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EXHIBIT E

SECTION 1.0 INTRODUCTION AND PURPOSE

The Newark City Council approved the Newark Areas 3 and 4 Specific Plan in 2015, following the City's certification of a Recirculated Environmental Impact Report (REIR) under the California Environmental Quality Act (CEQA), California Public Resources Code Section 21000 et seq. That certification act is final and the REIR is beyond any legal challenge and is presumed adequate as a matter of law. The City previously approved various land use entitlements for the development of Area 3 under the Specific Plan in 2016 based on the REIR. The City is now considering further implementation of the Specific Plan, including a proposed vesting tentative subdivision map and related development applications with regard to Area 4 of the Specific Plan – referred to as the Sanctuary West Residential Project.

Once an EIR has been certified as to a project or program, such as the 2015 Specific Plan REIR, CEQA generally provides (Public Resources Code Section 21166, and CEQA Guidelines Section 15162) that the circumstances requiring or allowing further CEQA review, or calling for supplemental or subsequent environmental reviews, are limited to specific situations involving substantial changes in the proposed project; or the circumstances under which the project is being undertaken; or new, previously unknowable, information of substantial importance which shows a need for new detailed investigation or analysis. When the conditions calling for supplemental or subsequent environmental review are not present, the agency can prepare an Addendum to the EIR.

Additionally, pursuant to CEQA Guidelines Section 15168, an agency can approve an activity as being within the scope of the project covered by a program EIR and no new environmental document is required provided that the triggers for subsequent environmental review are not met. In making the determination that a later activity is within the scope of a program EIR, the agency should consider consistency of the later activity with the type of allowed land use, overall planned density and building intensity, geographic area analyzed for environmental impacts, and covered infrastructure as described in the program EIR.

Separately but similarly, Section 65457 of the California Government Code provides that residential development projects, including a subdivision, that implement and are consistent with a specific plan for which a lead agency certified an EIR are exempt from further CEQA review, unless an event as specified in Public Resources Code Section 21166 has occurred after adoption of the specific plan.

The information and analysis presented in the September 2019 checklist demonstrate that no further environmental review is called for as to the proposed Sanctuary West Residential Project, because the Project is within the scope of the program Specific Plan REIR certified in 2015, and because none of the events specified in Public Resources Code Section 21166, or CEQA Guidelines Section 15162 have occurred since the certification of the REIR.

SECTION 2.0 VOLUNTARY PUBLICATION OF COMPLIANCE CHECKLIST

Circulation of the Draft Compliance Checklist is not required by CEQA; nor are formal responses required to any comments received in response to the Checklist. The City of Newark elected to post the checklist for informational purposes for a 20-day period (September 11 through October 1, 2019); however, this posting period is not a comment period. The Checklist is still available for public review and will be considered by the City's decision makers when they consider the Vesting Tentative Map, Conditional Use Permit, and Planned Unit Development. The City undertook the following actions to inform the public of the availability of the Draft Compliance Checklist:

- A Notice of Draft Compliance Checklist was published on the City's website (<http://www.newark.org/home/showdocument?id=5265>);
- Copies of the Draft Compliance Checklist were made available on the City's website (<http://www.newark.org/home/showdocument?id=5267>); and
- Email notification of the availability of the Draft Compliance Checklist was sent to members of the Citizens' Committee to Complete the Refuge.

SECTION 3.0 RESPONSES TO CHECKLIST LETTERS

Although not required by CEQA, this document includes written responses to letters received by the City of Newark in response to posting of the Draft Compliance Checklist. This section also summarizes and addresses verbal comments related to the Draft Compliance Checklist received at the Newark City Council hearing on September 26, 2019.

Letters are organized under headings containing the source of the letter and its date. The specific comments from each of the letters and/or emails are presented with each response to that specific comment directly following. Copies of the letters and emails received by the City of Newark are included in their entirety in Appendix A of this document. Letters received on the Draft Compliance Checklist are listed below.

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FEDERAL AND STATE AGENCIES

A. U.S. Fish and Wildlife Service, San Francisco Bay-Delta Office (email dated September 26, 2019)

Comment A.1: It is unclear if the City of Newark is reopening the CEQA public comment period. Given the level of interest from State and Federal agencies, as well as, non-profit and constituent interest, it may be prudent to allow the public to comment on the new project.

