place Plant improvements within a land use EIR. It strikes us that separate EIR processes for the two actions may be a solution, with the Plant EIR completed first. We are hopeful that our comments and those of agencies, respected experts and other members of the community will be helpful guides to a much improved environmental process. 59

[9] Zanker Landfill and MPF has not constructed the MPF facility approved in 2008. However, the company has initiated a revision of its 2008 plan with the City, File No. PDC12-029. The new project retains the plan to build the MPF facility while increasing permitted landfill capacity and height, still requiring sustained truck traffic.

CCCR, 3/13/13 re File No. PP11-043, PMP DEIR

The CCCR is a 501(c)(3) nonprofit corporation established by citizens who led the efforts that founded the Refuge in 1972. Fully volunteer-run, it acts to ensure that the Refuge fulfills its Congressional acquisition authority to expand its land holdings to protect special and sensitive habitats and wildlife along the South Bay's shores. Very similarly, it acts on behalf of the continuous protection of the wildlife and habitats the Refuge and our wetlands must provide.

As may be needed, contact Eileen McLaughlin at 408-257-7599 or wildlifestewards@aol.com.

Sincerely,

Eileen P. McLaughlin
Board Member, CCCR

Carin High
Vice-Chair, CCCR

CC: Florence LaRiviere, Chair, CCCR

ATTACH: USFWS map of the Don Edwards San Francisco Bay National Wildilfe Refuge

Sierra Club Loma Prieta Chapter

Celebrating 80 years of protecting the planet

SIERRA CLUB

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February 26, 2013

Bill Roth
City of San Jose Department of Planning, Building & Code Enforcement
200 East Santa Clara Street, 3rd Floor
San José, CA 95113-1905

RE: San Jose/Santa Clara Water Pollution Control Plant Master Plan Draft Environmental Impact Report

Dear Mr. Roth,

The Sierra Club Loma Prieta Chapter understands that the City of San Jose would like to upgrade and modernize the Water Pollution Control Plant (WPCP). Our main concern is the proximity of the project and proposed new development to tidal marshlands, local streams and creeks and wildlife habitat.

The project vicinity includes wetlands and the largest continuous open space in the southern San Francisco Bay. The WPCP lands contribute to this important resource to local wildlife including the salt marsh harvest mouse habitat and western burrowing owls. The open space also provides flood protection to existing development in this area of San Jose and acts as a buffer to sea level rise.

Our comments on the WPCP Master Plan Draft Environmental Impact Report (DEIR) are attached. We believe it is essential for the DEIR discuss a no new economic development alternative for this project. Most of the nearby community of Alviso is situated at below sea-level. Like other low-lying areas around the Bay, Alviso's existence is in jeopardy if climate change and sea-level rise trends continue. Putting new businesses in an area so directly at-risk by sea-level rise doesn't make practical sense. San Jose should focus development in transit-friendly, urbanized areas and not in areas adjacent to the Bay. Even the proposed "nature center" seems unjustified with The Don Edwards San Francisco Bay National Wildlife Refuge providing similar educational resources close by.

Restoring pond A18 to wetland habitat and improving the already-existing levee are the right steps towards helping this region with flood coutrol, however this does not justify the addition of light industrial, commercial, and retail development so close to sea level. The environmentally superior alternative would guide such development to smart growth areas identified in the San Jose General Plan and preserve the WPCP site for habitat conservation, flood protection, and passive recreation.

Respectfully Submitted,

Katja Irvin
Chair, Water Committee
Sierra Club Loma Prieta Chapter

Michael Kerhin
Chair, Baylands Committee
Sierra Club Loma Prieta Chapter

San Jose/Santa Clara Water Pollution Control Plant Master Plan Draft Environmental Impact Report

Comments from the Sierra Club Loma Prieta Chapter

Section 4.9 Hydrology, Topic HYD-5 (page 4.9-44)

This topic addresses the **following thresholds of significance**. Will the project:

- place structures that would impede or redirect flood flows within a 100–year flood hazard area; or
- expose people or structures to a significant risk of loss, injury, or death involving flooding, including flooding as a result of the failure of a levee or dam.

Comment #1: The analysis discusses only the risks associated with coastal flooding and **does not discuss risks associated with stream flooding or the impact of placing structures within a 100–year flood hazard area. Evaluation of the thresholds of significance is not adequate.** What if Anderson Dam fails during a major storm event? How will changes in ground surfaces and the introduction of significant fill impact the likelihood of flooding in Alviso? The analysis is incomplete.

Comment #2: The data used in the analysis under Topic HYD-5 is misleading as follows:

- 100-year flood hazard areas are determined by FEMA, not by USACE. USACE analysis is irrelevant and should not be used to determine significance.
- There is no analysis of the impact of sea-level rise on the risk of significant loss due to failure of a levee. In fact, the analysis says "these assessments are about 20 years old and may underestimate flood risks and extents by omitting recent sea level rise."

The analysis should be updated to reference and discuss the correct information. FEMA data should be used when discussing "100-year flood hazard areas" and sea-level rise should be included in the discussion.

Comment #3: The mitigation measures are inadequate. There is too much uncertainty and therefore too much risk. Assessments and data related to sea-level rise are not yet available; the amount of risk reduction provided by the Shoreline Study levees and restoration of pond A18 is unknown. Therefore, a **mitigation measure should be included to: require *Other Proposed Land Uses* to be staged after commencement of construction of levees, and after completion and analysis of the pond A18 wetland restoration.** At that time more information will be available and a supplemental EIR can be done to adequately analyze flooding impacts related to the *Other Proposed Land Uses*.

Impact C-HYD: Cumulative impacts on hydrology (page 6-26)

Comment #1: **The analysis in this section is contradictory with respect to the potential impacts of climate change on precipitation.** First, the analysis says "climate models have not provided a consensus on how total precipitation is likely to change in the future... [and] no models show statistically significant changes in extreme rainfall events." However, the next paragraph says "climate change is likely to result in ... more extreme storm surges, rainfall

events, and droughts." **With such an uncertain and risky scenario, the EIR should analyze and plan for the likelihood of storm surges, rainfall events and drought, and not just ignore an impact because 3-year old models did not show statistically significant changes on average.**

Comment #2 (Potential for Increased Coastal Flood Risk (page 6-32): This analysis states that "the Shoreline Study would likely include an adaptive management plan that would address increasing coastal flood risk due to sea level rise. Because the timing of the flood protection levee is somewhat uncertain (relying on as yet unauthorized congressional funding) and because numerous PMP facilities and other proposed development would be implemented within the FEMA 100-year coastal floodplain, increased coastal flood risks would be a potentially significant cumulative impact." Given the risks and uncertainty, simply implementing current building codes for structures in the 100-year flood plain is not adequate mitigation. **A mitigation measure should be included to: require *Other Proposed Land Uses* to be staged after commencement of construction of levees, and after completion and analysis of the pond A18 wetland restoration.** At that time more information will be available and a supplemental EIR can be done to adequately analyze the impacts of the *Other Proposed Land Uses* in relation to sea level rise.

Comment #3: The extent of uncertainty and risk related to climate change cannot be overstated. To protect future owners, users, and insurers, a **mitigation measure should be included to: require *Other Proposed Land Uses* to be staged after climate change models have improved and can provide better predictive capacities of the risks of building so close to sea level.** Once adequate models are available a supplemental EIR can be done to adequately analyze how climate change will impact the *Other Proposed Land Uses*.

Section 7.5 Alternatives Considered but Eliminated From Further Analysis

Comment #1: The analysis of alternatives is inadequate. **The essential function of the project is wastewater treatment and therefore it is essential to include the WPCP Improvements / No Economic Development Alternative in order to explore the full-range of feasible alternatives.** Economic development is not essential to the project and would likely occur at other nearby locations if the project site is not available. The analysis does not indicate that economic development or job creation in the area would be impacted. Furthermore, the analysis in Section 7.5 shows that the General Plan is currently internally inconsistent with regard to job growth and land use. The proposed project intends to amend the General Plan to change land use to increase jobs, but the No Economic Development Alternative would not diminish jobs. If the General Plan currently requires jobs to be created on the WPCP site, then it is internally inconsistent. The General Plan cannot explicitly require building in a location where environmental review is not complete. The General Plan should be amended to remove this requirement and should not be used as an argument to eliminate an alternative that should be included in a reasonable range of feasible alternatives for the project.

Given the uncertainty of developing the Other Proposed Land Uses at this time, it is essential that the EIR include the No Economic Development Alternative in the analysis. This would clearly be the environmentally superior alternative and the one that should be approved and implemented at this time.

SAN FRANCISCO
BAYKEEPER®

March 13, 2013

Bill Roth
Department of Planning, Building & Code Enforcement
200 East Santa Clara Street, 3rd Floor
San José, CA 95113-1905

Via electronic mail to bill.roth@sanjoseca.gov

RE: Draft Environmental Impact Report (EIR) for the San José/Santa Clara Water Pollution Control Plant Master Plan, File No. PP11-043, SCH # 2011052074

Dear Mr. Roth:

On behalf of San Francisco Baykeeper and our 2,300 members, please accept these comments to the Draft Environmental Impact Report (DEIR) for the San José/Santa Clara Water Pollution Control Plant Master Plan, prepared by the City of San José (City). In general, Baykeeper would like to express disappointment that the City has not made greater effort to consider a greater range of alternatives that augment the City's limited connectivity with San Francisco Bay, enhance habitat, and increase resiliency to flood risk and sea level rise. Of those alternatives considered, none consider feasible options to specific features of the Water Pollution Control Plant (WPCP), which may result in greater efficiencies, fewer environmental impacts, and potential cost savings. Alternatives considered are nearly identical in character and focus only on options for developing buffer lands surrounding the WPCP.

Dating back to the public scoping process in the spring of 2010, a number of organizations requested review of alternatives that limit new and redevelopment activities within the proposed project site to those activities necessary to meet water treatment needs of the communities served by the Plant. The public requested the City consider options in which lands not used for water treatment be dedicated to preservation, habitat restoration, or recreation, consistent with the ecology and the nature of the land. This requested alternative has yet to be presented to the public.

Comments contained herein are general in nature and serve to supplement the more detailed comments made by Citizens Committee to Complete the Refuge (CCCR) and others. It should be noted that comprehensive review of the DEIR in a timely fashion is hindered by the unwieldy nature of the DEIR. The City's choice to simultaneously evaluate project- and program-level components of the master plan has resulted in the evaluation of an insufficient range of feasible alternatives, at a level that more closely resembles an Initial Study. Given the scope and magnitude of this Proposed Project, located on some of the last remaining undeveloped lands along the South Bay, San Jose should re-evaluate their Master Plan, considering alternatives that benefit the community and environment to a much greater extent than what has been presented to date.

1. Inadequate Project Description and Piecemealing

Table 3-4 of the DEIR provides a summary of Water Pollution Control Plant (WPCP) improvement components, and whether they were evaluated at the project- or programmatic-level. This follows Section 4.1.3, which includes a figure indicating that a majority of the lands designated for the WPCP represent project-level improvements, while 'improvements' to surrounding land, including the 'residual solids management area' and 'bufferlands', shall be subject to programmatic-level evaluation.

Baykeeper is concerned that project-level evaluations for MPCP improvements have been combined with programmatic-level analysis for development of lands surrounding the WPCP. Through combining these efforts, the City has generated a convoluted and superficial document that fails to consider project alternatives for those projects designated for project-level evaluation and inappropriately considers a narrow range of land use alternatives for surrounding lands, which are inadequately analyzed even at the programmatic level.