Response A.1: The Newark Areas 3 and 4 Specific Plan REIR was certified in 2015, and that certification action is final. The Project is exempt from further CEQA review under Government Code Section 65457. Public circulation of the Draft Compliance Checklist is not required; the Checklist was prepared pursuant to CEQA Guidelines Section 15168(c)(4) and Government Code Section 65457. Additionally, the Checklist serves as an Addendum pursuant to CEQA Guidelines Section 15164 by documenting that the Project would not result in any new or substantially more severe impacts than those previously identified in the REIR. It will be attached to the REIR for consideration by the decision makers. The City of Newark elected to post the Checklist for informational purposes for a 20-day period (September 11 through October 1, 2019). Responses to letters and verbal comments received from the public are included in this report.

Comment A.2: This area is ecologically important for listed species recovery and marsh restoration. The Tidal Marsh Recovery Plan which underwent public review and comment delineated Area 4 as an area for Future Ecotone Restoration. Actions under the Recovery Plan are voluntary but are consistent with other restoration planning efforts in the Bay like the Habitat Goals Project and the expansion of the Refuge as previously discussed in the U.S. Fish and Wildlife Service's Don Edwards San Francisco Bay National Wildlife Refuge's previous comment letter.

Response A.2: The U.S. Fish and Wildlife Service (USFWS) states that its Tidal Marsh Recovery Plan (2013) identified Area 4 as an area for future ecotone restoration. However, the USFWS email also explains correctly that potential future actions under the Recovery Plan are voluntary. USFWS recovery plans do not impose any requirements or establish any restrictions on landowners or local governments.

Comment A.3: The site is important for the federally and state listed (fully protected) salt marsh harvest mouse, which occurs on site. The Service is concerned over the very impacts (habitat loss including loss of function from isolation/bifurcation, predators, construction impacts, etc.) the 2019 Biological Resources Technical Report discusses. There are mitigation measures provided to lessen the level of significance (CEQA definition) but MM-BIO 8.2 and 8.3 in the RDEIR are not viable mitigation measures as the Service and the California Department of Fish and Wildlife do not allow capture and translocation of salt marsh harvest mice as a mitigation measure. These project effects and measures clearly result in "incidental take" not scientific take for recovery purposes and is an inappropriate use of a section 10(a)(1)(A) recovery permit.

Response A.3: The USFWS states that two mitigation measures (MM BIO-8.2 and -8.3) from the 2015 REIR allow capture and translocation of endangered salt marsh harvest mice, which the USFWS states it no longer approves of as a mitigation measure. The Compliance Checklist for the current tentative map identifies the mitigation measures for this species that are relevant and apply to the current development under the Specific Plan (see Compliance Checklist pp. 27 and 49, and Appendix B pp. B-7). Given the significantly reduced size of the Project compared to that analyzed in the REIR, and its configuration, the Project would not directly impact salt marsh harvest mouse habitat. As a result, the capture and translocation of salt marsh harvest mice described in REIR mitigation measure MM BIO-8.3 is not necessary and would not occur. Consequently, MM BIO-8.3 was not included in the Compliance Checklist list of relevant and applicable REIR mitigation measures. MM BIO-8.2, which is included in the list of relevant and applicable REIR mitigation measures, does not call for the capture and relocation of salt marsh harvest mice.

B. U.S. Fish and Wildlife Service, San Francisco Bay National Wildlife Refuge (letter dated October 1, 2019)

Comment B.1: The City has prepared the Draft 2019 compliance checklist for the 2015 Final Recirculated EIR (FREIR) and finds no new information of substantial importance, at the time the previous EIR was certified as complete and, therefore, no Subsequent or Supplemental EIR needed. The Refuge has provided comment letters regarding Area 4 to the City of Newark since 1985, and we reiterate and incorporate by reference any of our previous concerns expressed in our comment letters. Unfortunately, due to the short 20-day time period we did not have adequate time for a complete review, or time to meet with City staff to understand how our previous concerns as an adjacent landowner have been considered and/or addressed.

Response B.1: The Newark Areas 3 and 4 Specific Plan REIR was certified in 2015, and that certification action is final. The Area 4 – Sanctuary West Residential Project is exempt from further CEQA review under Government Code Section 65457. Public circulation of the Draft Compliance Checklist is not required; the Checklist will be attached to the REIR, pursuant to CEQA Guidelines Section 15164(c). The Checklist also serves to document that the Project is within the scope of the REIR pursuant to CEQA Guidelines Section 15168. The City of Newark elected to post the Checklist for informational purposes for a 20-day period.

Comment B.2: The Draft Compliance Checklist concludes that there are no new circumstances involving new significant impacts or increase in the severity of impacts for any sensitive or special status species or substantial interference with their movement. However, the Checklist and the associated analysis fail to consider new research, ongoing and planned wetland restoration activities, climatic data analysis, and most recent regional planning guidance that highlight the significance of the project area for species like the federally listed Salt Marsh Harvest Mouse (SMHM) and Ridgeway's Rail (RIRA). In 1990, Congress identified Area 4 as important wildlife habitat, and the Tidal Marsh Recovery Plan (2013), which underwent public review and comment, delineated Area 4 as an area for potential future Baylands Ecotone Restoration.

The Refuge managed ponds adjacent to Area 4 are still planned for restoration to tidal influence, in furtherance of the 2015 Baylands Ecosystem Habitat Goals Science Update, a regional guidance document, emphasizes the importance of the upland-wetland restoration zones. Area 4 could support existing habitat needs of marsh wildlife and allow space for marsh migration caused by sea-level rise. The higher elevation areas of Area 4 that the project seeks to develop could provide valuable ecotonal habitat transitioning from restored wetlands to upland areas. These higher areas provide critical high tide refugia for marsh species like the salt marsh harvest mouse and Ridgway's rail. Since the projected sea-level rise acceleration will increase frequency and severity of flooding events and the surrounding lands have already been developed, higher elevation areas of Area 4 could be one of the potential habitat refugia to these species. In addition, new research on the movements and diet of SMHM indicate the important role of these upland areas for preferred food items and vegetation structure.

Response B.2: The 1990 Congressional approval of the Refuge expansion boundary and the 2013 Recovery Plan (a) predate the certified REIR, and (b) did not create any requirements for or establish any restrictions on private landowners or local governments, as noted in Response A.2 above. The Project site is privately owned and proposed for residential development in accordance with the City's General Plan, Areas 3 and 4 Specific Plan, and Zoning Ordinance.

Potential future restoration of off-site lands, and potential future habitat conditions and habitat uses on Area 4, are not relevant to CEQA evaluation of the Project. Area 4 is part of an approved Areas 3 and 4 Specific Plan, and the current Project implements the Specific Plan. The City understands the USFWS's desire for habitat conservation and restoration actions on Area 4, but such desire is not relevant to the CEQA analysis of the proposed Project. It should also be noted that the California Ridgway's rail does not occur on the Project site due to the absence of suitable habitat, and none of the proposed development areas are close to potential tidal marsh habitat for this species.

Comment B.3: The Draft Compliance Checklist should address the impact of the project to the Western burrowing owls. Once abundant on the upland areas of the Baylands, the burrowing owl (BUOW) population has steadily decreased in the South Bay primarily due to habitat loss for development. In the recent five years, the South Bay Burrowing Owl Science Team, a local team of experts, has warned on the potential of the species extirpation and highlighted the need of coordination at a Regional scale to improve conditions for the species. Since 2015, the Refuge has collaborated with the Santa Clara Valley Habitat Agency to enhance habitat for the burrowing owl on Warm Springs Unit as part of a habitat management plan. Among others, several artificial burrows were installed at Stevenson's Subunit, which is located adjacent to Area 4. The proposed development jeopardizes the efforts to rebound the owl population by removing potential nesting habitat and equally importantly foraging habitat. Studies show that burrowing owls may travel as much as 2 miles away from their nest to forage and they forage in diversity of habitats that include farmland. Nesting burrows at Warm Springs are less than a mile away from Area 4.

Response B.3: The Draft Compliance Checklist and its attached Biological Resources Technical Report addressed potential impacts to burrowing owls. No new information is presented in the comment regarding owls on the Project site.

Focused, breeding-season surveys were completed in 2019, and detected no burrowing owls in Area 4. For the first time, 2019 surveys (not associated with the current Project) detected no burrowing owls in the Warm Springs Unit of the Refuge. Under current, 2019 conditions, there are no burrowing owls to be impacted; therefore, the Project mitigation (requiring habitat mitigation based on 2010 conditions) is quite conservative. The decline in burrowing owls at Warm Springs and their absence in 2019 suggests that, if owls were to ever recolonize Warm Springs, they would have ample foraging habitat (with little competition among pairs of owls) and would not need to rely on Area 4, one mile or more away, for foraging. Finally, it should again be noted that nearly the entire Area 4 development area has been and has continued to be disked and cultivated annually, so it does not provide high-quality habitat of any kind for burrowing owls.