Section 7.3 of the DEIR considers five (5) CEQA Alternatives:

- No Project
- Western Open Space Compressed Development
- Western Open Space Reduced Development
- Eastern Open Space Compressed Development
- Eastern Open Space Reduced Development

These Alternatives can be characterized as general options for land use planning in the lands surrounding the WPCP. None of these alternatives considers work within the WPCP itself. For example, consistent with comments on this DEIR by sanitary districts served by the WPCP, alternatives for headwork and primary treatments were not presented and impacts to cultural resources associated with these projects are inadequately mitigated. In addition, only one alternative for the biosolids treatment facility was presented, despite the opportunity for analyzing other efficient/effective treatment approaches, such as three-phase, two-phase acid/gas, or simultaneous digestion.

Failure to present an appropriate range of alternatives restricts public access to information that will adversely affect land use and wastewater treatment decisions for decades to come. Considering the scale and magnitude of this project, the City should take the appropriate steps to develop alternatives for each project component, or groups thereof.

2. DEIR Inconsistent with Ecosystem Recovery Goals for South San Francisco Bay

Aspects of the DEIR are inconsistent with ecosystem protection and recovery plans or goals established in the 1999 Baylands Ecosystem Habitat Goals report (Goals Report) and the 2010 Draft Recovery Plan for Tidal Marsh Ecosystems of Northern and Central California (Draft Recovery Plan).[12] The U.S. Fish and

[1] San Francisco Bay Area Wetlands Ecosystem Goals Project. 1999. *Baylands Ecosystem Habitat Goals*. Available at www.sfei.org

Wildlife Service (USFWS) is in the process of finalizing the latter plan, expected for released in mid-2013. Examples of inconsistency with the Goals Report and Draft Recovery Plan include:

a. ***Lack of predator control***: Consistent with comments to this DEIR made by the USFWS, the City should minimize the effects of predators on the salt marsh harvest mouse, California clapper rail, and western snowy plover by avoiding construction of trails and other facilities near habitats for these listed species, and implementing a USFWS-approved long-term management plan to control avian and mammalian predators. The Recovery Plan states predator control is particularly important in south-central and south San Francisco Bay around populations of California clapper rails. The DEIR fails to address the need for predator control or mitigate for likely impacts.

b. ***Ineffective mitigation for long-term invasive species invasion:*** Invasive vegetation control is only accounted for in Impact BIO-2, which addresses construction-phase invasive species controls. Consistent with comments made by the USFWS, the City should develop and implement a USFWS-approved plan to control invasive species, for the construction and operations phases. A long-term plan should also be developed to control perennial pepperweed (*Lepidium latifolium*) within and near WPCP lands similar to that developed by the San Pablo Bay National Wildlife Refuge. Finally, the City should adopt and implement the weed management plan currently being developed by the Don Edwards San Francisco National Wildlife Refuge. The Recovery Plan identifies perennial pepperweed in the vicinity of the Proposed Project area, in brackish marshes of the Alviso area. Given this species is known from brackish marsh, it is reasonable to assume that additional freshwater discharges associated with the proposed creation of a freshwater pond and outlet area could exacerbate this issue, requiring additional pepperweed control.

c. ***Freshwater habitat creation inconsistent with plans and regulations***: Current proposals for creation of wetland habitat are inconsistent with the Goals Report and Recovery Plan, which recognizes fresh/brackish marsh provides lower habitat quality for listed species, compared to salt marsh. The DEIR acknowledges that the inactive biosolids lagoons the City is proposing to cap and fill include approximately 50.6 acres of seasonal wetlands, freshwater, brackish, salt marsh, salt pannes, salt ponds, and open water. Although not addressed in the DEIR, USFWS comments to this DEIR indicate approximately 15 acres of these wetlands have revegetated with non-tidal salt marsh vegetation, including pickleweed.

   As stated in the USFWS' comments to this DEIR, salt marsh harvest mouse is likely to occur within all non-tidal wetland vegetation and adjacent uplands within these inactive lagoons. Conversion of habitat from non-tidal salt marsh to freshwater ponds and low quality riparian habitat proves inconsistent with the Recovery Plan and indicates a lack of appropriate planning and consultation with resource management agencies. The DEIR illegally defers mitigation for impacts to wetlands, stating 'the proponent shall obtain permits and approvals from the USACE, RWQCB, and CDFG.' Numerous courts have held that reliance on tentative plans for future mitigation after project

[2] U.S. Fish and Wildlife Service, Region 8. 2010. *Draft Recovery Plan for Tidal Marsh Ecasystems of Northern and Central Californio*. Sacramento, CA. Available at http://ecos.fws.gov

approval undermines and violates CEQA. Further, since freshwater habitat creation at inactive biosolids lagoons forms a large portion of the Proposed Project, these effects must be evaluated in an EIR prior to project approval.

As stated in the Recovery Plan, in 1991 the Regional Water Quality Control Board (Regional Board), under provisions of the State's Porter Cologne Water Quality Act and section 402 of the Federal Clean Water Act, required about 385 acres of full replacement for habitat values and acreage lost due to conversion of approximately 270 acres from salt marsh to fresh/brackish marsh in south San Francisco Bay from the WPCP. It is reasonable to expect that the Regional Board, CDFW, and USFWS would require greater than 1:1 mitigation for loss of non-tidal salt marsh, to maintain consistency with applicable laws and recovery plans. In addition, USFWS may require the restoration, enhancement, and/or preservation of suitable tidal marsh and upland transition zone habitat for the salt marsh harvest mouse within the Central/South San Francisco Bay recovery unit, as identified in the Recovery Plan. These needed mitigation measures have not been fully evaluated or committed to in the DEIR.

d. ***Master Plan fails to reduce the existing impacts associated with freshwater discharges:*** The Goals Report concedes that "Triangle" Marsh, north of Alviso and west of the railroad tracks and bordering Coyote Creek within the Alviso Sector, has been virtually lost to the salt marsh harvest mouse and shrews by the effects of brackish waters. This area has almost completely turned into brackish vegetation because of non-saline sewage water entering the Bay from the San Jose-Santa Clara Water Treatment Control Plant. According to the Goals Report, 'the only salvation of this former highly productive salt marsh is saltier water'. The Goals Report recommends increased salinities in the marshes of the 'Alviso Sector' (Albrae Slough, Mud Slough, Upper Coyote Creek, and Artesian Slough), to facilitate the re-conversion back to saline marshes. It is also recommended that these sloughs be widened from their present narrow, strip-like character, to provide higher quality habitat.

   Recommendations found in Appendix C of the Goals Report specifically address alternatives for reducing the impacts of conversion of salt marsh to brackish marsh at the discharge point from the treatment plant. These include locating the mixing zone inland from the Bay and having tidal marshes colonized with salt-tolerant plants on the margins of the Bay. Mixing could occur in a forebay, serving as a 'mixing pond'. Alternatively, a diffuser could be located at the terminus of a pipeline connected from the treatment plant to some point of high salinity, such as near the Dumbarton Bridge. Such alternatives are feasible, yet have not been considered in the DEIR. In light of sea level rise, the treatment plant's current gravity-fed discharge into Artesian Slough will become inoperable, suggesting these or similar alternatives should be considered in this EIR.

3. DEIR Fails to Adequately Address Flood Risk

Incredibly, even though almost the entire Proposed Project site is located within the 100-year coastal flood zone and that existing pond levees do not meet USACE and FEMA certification criteria, the DEIR contains virtually no flood risk analysis and claims flood risk is less than significant. This DEIR makes a

number of assumptions regarding current flood risk, the potential for completion of the Shoreline Study, and eventual construction of levees, which are not currently designed or funded. To adequately assess flood risk and satisfy requirements contained in the San Francisco Bay Plan[3], an analysis must include appropriate flood risk modeling, including breach analysis, to determine flood consequences and inform mitigation measures. In the absence of certified levees, the project must be evaluated as if they provide no protection to the proposed project area, rather than assuming new levees shall be installed at some later date. Construction of flood management infrastructure in the vicinity of the Proposed Project is merely at the feasibility phase and will in no way be implemented prior to construction of components of this Master Plan. The City has displayed a surprising degree of negligence by improperly assuming this site is adequately protected from even a moderate level of flood risk (1% annual probability), let alone tidal surges and a range of sea level rise which could exceed 1 meter over the life of the project.

4. "Coyote Delta Alternative" Inappropriately Dismissed for Consideration

Despite the City's recognition that 'numerous agencies and individuals expressed interest in exploring an alternative that expands restoration efforts in the northeastern corner of the PMP planning area...' (7-34), the so-called Coyote Delta alternative was rejected on the grounds that it 'would not reduce any of the project's significant impacts'. Such a rationalization fails to meet CEQA requirements, whereby a range of reasonable alternatives must be considered which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project. An alternative which enhances connectivity of the Bay with Coyote Creek would reduce flood risk within the proposed project area and at upstream commercial/residential areas, and would greatly enhance riparian habitat along Coyote Creek. San Jose is now disconnected from Coyote Creek and the City has ignored its obligations under the Municipal Separate Storm Sewer System (MS4) Permit to reduce trash and contaminant loading. As a result, Coyote Creek is among the most polluted creeks in the region. Baykeeper was among those groups that spoke to agencies and elected officials regarding this alternative, which was well received as a means of reducing flood risk and improving the environment. Full evaluation of the Coyote Delta Alternative should be conducted to mitigate existing flood risk, which was negligently considered in the DEIR. Implementation of an alternative that opens Coyote Creek to tidal influence would also minimize the conversion of salt marsh to brackish/freshwater marsh at the newly proposed WPCP discharge points, and would enhance the City's resiliency to sea level rise – facilitating the migration of habitat as water levels rise.

5. Tidal Marsh and Marsh Ecotone Restoration should Consider Sea Level Rise

Within Section 3.6.3, a conceptual vision for the restoration of Pond A18 and construction of levees is described. This section includes description of habitat terraces, which could be developed along the toe of the levee, yet acknowledges that "With projected 100 year sea level rise, the habitat islands and mud flat and salt marsh terraces would ultimately be inundated, and only the upland habitat would remain." Given this is a foreseeable impact that can and be mitigated for over the life of the project, the DEIR

[3] Bay Conservation and Development Commission (BCDC). *San Francisco Bay Plan*. Available at http://www.bcdc.ca.gov/laws_plans/plans/sfbay_plan.shtml

should explore alternatives that would reduce the likelihood and magnitude of shallow bay and marsh habitats.

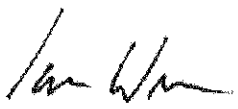
6. Burrowing Owl Mitigation Insufficient and Project Jeopardizes the South Bay Population

Consistent with comments made by the California Department of Fish and Wildlife (CDFW), Citizens Committee to Complete the Refuge (CCCR) and Santa Clara Valley Audubon Society, proposed mitigation for impacts to burrowing owl habitat is wholly insufficient to ensure long-term viability of the South Bay population. Comments made by CDFW indicate over 450 acres of burrowing owl habitat will likely be impacted as a result of this project, rather than the 178 acres described in the DEIR. Implementation of the Master Plan on the scale currently described will undoubtedly constrain some of the last remaining burrowing owl habitat in the South Bay region. To avoid extirpation of this species, a feasible alternative would be to retain the buffer lands as-is and have a WPCP-plant improvement only project alternative. Baykeeper hopes CDFW and Audobon are consulted to develop this or a similar alternative, which would maximize open space to retain some of the last remaining undeveloped lands along San Francisco Bay in Santa Clara County.

***

Thank you for considering Baykeeper's comments. We hope the City takes this opportunity to re-evaluate a more complete range of alternatives and seeks additional mitigation measures that would reduce flood-related risks to the public, and enhance the quality and scope of San Jose's wetlands and last remaining upland habitats located in close proximity to the Bay.

Sincerely,



Ian Wren
Staff Scientist
San Francisco Baykeeper

City of San Jose'
Department of Planning, Building, and Code Enforcement
200 East Santa Clara Street, 3rd Floor
San Jose', CA 95113
Attn: Bill Roth

February 22, 2013

SUBJECT: COMMENTS ON THE ADEQUACY OF THE ENVIRONMENTAL IMPACT REPORT FOR THE SAN JOSE/SANTA CLARA WATER POLLUTION CONTROL PLANT MASTER PLAN (PMP)

Dear Mr. Roth;

Grassetti Environmental Consulting (GECo) has been retained by the Santa Clara Valley Audubon Society to review the adequacy of the Draft Environmental Impact Report (EIR) for the San Jose/Santa Clara Water Pollution Control Plant Master Plan (PMP). As Principal of the firm, I conducted this review to determine whether, in my professional judgment, the Final EIR (FEIR) conforms to the basic requirements of CEQA and its implementing Guidelines. This review is for general CEQA adequacy, and is not intended as a review of technical adequacy of any of the technical studies included in the EIR. My qualifications include over 30 years of preparing and reviewing CEQA documents, as well as teaching both professional and university courses on CEQA. My resume is attached to this letter.

This review found substantive deficiencies in the EIR, which are summarized below.

1. **The Program EIR is inadequate to support approval of Other Land Uses.** The EIR includes both project-level and program analyses. The project-level analyses and a portion of the program analyses are related to the expansion of the wastewater treatment plant. The remainder of the program-level analyses relate to the so-called "Other Land Uses", which encompass nearly 12 million square feet of development and associated infrastructure, pond restoration, new levees, and over 15,000 employees. As detailed below, the EIR's treatment of "Other Land Uses" is cursory, at best, and fails to meet even the most basic CEQA standards. Therefore the EIR's analyses are not adequate to support its findings or to justify the City's approval of the General Plan Amendment or any other discretionary approvals that are required to permit those land uses.

2. **Inappropriate deferral of analysis to future studies.** A long line of CEQA case law, starting with the 1988 *Sundstrom v. Mendocino County* (202 Cal.App.3d 296, 1988) decision and continuing through the 2012 *Preserve Wild Santee v. City of Santee* (42 ELR 20220. No. D055215, Cal. Ct. App. 4th Dist., 10/19/2012) decision prohibits deferral of analysis to future studies. This prohibition includes deferral of mitigation

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to future permits. In fact, the Santee decision references an earlier decision (*Clover Valley Foundation v. City of Rocklin* [2011] 197 Cal.App.4th 200), which states, "Impermissible deferral of mitigation measures occurs when an EIR puts off analysis or orders a report without either setting standards or demonstrating how the impact can be mitigated in the manner described in the EIR".

Santee also found that the reliance on a Draft Habitat Management Plan as mitigation was inappropriate, citing another earlier decision (Citizens for a Better Environment v. City of Richmond), which found, "An EIR is inadequate if the success of failure or mitigation efforts...may be largely dependent on management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR."

The PMP EIR repeatedly defers analysis and mitigation to future studies and permits, as summarized in the table below.

Impact	Mitigation	Method of Deferral
TR-3, TR-4: Construction traffic	TR-4	This mitigation requires preparation of a construction traffic management plan. While the mitigation does include items to be included in the plan, it has no standards and does not allow any analysis of its potential for successful mitigation of the impact.
TR-8: Operational circulation impacts	TR-8	This mitigation identifies development of a Transportation Demand Management program as a possible mitigation measure. Not only does the mitigation not specify anything about either the content or standards for the plan, it says that mitigation "could include implementing a Transportation Demand Management Program", thereby not even requiring that such a program be developed/adopted.
NOI-1: Demolition and construction noise	NOI-1	Mitigation requires development of a Construction Noise Logistics Plan to reduce PMP impacts to less than significant. The mitigation does not specify anything about standards for the plan and there is no analysis of the potential for the plan's success in reducing the impacts to a less-than-significant level.

AQ-3: Operational air pollution	TR-8	This mitigation refers back to the deficient mitigation TR-8, discussed above. No other mitigation measures are identified for operational air pollutant emissions.
GHG-1	TR-8	This mitigation relies, in part, on the deficient mitigation TR-8, discussed above.
Impact BIO-2: Special- Status species	BIO-2c	The salt-marsh harvest mouse mitigation if impacts to the mouse cannot be avoided is deferred to "the applicant shall contact the US Fish and Wildlife service and/or CDFG staff to identify the appropriate mitigation measures." No standards for success or mitigation strategies are included in the EIR.
"	BIO-2d	The raptor and migratory bird nest measures are contradictory and confusing – first the measure says that that the applicant *shall* avoid conducting vegetation removal or ground-disturbing activities during the nesting season. Then the mitigation goes on to state mitigation "if project activities must commence during the nesting season." This implies that the "shall" is meaningless. Similarly, the mitigation identifies buffer zones for nesting birds, but then goes on to say that if California clapper rail or black rail are found, "the project proponent shall contact USFWS staff to identify the appropriate avoidance measures." Then EIR should identify those measures, and not defer them to some future contact with an agency.
Impact BIO-3: Riparian woodland habitat loss	BIO-3b	This mitigation specifies that if the resource cannot be avoided, the applicant shall obtain all required permits to ensure that there is no net loss of the habitat. The mitigation goes on to say, "Mitigation shall be implemented by the project applicant in amounts acceptable to the Army Corps of Engineers, California Department of Fish and Game, and San Francisco Regional Water Quality Control Board. The size and location(s) of the area(s) to be restored, created, enhanced, or preserved shall be determined based on appropriate ratios derived in consultation with CDFG and USACE." This is an impermissible reliance on future analysis and

		permitting as mitigation, as expressly prohibited in *Santee*.
Impact BIO-4: Wetlands	BIO-4b	This mitigation specifies that if the resource cannot be avoided, the applicant shall obtain all required permits to ensure that there is no net loss of the habitat. The mitigation goes on to say, "Mitigation shall be implemented by the project applicant in amounts acceptable to the USACE, RWQCB, and CDFG. The size and location(s) of the area(s) to be restored, created, enhanced, or preserved shall be determined based on appropriate ratios derived in consultation with CDFG, USACE, and the San Francisco Bay RWQCB. The City shall prepare a mitigation plan, which will include monitoring requirements and success criteria in consultation with CDFG. USACE, and the San Francisco Bay RWQCB." This is an impermissible reliance on future analysis and permitting as mitigation, as expressly prohibited in *Santee*. Further, it defers success criteria to a future plan, in conflict with a long line of CEQA case law.
"	BIO-4c	Identical problem to 4b.
"	BIO-4d	This measure states, "Design of program-level WPCP improvements and planned land uses will consider and avoid areas of wetland resources to the extent feasible. Prior to implementation, the City would undertake further environmental review....[which] would include mitigation measures to reduce and minimize impacts to wetland resources." This wholesale deferral of analysis and mitigation is then relies upon to reduce impacts of developing hundreds of acres of sensitive habitat to "less than significant". The measure provides zero substantial evidence of effectiveness, and is therefore inadequate on its face.
Impact BIO-7	BIO-2e	See comments on that mitigation, above.

Impact HYD-1: Flooding	HYD-1	Requires comprehensive drainage plan. In order to assess the feasibility of drainage of the long-term expansion area, a conceptual drainage plan should be included and reviewed in the EIR. Also, the Plan must consider sea-level rise.
Impact WQ-2: Pond water quality	WQ-2	This mitigation requires preparation of a water quality evaluation for Pond A18 restoration. This evaluation should be done in this EIR, not deferred. In addition, the mitigation provides no standards for achieving adequate mitigation and defers development of those standards to the future plan.
Impact Haz-1: Hazardous soil and groundwater conditions	HAZ-1a, Haz-1b	This mitigation requires that a limited soils and groundwater investigation be performed for all WPCP improvement, including those covered at a project level in this EIR. This analysis should have been included in the EIR, and not deferred to future study. The results of this study will then be used to develop a health and safety plan, which also is deferred until after approval of the project.
Impact PS-1: Police and Fire services	Mitigation PS-1	This mitigation defers until a later date even identifying the project's effects on police and fire response times. There is zero analysis of the adequacy of these services or the potential need for new facilities due to the nearly 12 million square feet of new development and 15,000+ new jobs proposed for the site. The entire impact assessment and mitigation has been deferred until a later date.
Impact UT-1: Water supply	—	The EIR defers preparation of the required Water Supply Assessment to an unspecified future permit. This has resulted in the EIR failing to adequately address the issue of water supply, and the development (and potential approval) of a project that has no adequate water supply.
Impact CUL-2: Cultural landscape	CUL-2	This mitigation requires preparation of a cultural landscape impact assessment for Pond A18. There is no reason that this evaluation must or should be postponed to future study. The

		project's impacts should be identified in this EIR if it is possible to do so – for this issue, it is possible.
Impact AES-1: Visual character	-	In this case, the EIR fails to identify any mitigation for the large-scale changes in the site's visual quality other than landscaping and roadway design. It should consider reduction in the heights of buildings, changing the site plan to permit view corridors from major roadways, etc.
Impact C-TR	Mitigation C-TR	The mitigation requires development of a Coordinated Transportation Management Plan but includes no success standards or criteria for that plan. Further, that Plan only addresses construction traffic impacts, and not the larger, long-term impacts associated with operation of the cumulative projects. The EIR also assumes effectiveness of the plan, absent any substantial evidence that the Plan would be effective, to reduce the project's impacts to less than significant.

3. **Inadequate analysis of traffic impacts.** The EIR transportation section (Section 4.3-7) described the existing levels of service and intersection operations on roadways and intersections near the project site, but fails to analyze the project's impacts to operations at those intersections and road segments. SR 237 is already operating at unacceptable levels of service in the commute directions (Table 4.3-4). The project would add nearly 12 million square feet of office, commercial, and industrial space (with over 15,000 new jobs) with zero new housing, resulting in a massive need for new vehicular commuting for both employee and service vehicles. Yet the EIR uses an arcane "Measures of Effectiveness' threshold system instead of an actual impact analysis. The threshold does not use existing conditions as the baseline, but rather percentages in excess of the City's 2040 General Plan. It provides zero information on the project's effects on any of the roadways or intersections in the project vicinity. In substituting policy compliance for impact assessment, the EIR runs afoul of the *Berkeley Keep Jets Over the Bay v. Board of Port Commissioners* (111 Cal.Rptr.2d 598, 2001) dictum, which states that CEQA is not primarily concerned with compliance with policies, but rather with physical impacts on the environment. The EIR states that intersection and freeway levels of significance should be determined based on operations levels (p 4.3-170, and then fails to evaluate the impacts of the Other Proposed Land Uses (the nearly 12 million square feet of proposed development) with respect to those metrics. Further, as noted above and stated on p. 4.3-41 "Future (year 2040) traffic volumes ...were used to determine future baseline traffic volumes...." This results in the absurd conclusion that, " Implementation of the

Plant Master Plan would reduce vehicle travel in the project study corridors in the City of Milpitas east of I-880, as well as on SR-237 immediately west of I-880." Use of future baselines is generally prohibited under CEQA, except in unusual circumstances.

4. **Inadequate evaluation of noise impacts.** The noise analysis uses unsupported significance criteria of 3db and 5db. There is no discussion as to how these criteria are protective of the environment despite this requirement being clearly stated in the Berkeley Keep Jets Over the Bay v. Board of Port Commissioners decision. The criteria used require a doubling of traffic to result in a significant impact. Why are lesser increases in traffic noise not significant? Please provide substantial evidence that the standards used are actually protective of the environment, and not arbitrary. Further, the noise analysis fails to identify noise impacts in any particular areas of the site due to increased traffic, but just makes an assumption that traffic on any roadway will not double, and therefore the impact would not be significant. Because the traffic analysis failed to address changes in traffic levels on any roadway segments, the noise impacts analysis also fails to provide any substantial evidence for its conclusion. The EIR acknowledges this deficiency on p. 4.4-19, where it states, "**The transportation impact analysis report in Appendix E does not address the proposed institutional, retail, light industrial/commercial uses associated with economic development on the south and east sides of the project site in terms of vehicle trip volume and distribution.**" This flaw also renders the cumulative noise impacts discussion inadequate.

5. **Inadequate evaluation of air quality impacts.** The air quality analysis is deficient in several areas:
    - It fails to account for overlapping emissions of the various project and cumulative components. It calculates construction and operational emissions of WWTP and Other Land Uses but never adds them together, even though many of the emissions would overlap. Therefore it understates the long-term impacts on air quality of the project.
    - As described for noise, above, the analysis of emissions of Other Proposed Land Uses is deficient because it relies on a deficient traffic analysis. This both calls into question the adequacy of emissions calculations from the Other Land Uses, and provides inadequate information to determine if any CO hot spots may occur from the project. Because this analysis requires consideration of cumulative traffic from the project and other sources, it must be done now and should not be deferred to future project-level analyses.
    - The project-level analysis of odors details odor-reducing technologies proposed for inclusion in the project, but does not include any analysis of the effectiveness of those technologies on sensitive receptors. Therefore the conclusion of insignificance is unsupported by analysis or other substantial evidence, and is arbitrary.

6. **Inadequate analysis of biological resources impacts.** The EIR fails to provide the reader with any analysis of the intensity of the impacts to special status species and habitats. The analysis reads like an Initial Study level assessment rather than an EIR. All we know, for nearly all of the species discussed, is that there might be some sort of impact. The EIR then relies upon the numerous future plans and studies identified in comment 1, above, to mitigate all of the impacts to a less-than-significant level. No analysis of impact intensity plus deferral of mitigation measures to future plans and studies absent any criteria of success does not make an adequate EIR. Further the EIR's analyses of cumulative impacts to special status species and riparian woodland habitat fails to provide any evidence supporting their conclusions of insignificance.

7. **Inadequate analysis of wetlands in drying ponds.** The EIR dismisses the habitat value of the over 50-acres of freshwater wetlands in the drying ponds, stating:

> Although *active* lagoons and drying beds support both aquatic and emergent vegetation depending on the amount of water contained within each pond and stage of treatment, these active lagoons and drying beds do not currently resemble the historic wetland types that existed in the area prior to development of the WPCP.

Regardless of whether these habitats resemble historic wetland habitats, these ponds provide habitat for numerous bird species. The EIR must evaluate the impacts of the loss of these wetlands on the species that utilize them.

8. **Inadequacy of geologic analysis with respect to levees/flood hazards.** The EIR's geology section addresses the potential impacts of ground squirrels on levees (p.4.8-25), but fails to assess the impact of earthquakes on levees. This assessment should be added, particularly in light of predicted sea level rise and the predictability of a large scale, landscape- transforming earthquake in the region.

9. **Inadequate analysis of sea-level rise and associated flooding issues.** The EIR cites a 1988 US Army Corps of Engineers study of flood levels in the project area. This study is outdated and obsolete, based on more recent studies and existing and predicted sea-level rise. Updated mapping should be included in this EIR prior to considering approval of nearly 12 million square feet of development on the site. The EIR references a sea level report due out "at the end of 2012" (p. 4.9-21). A preliminary version of this report has come out and shows sea level rise ranging from 4 inches to two feet by 2050 and from sixteen inches to 65 inches by 2100. This information should be included in the EIR. Given that this project may not be built out until 2030 or later, the EIR should evaluate flooding impacts in light of the higher levels of potential sea level rise. Such an analysis would be consistent with the City's General Plan, Environmental Considerations/Hazards Policy EC-5.13, which requires "evaluation of projected inundation for development projects near San Francisco Bay or at risk from local waterways which discharge into San Francisco Bay." The policy goes on to require mitigation to prevent exposure to substantial

flooding hazards from increased water levels in San Francisco Bay. As written, the EIR's hydrology section fails to conduct this evaluation.

The cumulative impacts discussion does include some analysis of sea level rise. It is unclear why that discussion is a cumulative impact and not a project/program impact. The impacts of concern are to the proposed project/plan. In addition, the discussion in section 6.1.4.7 does not actually analyze the effects of sea level rise on the project. It just discusses the future Shoreline Study as addressing the issue (inappropriate deferral), reliance on an unfunded levee (unfunded mitigation cannot be assumed to mitigate), and a mitigation requiring flood-proofing of buildings. This does not set any standards for flood-proofing, and fails to account for buildings that, while flood-proofed, cannot be accessed due to flooded roads, cannot be served due to flooded utilities, and that have been, essentially rendered useless by their location in an area subject to sea level rise. Therefore the mitigation is inadequate and the impact should be considered significant and unavoidable. The project site is additionally subject to backwater flooding from creeks in the evens of sea level rise. The cursory "assessment" of this issue is wholly inadequate given the scope of the potential impact and the City's General Plan policy to fully address the issue.

Although some courts have ruled that sea-level rise need not be assessed in CEQA documents because they are impacts of the environment on the project, they must be addressed in this document for the following reasons:

- The City's Policy EC-5.13 requires that they be addressed (local agencies have the authority to implement CEQA as they deem appropriate, provided that their implementation complies with CEQA statutes and guidelines),
- The project would create a potentially significant adverse impact on the public health environment by locating over 15,000 workers in an area subject to potential flooding from sea level rise, and
- The project itself is, in part, a response to sea level rise – the WWTP's operational objectives cannot be met without flood control afforded by the levee and Pond A18 improvements, which must consider sea level rise.
- Impacts of flooding of the WPCP could disable the entire sewage treatment system for San Jose and the other participating cities. This could result in health risks as well as impacts to the San Francisco Bay. Thus, sea level rise and flooding could have region-wide effects.
- Failure to evaluate those impacts would fail to meet CEQA's requirements to address mandatory findings of significance on human health, as well as its requirements that project objectives be considered.

10. **Inadequate analysis of water supply.** CEQA Guidelines require that a Water Supply Assessment be conducted for projects of this scale, and that projects that do not have adequate water supply not be approved. No Water Supply Assessment has

been conducted for this project. Instead, the project relies on the City-wide Water Supply Master Plan and defers preparation of a WSA to future implementation of the project (p. 4.13-17). This deferral is impermissible and leaves the EIR without an adequate water supply analysis. It also results in a project that apparently has an inadequate water supply and, therefore, cannot be approved without conflicting with state law. The Santee decision discussed above (following on the earlier *Vineyard* decision) also addresses this issue. In brief, these decisions require an EIR to evaluate potential sources of new water if supplies are found to be inadequate. This EIR fails to do so. A WSA must be prepared for the project and evaluated in the EIR. If supplies are found to be inadequate, then the EIR must discuss "possible replacement sources or alternatives and the environmental consequences of those contingencies." (*Vineyard*, p. 432). *Vineyard* (p. 431) goes on to say, "An EIR may not ignore or assume a solution to the problem of supplying water to a proposed project." This EIR finds the water supply inadequate, yet fails to identify alternatives that would remedy the situation.

11. **Inadequate Analysis of Energy Supply and Infrastructure.** The EIR's Energy section fails to include any analysis of the adequacy of electrical energy supplies or infrastructure to serve the nearly 12 million square feet of development proposed as pat of the plan. Instead it states, "As described in project description Section 3.6.4, Economic Development, the proposed economic development could result in approximately 12 million square feet of additional commercial and industrial development at the project site. The long-term energy demand that would be associated with this development is not currently known". The energy demand can be easily calculated at a planning level and, in fact, must have been calculated to prepare the greenhouse gas emissions analysis. The EIR apparently simply chose not to do this calculation. Additionally, neither this section nor the Utilities section of the EIR address the potential need for new utility infrastructure, including new generating and distribution facilities, which could be substantial for a project of this size. Instead of conducting an analysis of energy and infrastructure, the EIR chose to address only the Initial Study (IS) checklist question regarding energy efficiency. The EIR is required to address all potential impacts to the environment, whether or not they're on the CEQA IS screening checklist.

12. **Inadequate aesthetics analysis.** The aesthetics section assumes that compliance with the City's design guidelines "...would ensure that the proposed institute, retail, and office/R&D are responsive to the rural character of the Town of Alviso and visually consistent with the surrounding landscapes, the remaining open space, and proposed industrial and urban land uses." (p. 4.15-35). This is pure fantasy. A row of 8-story modern buildings has nothing in common aesthetically with open space or the rural character of Alviso. Please provide substantial evidence supporting this conclusion, or delete it and change the impact to Significant Unavoidable. Further, as described above in Comment 2, the EIR fails to adequately describe changes in the views from SR 237, the quality of which would be substantially diminished by the Other Land Uses, including the wall of mid-rises facing the highway where open fields now dominate the views.

13. **Inadequate growth-inducement analysis.** Impact G-1 fails to include any analysis of growth that may occur in the vicinity of the project or from the proposed new arterials leading to Milpitas and Alviso. In addition, the policy of allowing development on lands subject to flooding from sea level rise could induce other bayfront property owners to attempt to develop their sites. Please revise the EIR to address these issues.

14. **Inadequate range of alternatives.** As described above, the EIR relies on numerous future plans, studies, and permits to conclude that many of the project's impacts are less than significant. Further, the inadequate traffic study renders the traffic, noise, and air quality conclusions of insignificance unsupported. Similarly, the EIR's failure to adequately consider sea level rise (and assumes construction of an unfunded levee) results in inadequate consideration of flood impacts. These inadequate analyses and unsupported assumptions of insignificance are important to the alternatives discussion because the EIR focuses its alternatives on reducing impacts identified as significant and unavoidable in the document. Simply stated, the skewed impacts analyses have resulted in a skewed range of alternatives. In addition, the EIR assumes that development that will not occur on this site in reduced-development alternatives would occur elsewhere in San Jose. This is an unsupported assumption – such development may not occur at all – or it may occur in other cities in the region. In the end, the EIR does not find alternatives that reduce any of the project's significant impacts to a les than significant level. This, in itself, indicates the need for an alternative that is reduced in scale and reconfigured to actually reduce at least one of the project impacts to a less-than-significant level.

    Interestingly, Section 7.1 omits a crucial CEQA stipulation from its discussion of CEQA's criteria for selecting alternatives, specifically Guidelines section 15126.6(b), which states:

    "Because an EIR must identify ways to mitigate or avoid significant effects…on the environment….the discussion shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening the impacts of the project, **even if those alternatives would impede to some degree the attainment of project objectives, or would be more costly**." [emphasis added]

    The EIR, p. 3-9, Table 3-3, lists 15 specific Master Plan objectives. These are:

    a) Wastewater treatment/public health
    b) Maximize efficient operations of the plant
    c) Maintain cost-effective plant operations
    d) Promote resource recovery at the plant
    e) Pursue energy self-sufficiency/reduce greenhouse gas production
    f) Allow for beneficial reuse of water
    g) Allow for complimentary economic development/clean tech
    h) Maximize viability and visibility of economic development on plant lands
    i) Protect character of Alviso
    j) Allow for complimentary recreation use

k) Protect, enhance, and/or restore habitat
l) Pond 18 should provide water quality, flood control, and ecosystem benefits
m) Promote transportation access by improving connections
n) Protect plant from sea level rise.

In addition, SCVAS, in its scoping comments, requested that an alternative be included in the EIR that focused on: 1) necessary alternations/expansions to the treatment plant (including needed flood protection), 2) habitat preservation, 3) social benefits (recreation and institutional uses), and 4) energy benefits. This alternative would achieve all but three of these 15 goals (all but goals g, h, and m), and may allow partial fulfillment of those three goals. Therefore the EIR should include an alternative that meets all of the above goals except the economic maximization. Such an alternative would likely reduce impacts to greenhouse gas and air quality, biological resources, traffic, water supply, growth inducement, and aesthetics to well below significant levels, while still meeting most of the project objectives.

The EIR also should include alternatives that seriously consider sea-level rise (i.e. elimination of all of the eastern development near Coyote Creek, or at a minimum, elimination of the flexible space in Alternatives 4 and 5. In addition alternatives that preserve all or most of the valuable upland habitat for the Burrowing Owl should be considered. An alternative that considered adjusting general plan designations and zoning on already developed lands within the City to allow for more compact, intense development should be addressed.

CONCLUSIONS

It is my professional opinion that the deficiencies described above are substantial and render the EIR inadequate to meet basic CEQA analysis and disclosure standards. The City should revise the document to eliminate the deferral of analyses and mitigation, upgrade the traffic, noise, air quality, and sea level rise impacts discussions to actually identify the project's impacts, and recirculate the document for public review.

Sincerely

Richard Grassetti

Principal

Richard Grassetti

PRINCIPAL

Expertise

- CEQA/NEPA Environmental Assessment
- Project Management
- Geologic and Hydrologic Analysis

Principal Professional Responsibilities

Mr. Grassetti is an environmental planner with 30 years of experience in environmental impact analysis, project management, and regulatory compliance. He is a recognized expert on California Environmental Quality Act (CEQA) and National Environmental Policy Act (NEPA) processes, and has served as an expert witness on CEQA and planning issues. Mr. Grassetti regularly conducts peer review and QC/QA for all types of environmental impact analyses, and works frequently with public agencies, citizens groups, and applicants. He has managed the preparation of over 80 CEQA and NEPA documents, as well as numerous local agency planning and permitting documents. Mr. Grassetti has prepared over 200 hydrologic, geologic, and other technical analyses for CEQA and NEPA documents. He has analyzed the environmental impacts of a wide range of projects including infrastructure improvements, ecological restoration projects, waste management projects, mixed-use development, energy development, residential projects, and recreational facilities throughout the western U.S. Mr. Grassetti also has prepared numerous peer reviews of CEQA and NEPA documents for agencies, applicants, native American tribes, and citizens groups. In addition to his consulting practice, Mr. Grassetti regularly conducts professional training workshops on CEQA and NEPA compliance, and is a lecturer at California State University, East Bay, where he teaches courses on environmental impact assessment, among others.

Professional Services

- Management and preparation of all types of environmental impact assessment and documentation

for public agencies, applicants, citizens groups, and attorneys

- Peer review of environmental documents for technical adequacy and regulatory compliance
- Expert witness services
- Assisting clients in CEQA and NEPA process compliance
- Preparation of hydrologic and geologic analyses for EIRs and EISs
- Preparation of project feasibility, opportunities, and constraints analyses, and mitigation monitoring and reporting plans

Education

University of Oregon, Eugene, Department of Geography, M.A., Geography (Emphasis on Fluvial Geomorphology and Water Resources Planning), 1981.

University of California, Berkeley, Department of Geography, B.A., Physical Geography, 1978.

Professional Experience

1992-Present	Principal, GECo Environmental Consulting, Berkeley, CA
1994-Present	Adjunct Professor, Department of Geography and Environmental Studies, California State University, Hayward, CA
1988-1992	Environmental Group Co-Manager/ Senior Project Manager, LSA Associates, Inc. Richmond, CA
1987-1988	Independent Environmental Consultant, Berkeley, CA
1986-1987	Environmental/Urban Planner, City of Richmond, CA
1982-1986	Senior Technical Associate - Hydrology and Geology -

		Environmental Science Associates, Inc. San Francisco, CA
	1979-1981	Graduate Teaching Fellow, Department of Geography, University of Oregon, Eugene, OR
	1978	Intern, California Division of Mines and Geology, San Francisco, CA

Professional Affiliations and Certifications

Member and Past Chapter Director, Association of Environmental Professionals, San Francisco Bay Chapter

Member, International Association for Impact Assessment

Publications and Presentations

Grassetti, R. *Round Up The Usual Suspects: Common Deficiencies in US and California Environmental Impact assessments.* Paper Presented at International Association for Impact Assessment Conference, Vancouver, Canada. May 2004.

Grassetti, R. *Understanding Environmental Impact Assessment – A Layperson's Guide to Environmental Impact Documents and Processes.* (in press).

Grassetti, R. *Developing a Citizens Handbook for Impact Assessment.* Paper Presented at International Association for Impact Assessment Conference, Marrakech, Morocco. June 2003

Grassetti, R. *CEQA and Sustainability.* Paper Presented at Association of Environmental Professionals Conference, Palm Springs, California. April 2002.

Grassetti, R. and M. Kent. *Certifying Green Development, an Incentive-Based Application of Environmental Impact Assessment.* Paper Presented at International Association for Impact Assessment Conference, Cartagena, Colombia. May 2001

Grassetti, Richard. *Report from the Headwaters: Promises and Failures of Strategic Environmental Assessment in Preserving California's Ancient Redwoods.* Paper Presented

at International Association for Impact Assessment Conference, Glasgow, Scotland. June 1999.

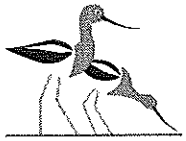
Grassetti, R. A., N. Dennis, and R. Odland. *An Analytical Framework for Sustainable Development in EIA in the USA.* Paper Presented at International Association for Impact Assessment Conference, Christchurch, New Zealand. April 1998.

Grassetti, R. A. *Ethics, Public Policy, and the Environmental Professional.* Presentation at the Association of Environmental Professionals Annual Conference, San Diego. May 1992.

Grassetti, R. A. *Regulation and Development of Urban Area Wetlands in the United States: The San Francisco Bay Area Case Study.* Water Quality Bulletin, United Nations/World Health Organization Collaborating Centre on Surface and Ground Water Quality. April 1989.

Grassetti, R. A. *Cumulative Impacts Analysis, An Overview.* Journal of Pesticide Reform. Fall 1986.

1986, 1987. Guest Lecturer, Environmental Studies Program, University of California, Berkeley.



February 26, 2013 *Via Email*

Mr. Bill Roth
Department of Planning, Building and Code Enforcement
City of San Jose

Comments on Draft Environmental Impact Report for:
PP11-043 SCH# 2011052074 San Jose/ Santa Clara Water Pollution Control Plant Master Plan

Dear Mr. Roth,

Santa Clara Valley Audubon Society (SCVAS) thanks the City of San Jose for the opportunity to provide comments for the Santa Clara San Jose Water Pollution Control Plant (WPCP, Plant) Master Plan (PMP, Project) Draft Environmental Impact Report (EIR.) Our organization has over 3,500 members in Santa Clara County and our members typically share a passion for wildlife, birds, habitat protection and environmental quality. We are especially interested in populations of endangered avian species in our region, and particularly in the fate of burrowing owls. SCVAS participated as a stakeholder in the Citizens Advisory Group for this Project, and provided information, resources and comment letters throughout the PMP planning process. We have already submitted one comment letter on the Project DEIR (2/25/2013), and this is a second comment letter.

In the past two years SCVAS has worked in partnership with the City of San Jose to enhance habitat for burrowing owls at the PMP area. At the same time, open space and burrowing owl habitat areas in North San Jose and elsewhere along the South Bay Area were developed, and resident owls lost nesting sites and foraging lands. We consistently expressed our expert opinion, based on county-wide and cumulative data, that the bufferlands of the WPCP are critical to the survival of this species in the Santa Clara County and in the Bay Area.

The PMP proposes roads, a bridge, and commercial development of the largest remaining grasslands and open space along the south shores of the San Francisco Bay, land that provides critical and irreplaceable contiguous habitat to the remaining burrowing owl population of the Bay Area. We maintain that the development of "other land uses" of the PMP bufferlands as proposed in the PMP selected alternatives will impose significant and unavoidable impacts to burrowing owls, impacts that are likely to cause the failure of the Santa Clara Valley Habitat

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Plan (HCP) Conservation Strategy for Burrowing Owls and to cause the extirpation of the species from the County.
We encourage the City of San Jose to provide in-depth analysis of the "habitat only" alternative as the EIR's preferred alternative. We see the "habitat only" alternative as a great opportunity to create a true "green" San Jose, and to allow modernization of the WPCP with adequate mitigation of the biological (and other) impacts of Plant improvements to a less-than-significant level. The "habitat only" alternative will also help implement the HCP and its Burrowing Owl Conservation Strategy. If any of the alternatives that consume grasslands is approved, a trigger to any new roads or development on grassland must be included that would allow no development in the bufferlands until such time that the Burrowing Owl Strategy of the HCP is successful, and a viable, breeding population of burrowing owls is established on public lands in south Santa Clara County. Such trigger will ensure that the PMP is compatible with Action ER-4.5 of the General Plan Envision 2040, and achieve the goal of mitigation Bio-2e that aim to maintain or increase burrowing owl populations.

1. Environmental Setting / Baseline

An EIR is required to include a description of the physical environmental conditions at the project site and its vicinity from both local and regional perspectives. This baseline is used to determine whether impacts are significant, assess alternatives, and propose mitigation measures. The WPCP EIR provides an incomplete and inadequate baseline for the current situation of burrowing owl habitat onsite and in the region.

The EIR underestimates the amount of burrowing owl habitat on the Project site

Mitigation Bio-2e identifies all land within 2-miles from nesting habitat as foraging habitat. Based on Figure 4 of Appendix J., a 2-mile radius from recorded burrowing owl nests designates the entire open space within the PMP footprint burrowing owl habitat, including grasslands, riparian areas, ruderal areas, biosolids drying beds, biosolids lagoons, the inactive biosolids lagoons, landscaped areas and other disturbed habitats.

Figure 4 of Appendix J. establishes that owls have used the entire WPCP upland habitat for nesting, including both grasslands and ruderal areas on both sides of Zanker Road.

Figure 4.7-3 is inconsistent with the data presented in Figure 4 and with the designation of foraging habitat. To be consistent, all the grasslands and ruderal areas within the PMP area should be considered "Existing Foraging and Nesting Habitat in the Study Area." In addition, "Existing Foraging Areas" should include ruderal and landscaped habitats, the biosolids drying beds, lagoons, and disturbed habitats within 2 miles of nesting habitat. These habitats can produce insects and rodents that burrowing owls may prey on (for example, the dry material in the biosolids lagoons is abundant with crickets, one of the primary diet species of burrowing owls in California.)

Grasslands east of Zanker Road should be considered nesting habitat, and there is no justification for the designation of this land as mere "Foraging Habitat" in Figure 4.7-3. All of the grassland

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and ruderal habitats (on both sides of Zanker Road) should be designated nesting/foraging habitat, and all of the open space within a 2-mile radius, including the biosolids drying beds and lagoons, should be considered foraging habitat.

Based on Table 2-2 and Figure 4.7, we calculate the habitat currently available to burrowing owls within the project boundary (Table 1):

Table 1: Existing Burrowing Owl Habitat

Land Use	Area (Acres)
Bufferlands grasslands / ruderal (nesting/foraging)	687
Drying beds and lagoons, ruderal habitat within 2 miles of nesting sites (foraging)	757
Santa Clara Valley Water District Easement (foraging)	167
Total	**1611**

We conclude that in proposing that only 178.1 acres of land on the PMP area require mitigation, the DEIR bases the analysis of impacts to burrowing owls on an erroneous baseline that grossly underestimates the existing acreage of burrowing owl habitat on the Project site.

The EIR baseline should provide a regional setting for burrowing owls

The EIR acknowledges, "The Plant lands provide one of the last remaining homes for burrowing owls within Santa Clara County" (page 3-53), stating that as of May 2012, at least four pairs of owls were known to occur at the western portion of WPCP. The importance of the WPCP lands to the owl population of the county is explained in the HCP, which provides the 2010 setting and shows that the burrowing owls of Santa Clara County are rapidly approaching extirpation. In our scoping comments, SCVAS asked that the WPCP EIR discuss the Burrowing Owl Conservation Strategy of the HCP and describe how the PMP integrates with the HCP. The EIR does not provide this discussion, and Page 4-1 of Appendix J. "Literature reviewed for analysis of biological resources found in the WPCP project area" does not list the HCP.

Burrowing owls are monitored very closely in Santa Clara County and numbers of breeding pairs exist for ALL of the nesting sites in the county[1]. To provide decision makers with adequate information, and to establish a meaningful baseline for the determination of levels of significance, the EIR must provide the number of breeding pairs of burrowing owls for the sites identified in the HCP as "Sites of Importance for nesting burrowing owls" (San Jose International Airport, San Jose/Santa Clara Water Pollution Control Plant, Mission College, Shoreline Park, Moffett Airfield, VTA Cerone Facility, Tesla Plant in Fremont and the Don Edwards National Wildlife Refuge) at the time the Notice of Preparation was issued in May 2011. Cumulative analysis of impacts to burrowing owls should be based on past, current and future development of these sites and habitats.

[1] Data is available from the CA Dept. of Fish and Wildlife, NASA Ames, the San Jose Airport, Shoreline Park, WPCP management, and the Santa Clara Valley Audubon Society.

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We conclude that the EIR provides an inadequate baseline that limits the information provided to the public and decision makers in a way that masks the potentially significant and unavoidable impacts of the PMP on burrowing owls in our region.

2. Missing and Inadequate Analysis

The EIR overestimates available burrowing owl habitat within the proposed 180-acre mitigation area

The EIR neglects to consider the reduced value of the freshwater marsh and seasonal wetlands located within the proposed 180-acre mitigation area (as shown in Appendix J. Figure 6 and Appendix D. Figure 2) for nesting owls. These wetlands, most of which are seasonal, are extensive in size (32 acres) and during wet years may not provide habitat.

The rainy season in California coincides with the start of the burrowing owl breeding season, thus, during wet years a substantial part of the 180-acre mitigation area could revert to its wetland state. Inundation would not only reduce the amount of land available for foraging, but would also create risk of burrows becoming submerged and potentially result in reproductive failure. In fact, the 2012 California Department of Fish and Wildlife (CDFW) "Staff Report On Burrowing Owl Mitigation" lists flooding as one of the activities that may degrade habitat and result in "take" or otherwise impact burrowing owls if burrows are impacted.

The calculation of burrowing owl mitigation for nesting habitat should not include jurisdictional and seasonal wetlands as nesting habitat because these areas only provide seasonal foraging habitat for burrowing owls in some years.

The EIR should analyze impacts of a roadway through the 180-acre burrowing owl mitigation area and address habitat fragmentation

A proposed arterial roadway (Nortech Extension) traverses the proposed 180-acre burrowing owl habitat. This road would significantly decrease the habitat value of the 180-acres habitat preservation area. Vehicle collisions are considered a major source of mortality for burrowing owls, and studies show that in some areas, collisions with automobiles are the cause of 25% to 37% of burrowing owl mortality.

During the burrowing owl breeding season of 2012, one pair of burrowing owls successfully produced chicks at a burrow directly adjacent to the proposed access road (as per burrowing owl surveys by Phil Higgins August 23, 2012 and September 22, 2012).
There is sufficient information to analyze and mitigate the impacts of the proposed Nortech Extension and traffic associated with this extension at this time, and the EIR should provide an analysis of potential impacts of construction, traffic (vehicles, bikes, pedestrians) and landscaping on burrowing owls.

The EIR should evaluate the risk of increased predation on burrowing owls on the 180-acre habitat

Development of grasslands and open space will decrease the availability of foraging habitats for raptors, with the result of greater numbers of raptors hunting in smaller areas (especially, but not

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only during raptor migration periods). The EIR should consider the cumulative decrease in open space in San Jose and in nearby burrowing owl habitats, and evaluate the potential of an increased predation on burrowing owls.

The EIR should address the use of biocides on the PMP area and evaluate the potential for direct and secondary poisoning of burrowing owls and other raptors and wildlife
The EIR should analyze the potential of herbicides, insecticides and rodenticides to impact plants and wildlife on the PMP footprint. We are especially concerned with rodent bait and the possibility that rodenticide applications at WPCP and on educational and commercial developments may cause direct and/or secondary poisoning of burrowing owls, raptors and other wildlife. An appropriate mitigation would restrict rodent control to mechanical means.

The EIR should analyze the impacts of the PMP on East-West movement corridors
The decline in burrowing owls populations has been attributed in part to the fragmentation of landscapes and habitats – dispersing owls may simply not find each other as development interrupts contiguous habitats and continuous landscapes. The EIR should analyze and mitigate this potentially significant impact for the owls and for other species, according to Envision 2040 Policies NC-7.7 and NC-8-2.

The EIR provides no scientifically based analysis of PMP specific and/or cumulative impacts on burrowing owls, and does not evaluate the effects of the PMP on the HCP
Earlier we showed that the EIR provides an inadequate baseline for the local and regional population of burrowing owls. In addition, it does not provide a scientific basis to support the assumption that enhancement of 180 acres on the western part of the bufferlands would sustain even the 4 pairs of owls found there in 2012. In fact, the HCP's science based Habitat Criteria (Appendix M page 20) state that a nest should "be surrounded by at least 140 acres of foraging habitat within 0.5-mile of a nest site" and that an additional 70 acres are needed for an additional pair. The DEIR provides no scientific support for the assumption that the allocation of 180 acres to a burrowing owl preserve at the location where it is proposed would mitigate for local or regional project-related impacts. The outcome of the inadequate baseline and the missing analysis is that the EIR improperly downplays the project's enormous impacts on burrowing owls in the region, and leads to a flawed determination of "less than significant impact" that is not supported by fact or by expert opinion based on fact.

Appendix N of the HCP provided a Population Viability Analysis (2010) that predicted extirpation of burrowing owls from Santa Clara County within 20 years (and thus within the timeline of the PMP), unless an immediate and sustained reversal of the declining trend occurs to allow recovery and population growth. Three years later, the trend has not reversed. Appendix M of the HCP outlines the Conservation Strategy for the Western Burrowing Owl. The strategy looks at four conservation regions, only one of which – North San Jose/Baylands Region – is currently occupied by breeding populations. The Conservation Strategy relies on owls from these breeding populations to create the source for re-colonization of additional regions, "If conservation actions in the North San Jose/Baylands Region prove successful, and the number of breeding burrowing owls increases substantially, it is reasonable to assume the nesting

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burrowing owl population will expand into suitable habitat in the South San Jose, Morgan Hill and Gilroy regions" (HCP/NCCP, page M-3). We believe that the loss of one of the largest breeding habitats must be analyzed through the lens of the HCP Burrowing Owl Conservation Strategy, and take into consideration cumulative threats of currently planned projects on other "Sites of Importance for nesting burrowing owls" as identified in the HCP.

The HCP Conservation Strategy identifies "Sites of Importance for nesting burrowing owls" as follows: San Jose International Airport, San Jose/Santa Clara Water Pollution Control Plant, Mission College, Shoreline Park, Moffett Airfield, VTA Cerone Facility, Tesla Plant in Freemont and the Don Edwards National Wildlife Refuge. Of these sites, only four have had 3 or more nesting pairs in recent years: San Jose Airport, Moffett Field Airport, Shoreline Park and the WPCP. Some of these sites no longer support burrowing owls, some are undergoing development of all or some of the nesting and/or foraging habitat, and some have limited capacity to support an increase in burrowing owl populations due to conflicting regulatory constraints (landfills, airports).

The WPCP site is the last intact, large grassland habitat that exists for breeding burrowing owls in Santa Clara County. Since the implementation of the first phase of the Interim Burrowing Owl Management Plan the owl population has risen and we can expect full implementation (over the entire bufferlands) to be the seed of recovery for the burrowing owl population of our county. To quote Phil Higgins, Burrowing Owl specialist, "It is my opinion that the success of the HCP depends on the success of the owl population at this site, as this is the only site that burrowing owls can increase significantly in population size. It is fenced in, thus reducing impacts from people and dogs, it is large in size providing sufficient habitat for nesting and prey species and it already has an existing burrowing owl population."

The EIR has been described as the "heart of CEQA"; it is an "environmental alarm bell" which has the objective of alerting the public and governmental officials to the environmental consequences of decisions before they have reached ecological points of no return. We have no doubt that an adequate evaluation and analysis would reveal that the WPCP bufferlands are critical to the success of the HCP Burrowing Owls Conservation Strategy and to the survival of burrowing owls in Santa Clara County. In our expert opinion, the PMP and its proposed alternatives would have a potentially significant and unavoidable impact on burrowing owls, an effect that is likely to result in the regional extirpation of this species to a point of no return.

3. Inadequate Mitigation for impacts to burrowing owls

Burrowing owl mitigation measure BIO-2e (MM BIO-2e) is flawed because it is based on an erroneous baseline and erroneous assumptions about the quality of habitat:

- MM BIO-2e fails to mitigate for the expansion of the Plant itself. Table 4.7-7 recognizes impacts on only 1.8 acres of 757 acres of grasslands, ruderal habitat, lagoons and drying beds that would be used for WPCP improvements.

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- MM BIO-2e relies on preserving some existing habitat as mitigation for project impacts. In CEQA, the baseline for analysis is the existing conditions. There is currently far in excess of 180 acres of burrowing owl habitat on the site (see table 1 above). The project's conservation of (or failure to eliminate) the 180 acres is not mitigation for the habitat that will be eliminated because the 180 acres of habitat already exists.
- CEQA sometimes allows for enhancement of habitat as mitigation for loss of habitat. The DEIR proposes that the 180-acre preserve "presents an opportunity to improve the quality of owl habitat and expand the current owl population." We welcome the efforts by the City to improve habitat for burrowing owls on the 180-acres. However, we believe that it is unlikely that this enhancement would offset the net loss of grasslands and ruderal habitats of the PMP footprint and the introduction of new roadways:
    - There are in fact only 148 acres (32 are wetlands) available on the 180-acre site. Wetlands restrict the habitat value for burrowing owls throughout the 180-acre area. 148 acres of prime habitat, according to scientific analysis in the HCP/NCCP, can support ONE pair of breeding owls. Four pairs were found at the site during the 2012 breeding season. These owls have likely foraged for prey outside the 180-acre area,
    - A road is proposed to transverse the habitat. The road would fragment and degrade the habitat at the southern part of the 180-acre area,
    - Preservation of Congdon's Tar Plant restricts enhancement activities for burrowing owls, primarily at the northern part of the 180-acre area,
    - The project proposes to plant trees along Artesian Slough, on the eastern edges of the 180-acre area. Trees can provide perches and nesting sites for raptors that prey on burrowing owls, and therefore may reduce the value of the habitat at the eastern part of the 180-acre area;
    - The PMP fragments the habitat, cutting off the east-west movement corridor.

MM BIO-2e proposes that in the future, a biologist engaged by the city will determine if the 180-acres are supporting a stable or increasing population and provide a source of burrowing owls to the region. If it is not, then regional analysis would be conducted and additional mitigation measures may be implemented. While we support the concept of adaptive management, the restriction of analysis of impacts to burrowing owls future project-level analysis of the 180-acres, creates a de-facto fragmentation of the impacts of the PMP on burrowing owls. We see it as classic "piecemealing." The courts forbid the use of this tactic.

Furthermore, the deferral of evaluation of a regional context installs a de-facto future baseline, which, unfortunately, in the case of the PMP and the burrowing owl populations of Santa Clara County could be "burrowing owls no longer inhabit Santa Clara County."

MM BIO-2e proposes an alternative approach that would rely on the HCP. Indeed, the Burrowing Owl Conservation Strategy of the HCP provides a framework for the recovery of the species in the County. The conservation strategy relies on existing populations to provide a source for re-colonization of areas in the South of the County where the owls no longer breed.

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We maintain that the preservation of the entire grassland habitat of the PMP is critical to the success of the HCP burrowing owl conservation strategy and the recovery of the species in Santa Clara County (See above.) In our expert opinion, this approach to mitigation would void the Burrowing Owl Conservation Strategy of the HCP and result in the significant and unavoidable effect of extirpation of the species from the City of San Jose and the County of Santa Clara in the foreseeable future.

- The City should provide a "trigger" that releases 'other land uses' to development on the bufferlands only at such time that it is evident that the Burrowing Owl Conservation Plan of the HCP is successful, and breeding burrowing owl colonies are viable on public land in Santa Clara County south of San Jose.

4. Proposed Mitigation that may impact Biological Resources

Planting Trees

The EIR proposes to screen aesthetic impacts of the WPCP and solar arrays by planting trees. Trees are also proposed along Artesian Slough and along new roads, buildings, parking lots and landscaped areas. Trees provide perches and nesting sites for raptors that prey on ground nesting birds (including burrowing owls.) The proposed trees may impact a significant harm on burrowing owls and other bird species.

5. Additional Impacts to Avian species

Bird collision with buildings and other man made structures

Policy NC-8.1 of the Envision 2040 General Plan specifies, "In the area north of Highway 237 design and construct buildings to reduce the potential for bird strikes for species associated with the baylands or the riparian habitats of lower Coyote Creek." The PMP EIR should provide analysis and mitigation guidelines for implementation of this policy for any structure in the PMP area, including bridges and other man made structures that are recognized as hazardous to birds due to collision risks.

Trails and recreation

Activity on trails and other recreational activity is known to impact birds in terrestrial, riparian and aquatic ecosystems. Trails are proposed in the PMP without analysis or mitigation of impacts to burrowing owls and other sensitive species. The impact of human activity (and potentially pets) should be considered a significant impact and should be mitigated (for example, by restricting access to sensitive habitat, prohibition of pets.)

Feral animals and pets

The PMP should analyze the potential impacts of feral animals and pets, and recognize that encroachment by feral animals and pets may significantly impact burrowing owls and other ground nesting birds. The PMP should restrict access of pets, prohibit the feeding of feral animals in the PNP area and implement a program that removes feral animals from the PMP area.

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Impacts of traffic on new roads and bridges
The EIR should analyze the impacts of traffic, noise, and risks of collision and road kill on wildlife and avian species

6. Additional comments

The EIR uses a speculative future baseline and fails to analyze potential impacts of sea level rise
The EIR should use the existing conditions as a baseline. The existing conditions include no protection from sea level rise along the northern portion of the PMP planning area. Because the funding for the levee along the northern portion of the PMP planning area has not been secured, and because the cost is estimated in hundreds of millions of dollars that may never be secured, the EIR should analyze project impacts and offer mitigation for the reasonable scenario of no protection from sea level rise along the northern portion of the PMP planning area.

Need for tiering and triggers
We found the EIR confusing, and believe that the Final EIR should be structured to provide clear tiering. For and for each project and for each land use the EIR should provide a list of impacts studied in the EIR and a list of potential impacts to be studied at a later time. In addition, we request that the City prepare and circulate for public review a list of triggers that would set the prerequisite for planned projects and land uses. The City has previously employed triggers to mitigate growth impacts and to specify conditions that are required for development to occur. For the PMP, triggers should be developed to ensure that the development of 'additional land uses' does not occur prior to the completion of odor controls and other essential WPCP projects. An additional trigger should be developed to ensure that the Burrowing Owl Conservation Strategy of the EIR is successful prior to the development of the bufferlands.

The EIR should include, describe and analyze every proposed or potential General Plan amendments and describe in detail any changes that would impose specific or de-facto amendments to the Alviso Master Plan
CEQA Guidelines Section 15378 defines "Project" as the whole of an action, including specifically "the adoption and amendment of local General Plans or elements thereof pursuant to Government Code Sections 65100-65700." The PMP EIR would require an amendment to the General Plan Envision 2040 Land Use/Transportation Diagram and associated text amendments and an amendment to the Milpitas General Plan. Additionally, unspecified amendments may be required to the San Jose General Plan and the Alviso Master Plan. For example, page 4.2-27 states, "Implementation of other land uses could adversely affect upland and wetland habitats... Amendment of the General Plan and the Alviso Master Plan **could** [emphasis added] bring the project site into conformance with these planning documents." The California Environmental Quality Act guidelines (CEQA) require a project to be consistent with the General Plan so the deferral of compliance is inadequate, especially as there is no assurance that conformance will be achieved.

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When evaluating a later activity to determine whether it is eligible for consideration under a program EIR, the CA Office of Planning and Research explains, "First, the lead agency must determine whether the activity is consistent with the plan or element for which the program EIR was certified. A general plan amendment obviously would not qualify...[2]" Thus, amendments to General Plans and to the Alviso Master Plan should be treated as "Projects" within the EIR and the impacts of each amendment must be described in detail, analyzed and mitigated. If some impacts remain (for example, page 4.2-27 proposes, "It is possible that implementation of recreational uses south of the WPCP may not adequately buffer odors and potential toxic releases") the EIR should acknowledge these impacts clearly in the proposed amendments.

The analysis provided in the EIR does not provide sufficient information or even commit to consistency with relevant plans and policies. The proposition that the "PMP would temporarily result in inconsistency" with existing Plans provides no timeline or guarantee that Plans would eventually be changed to allow conformity, and in fact, pre-decides the outcome of future planning processes that may be defined as projects and subject to CEQA review. The conclusion of 'No Significant Impact' is not supported. We believe that these deficiencies are substantial and that a new Draft EIR should be prepared and circulated.

The EIR should evaluate impacts of the PMP beyond the footprint of the project
CEQA requires analysis of project impacts beyond the project's footprint. The EIR proposes that implementation of the PMP may require "funding of transportation improvements outside of the Plant lands, including improvements to existing roadways" (page 3-66).
The EIR should identify the improvements to existing roadways, and analyze the environmental impacts associated with the development of additional lanes.

The EIR should provide mitigation for impacts to biological resources that are not dependent entirely on voluntary implementation of beneficial parts of the PMP
There is no requirement that all parts of a project be implemented and thus, habitat improvements as proposed in the PMP cannot be used to mitigate impacts to biological resources, unless specified as mitigation. While extensive habitat restoration is proposed as part of the project on pond A18 and along Coyote Creek, the City of San Jose is not required and may not have the resources to implement there improvements. CEQA requires that government agencies develop mitigation measures that they have the ability, resources and capacity to implement, and to monitor the success of the mitigations they commit to. Thus, the City must show that it can provide adequate mitigation, and it does not suffice to rely on beneficial parts of the projects, unless these are committed to as mitigations for project impacts.

Mitigatious Monitoring and Enforcement
CEQA requires that the lead agency be able to implement, track, monitor, and report on any proposed mitigations for any identified impact. The EIR should specify who in San Jose will be

[2] State of California general Plan Guidelines, 2003, Governor's Office of Planning and Research. Page 138 (http://opr.ca.gov/docs/General_Plan_Guideliues_2003.pdf)

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responsible, and show that it has resources available to implement, track, monitor, report and enforce mitigation measures and plans.

We thank you for the opportunity to provide scoping comments for this project. Please keep us informed on any further opportunity for public review and input on this project. Please call us at (650) 868 2114 if we can be of help.

Thank you,

Shani Kleinhaus, Ph.D.
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February 25, 2013

TO: Bill Roth
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City of San Jose
San Jose, CA 95133

FROM: Lynne Trulio, Ph.D., Wildlife and Wetlands Ecologist
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SUBJECT: Comments on San Jose/Santa Clara Water Pollution Control Plant Master Plan Draft Environmental Impact Report

In this letter, I provide comments to the City of San Jose on the Draft Environmental Impact Report (DEIR) for the San Jose/Santa Clara Water Pollution Control Plan Master Plan (WPCP). I specifically address the portions of this document pertaining to impacts and mitigation measures relevant to Western burrowing owls (*Athene cunicularia*) and their nesting and foraging habitat. I write in my capacity as a burrowing owl researcher who has studied the impacts of development on burrowing owls in California for the past 25 years. I am a co-author of the "Bufferlands Interim Burrowing Owl Management Plan" (Appendix D within Appendix J), which evaluated the potential for enhancement of grasslands around the WPCP for burrowing owls.

The DEIR identifies burrowing owls as a California Species of Special Concern. As a result, the impacts from the three project elements (or phases)—project, program and "Other Proposed Land Uses"--to burrowing owl nesting and foraging habitat must be mitigated. The habitat on the 687 acres of "bufferlands" area is composed primarily of non-native grasses, alkali grassland and "disturbed ruderal" grasslands, which are all typical types of burrowing owl habitat. There is also approximately 32 acres of seasonal wetlands on the bufferlands, which is not burrowing owl habitat.

The City has documented nesting by burrowing owls on the bufferlands over the past 10 years. Between 2003-2007, burrowing owl nests were found in 5 locations on the east side of Zanker Road and at least 13 locations west of Zanker, especially in the area between Artesian Slough and Zanker Road. In 2012, burrowing owls nested in at least 4 locations west of Artesian Slough. Burrowing owls are known to forage extensively within several hundred yards of their nest burrow, as well as regularly up to 0.5 miles from their nest burrow. Thus, the bufferlands are both valuable nesting and foraging habitat. This extensive use of the bufferlands by nesting burrowing owls is evidence that the *entire* bufferlands area, approximately 650 acres (without the seasonal wetlands) is valuable habitat for burrowing owl reproduction and survival.

The burrowing owl population in Santa Clara County has dropped precipitously in the past 20 years. Loss of habitat is one key reason for this decline; currently very little habitat remains for burrowing owls in Santa Clara County. The DEIR notes that the bufferlands are important to burrowing owls 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 bufferlands is a significant impact to burrowing owls and has the potential to reduce their population in Santa Clara County.

Since the 650 acres of non-wetland habitat at the bufferlands is useful nesting and foraging habitat for burrowing owls, development impacts to any of this area will require mitigation. The DEIR proposes development of all but 180-acres of the bufferlands; the 180 acres are designated as burrowing owl preserve. The City incorrectly states that the burrowing owl preserve is 180 acres. A number of these acres are seasonal wetlands and cannot be included as habitat for the burrowing owl. So, the preserve is smaller than identified, perhaps in the range of 160 acres or so. While the habitat improvements to the approximately 160 acres are welcome, enhancing this area is not sufficient to mitigate development impacts to the remainder of the grasslands to a less than significant level. Development impacts to *any* of the 650 acres of owl habitat at the bufferlands must be mitigated for by creating new habitat of equivalent or higher habitat value; this would be new habitat that is not available to burrowing owls now.

The City of San Jose proposes a need to improve and upgrade the Water Pollution Control Plant. While the development of the water treatment facilities can potentially impact the burrowing owls, the proposed development that does not utilize the grasslands can potentially be mitigated to a less than significant level. However, **the impacts that are associated with the "Other Proposed Land Uses", which include commercial and recreational development as well as new roads and other infrastructure must be recognized as significant and unavoidable.** To mitigate any impacts to grasslands to less than significant, the City will need to preserve and enhance at least an equivalent number of acres of burrowing owl habitat that is not currently available to owls.

These "Other Proposed Land Uses", have nothing to do with upgrading the WPCP and are not necessary in any way to the WPCP work. To avoid impacts to burrowing owls and the necessity to mitigate for loss of essential burrowing owl habitat, the City should not propose any development on the bufferlands. While monetizing land use is considered essential by most cities, development is not the only way to have an area generate money. Under the Santa Clara Valley Habitat Plan (Habitat Plan), which is expected to be adopted within the next year or so, the City of San Jose will have the unique opportunity to maintain and enhance the grassland habitat for burrowing owls in order to mitigate for its own infrastructure projects (including the WPCP itself). There may also be mechanisms under the Habitat Plan by which the City could generate funds for maintaining the bufferlands as burrowing owl habitat.

In summary, the entire approximately 650 acres of grassland habitat at the bufferlands is documented burrowing owl nesting and foraging habitat. The proposed mitigations for the development proposed on the bufferlands--setting aside 180 acres and/or paying into the yet to be adopted Santa Clara Valley Habitat Plan--will not reduce the adverse impacts of "other proposed land uses" on these grasslands to a less than significant level. Even with substantial enhancements, the approximately 160 acres of "burrowing owl preserve" would not mitigate for the loss of the other grasslands. Any alternatives that consume grasslands for development would impose a significant, unavoidable impact on the burrowing owl population of the region.

My recommendation is that the City revise the EIR to remove development of the bufferlands and to identify the entire bufferland area as a burrowing owl preserve. This change will remove the significant impacts to burrowing owls from bufferland development and will eliminate the need to develop costly mitigations to offset impacts to burrowing owls on this site.

COMMITTEE FOR
GREEN FOOTHILLS

March 13, 2013

Bill Roth
City of San Jose
Department of Planning, Building and Code Enforcement
200 E. Santa Clara St.
San Jose, CA 95113

This constitutes Committee for Green Foothills' comments on the Draft Environmental Impact Report (DEIR) for the San Jose/Santa Clara Water Pollution Control Plant Master Plan. The Committee for Green Foothills (CGF) works to protect open space and natural resources in San Mateo and Santa Clara Counties. We have a strong interest in the impacts of the Master Plan on the open space, wildlife, and water resources in and near the project area.

The DEIR's analysis is flawed in many areas, many of which are discussed in the comment letters submitted by agencies, organizations and members of the public. This comment letter will focus on the inadequacies of the DEIR related to land use and alternatives analysis.

1. Land Use Analysis:

a. General Plan

According to CEQA, a land use impact is considered significant if the project would, among other things, conflict with any applicable land use plan, policy or regulation. DEIR at 4.2-19. The City of San Jose's Envision 2040 General Plan designates the entirety of the project site, including the bufferlands and other undeveloped space, as "public/quasi public" land. This designation allows institutional uses such as public utilities and associated facilities (including water treatment plants), schools, hospitals, and nonprofit activities that cannot be considered to be a residential, commercial, or industrial activity. Appendix 1 - Glossary, Envision 2040 General Plan. Thus, the WPCP and its water treatment facilities are an allowed use, but the retail, office, and industrial uses proposed by the Master Plan are not. Therefore, the project conflicts with the General Plan.

The DEIR states that the General Plan will be amended to change the designation of the area proposed for economic development from Public/Quasi-Public to various designations, including Light Industrial, Industrial Park, Neighborhood/Community Commercial, and Combined Industrial/Commercial. DEIR at 4.2-22. After the General Plan is thus amended, "the proposed PMP would be consistent with the General Plan." DEIR at 4.2-26. However, the CEQA requirement of evaluation of the impacts of failure to comport with local land use plans cannot be sidestepped by a mere statement that after the plan is amended to comply with the project, then the project will comply with the plan. General Plans are intended to guide land use policy and to control where various uses are located -- they are not intended to be changed every time a landowner wishes to put land to some use not included in the General Plan. If it were so, General Plans would be completely useless.

The DEIR's assumption that the putative future state of the General Plan may be relied on to conclude that the project does not conflict with the actual current state of the General Plan, could be considered to be either an impermissible baseline (since it assumes that current conditions are other than what they are) or an impermissible mitigation measure (since it relies on tentative future agency action). In fact, an amendment to a General Plan is itself an agency action requiring CEQA analysis. This highlights the fact that the impacts from the project's proposed change in land use must be analyzed in this DEIR, because otherwise those impacts must be analyzed at the time of the General Plan amendment.

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b. San Jose City Council Policy on Use of Plant Lands

On November 7, 2000, San Jose's City Council adopted a policy to guide use of WPCP land uses, affirming that the highest priority of land use for this site is compliance with the NPDES permit and consistency with the General Plan and Alviso Master Plan. DEIR at 4.2-17. Again, consistency with the General Plan is not to be achieved by amending the General Plan to follow the project.

The City Council policy also specifically addressed the uses of the bufferlands by requiring that the bufferlands must ensure sufficient buffer for odors and potential toxic releases and protect existing biological resources. The DEIR states that the project's WPCP improvements will control odors, but contains no analysis of the potential for increased risk of public exposure to toxic releases from the WPCP due to elimination of the open space bufferlands. DEIR at 4.2-26. Moreover, with regard to protecting existing biological resources, the DEIR merely states that the project "includes preservation, restoration and creation of various habitat types." DEIR at 4.2-27. However, since the City Council policy stressed protection of existing biological resources, the fact that the DEIR identifies significant impacts to biological resources as a result of the project indicates that the project is in conflict with this policy.

c. San Jose Zoning Designations

Finally, in addition to conflicting with the General Plan, the proposed economic development also conflicts with the existing zoning designations for that area, which include agricultural and residential zoning districts. Once again, the DEIR states that these zoning districts will be rezoned to eliminate this inconsistency. DEIR at 4.2-26. As stated above, this does not eliminate the requirement to analyze the impacts from the project's inconsistency with the current zoning designations.

2. Alternatives Analysis:

CEQA requires that an EIR discuss a range of alternatives to the project that could avoid or substantially lessen significant effects of the project, even if those alternatives would impede to some degree the attainment of the project objectives or would be more costly. CEQA Guidelines §15126.6. Thus, even though the stated goals of the project include economic development on the bufferlands, CEQA still requires that the EIR discuss alternatives that would reduce the environmental impacts of the project even if those alternatives do not include economic development.

Every one of the alternatives analyzed in the EIR, except the No Project alternative, includes at least some economic development. There is no discussion of what seems to be an obvious choice: an alternative that would include the improvements to the Water Pollution Control Plant (WPCP) but that would eliminate the development on the open space lands adjacent to the WPCP. Such development is not a necessary part of the WPCP improvements, but is merely tacked on as a way to provide revenue to the City. Moreover, the economic development is responsible for most of the significant impacts listed in the EIR, especially the biological impacts, due to the fact that the economic development would be located on lands that are currently undeveloped open space and that form an important habitat for burrowing owls and other species. Thus, the EIR's failure to include an alternative that would leave those open space lands undeveloped constitutes a violation of the CEQA requirement cited above.[1]

[1] It should be noted that the City was informed repeatedly during the scoping process that this alternative should be considered. Committee for Green Foothills, together with several other environmental groups, submitted more than one comment letter bringing this to the City's attention. CGF and our partners pointed out that any development on WPCP lands ought to be related to the water treatment purpose of the WPCP, not unrelated industrial and retail uses.

The DEIR states that the reason that all alternatives include some amount of economic development is that the 15,400 jobs predicted as a result of the proposed economic development will help to fulfill the jobs goal of the General Plan. The DEIR cites General Plan Policy IP-3.4, which states that amendments to the General Plan "may maintain or increase, but not diminish, the total planned job growth capacity for the City." DEIR at 7-33. Thus, the DEIR seems to imply, the project is somehow required by the General Plan to create 15,400 jobs, and no alternative that falls short of this goal may be considered.

First, the argument that the economic development aspect of the project will inevitably create no fewer than 15,400 jobs is ludicrous, considering that such development is entirely dependent upon putative future development proposals from outside parties. Second, considering that the DEIR's land use analysis assumes that the General Plan will be amended to conform with the project, the argument that the DEIR's alternatives analysis is constrained by the General Plan's jobs goal is inconsistent, to say the least. Third, Policy IP-3.4 is irrelevant to the DEIR's analysis. Inclusion of an alternative that maintains the bufferlands as open space would not require an amendment to the General Plan, since the General Plan identifies the bufferlands as undeveloped Public/Quasi-Public space. The fact that the General Plan contains a city-wide jobs goal no more requires this particular project to provide a certain number of those jobs than it requires the same of any other project.

In sum, the DEIR contains significant flaws in its analysis and omits entirely some analysis that is required. Much of these inadequacies are caused by the inappropriate inclusion of the economic development on the bufferlands. Even those impacts not analyzed in this letter (biological, air quality, greenhouse gases, and transportation, for example) are largely related to and caused by the economic development, rather than the WPCP improvements. All of this serves to underline the fact that development of the WPCP bufferlands is an inappropriate and environmentally harmful use of that open space. We request that the DEIR be revised to include adequate analysis of these impacts, and also to include analysis of an alternative that would provide for WPCP improvements without putting retail, industrial and other uses on the bufferlands.

Thank you for your consideration of these comments.

Sincerely,

Alice Kaufman
Legislative Advocate, Committee for Green Foothills

HS

From: Roth, Bill <Bill.Roth@sanjoseca.gov>
Sent: Wednesday, March 06, 2013 8:38 AM
To: Jill Hamilton; Allison Chan
Cc: Davidson, John; Davies, Ken
Subject:

FW: Draft EIR for SJ/SC WPCP Master Plan

From: Howard Shellhammer [mailto:hreithro@pacbell.net]
Sent: Tuesday, March 05, 2013 3:22 PM
To: Roth, Bill
Subject: Draft EIR for SJ/SC WPCP Master Plan

Mr. Roth. I visited the Planning Department and you today, March 5th, to examine some aspects of the Draft EIR for the San Jose/Santa Clara WPCP Master Plan. I am a Professor of Biology Emeritus at San Jose State University and the acknowledged expert on the endangered salt marsh harvest mouse. I am also knowledgeable about the salt marsh shrews that are scattered about the Greater S. F. Bay. I am also a part-time Senior Associate for H. T. Harvey and Associates of Los Gatos, however I write to you today as an interested and educated citizen of the city and as an expert on the mouse.

There is wording in the Bio 2c section of the EIR to the effect that trapping for endangered and sensitive small mammals will take place in various areas shortly before, one day before, manipulation is to occur, unless I misread that sentence. That section goes on to state that if animals are found then mitigation measures will be discussed the U. S. Fish and Wildlife Service and the California Department of Fish and Wildlife. There some major problems associated with planning to trap so little and so soon before development or other impacts on potential endangered species habitat. Since salt marsh harvest mice are often scarce to very scarce one night of trapping may not uncover any animals leading to the potential "take" of animals that are in a site, and all the penalties and delays such "take" would produce. The standard trapping protocol is to run trapping grids for four consecutive nights and in some places the agencies may require even longer trapping of each grid. The grids are usually ten traps by ten traps placed 10 meters apart hence it may require trapping of several to numerous grids in any one area. And this trapping should be done months, much better a year, before impacts to the trapping area are to occur. It can be a long and difficult process to develop and gain acceptance for mitigation measures. The agencies will not let the City, i.e. trappers hired by the City, trap one day in advance in any case. 1

And in that context I am concerned about the potential impacts of the road that might be developed along the northeastern edge of the project area to end in Dixon Landing Road just west of its interchange with Hwy 880. There is potential mouse habitat in some of that area. The vegetation between the Milpitas Sewage Disposal site and Dixon Landing Rd has been moderate to moderately poor habitat over the last five decades and while it might not support many mice it is likely to support some. It, like other areas that might support mice and/or shrews, should be trapped intensively long before any potential impacts occur. 2

Let me know should you have questions about my comments or other potential questions aobut the mouse or shrew.

Sincerely, Howard Shellhammer, Ph.D.