Comment B.4: The current REIR and associated analysis do not provide a comprehensive cumulative impact analysis on the impact of the Project on the groundwater hydrology, under appreciates the interconnected hydrology of the Baylands. Therefore, we feel the REIR does not adequately address the potential impacts on the Vernal pool and Seasonal wetland habitats found on the adjacent Refuge lands. The vernal pools, host the federally endangered vernal pool tadpole shrimp and federally threatened California tiger salamander. Groundwater hydrology and changes to groundwater hydrology from the proposed project may affect the inundation regime of the pools, which is associated with reproductive success. Water runoff and salt-water intrusion in the pools due to increased flooding potential can have detrimental effects on these species either via the introduction of predators like fish or directly through the alteration of salinity and water pollution.

Response B.4: The certified REIR addressed Project impacts to groundwater hydrology and groundwater recharge, and found them to be less than significant. This analysis is now deemed adequate as a matter of law. The Draft Compliance Checklist states that Project site hydrology and drainage conditions have not changed since the REIR was certified, and the USFWS comment letter does not provide any new information. The Project would not cause changes to up-gradient sources of groundwater recharge, nor tidal elevations in the San Francisco Bay. There would be no significant change in the movement of groundwater, or groundwater levels, which are predicated primarily upon temporal rainfall, Bay levels, and the hydraulic conductivity of site soils, which would remain unchanged. The Project would not increase flooding potential, as documented in the REIR and Draft Compliance Checklist.

Comment B.5: The proposed project can result in loss of flood accommodation space, REIR and the Checklist in our opinion does not adequately describe current research to address the cumulative impacts from flooding (Wang et al. 2018). We reiterate our previous comment that Area 4 has potential to provide natural and economical flood protection from sea-level rise, extreme storm events and 100-year flooding potential. Tidal marsh restoration can increase the resiliency to extreme

storms. The Bay Area Council's report on the risks from severe storms recommends incorporating up to date climate change predictions, including sea-level rise and changes in rainfall, into flood risk analyses. The REIR uses data that is outdated to assess impacts on flooding and ignores regional strategies that seek to increase resilience to sea-level rise.

Response B.5: There is presently no flood accommodation space in Area 4; therefore, the Project would not result in loss of flood accommodation space. The USFWS' previous comments on these topics were considered in the certified REIR. The Draft Compliance Checklist includes an updated evaluation of sea level rise impacts, utilizing guidelines published in 2018 by the California Ocean Protection Council Science Advisory Team Working Group, which were based on their work of one year prior ("Rising Seas in California: An Update on Sea-Level Rise Science." California Ocean Science Trust, April 2017.) It should be noted too that Area 4 is already separated from the San Francisco Bay by a system of protective levees which do provide a hardened shoreline. Top of levee elevations are generally at or above the 100-year storm surge elevation.

Comment B.6: The REIR and the Checklist also do not address the impact of the project on the spread of invasive species, the potential for an increase in nuisance species, such as crows and gulls, in the proposed landscaped public use areas, and the creation of tall perching spots for avian predators that affect species like the SMHM, RIRA, BUOW and other ground nesting species in the Refuge lands. The increased predation pressure combined with lack of high tide refugia can be critical for SMHM and RIRA. The REIR and the Checklist should address cumulative impacts on wildlife. Furthermore, mitigation measures to address invasive species and predator control lack measurable objectives and success criteria.

Response B.6: As noted in the Draft Compliance Checklist, REIR mitigation measure MM BIO-4.7 requires development of a predator management program, which would address impacts resulting from species such as crows and gulls. With respect to invasive plants, MM BIO-11.1 requires the development of an Invasive Species Management Plan consistent with Areas 3 and 4 Specific Plan Policy 6-10, and prescribes specific success criteria and measureable objectives. The Project does not propose any components that would create new tall perching sites adjacent to, or in the vicinity of, high-quality habitat for the Ridgway's rail. (As noted above in Response B.2, the Ridgway's rail does not occur on the Project site, and the only suitable habitat for this species is along Mowry Slough, well away from the proposed development.) The vast majority of development would be located far enough from high-quality salt marsh harvest mouse habitat that no new structures would provide good perch sites for avian predators of the salt marsh harvest mouse (especially considering the presence of existing electrical towers within the highest-quality habitat for this species).

The REIR was certified in 2015 and is presumed adequate as a matter of law. USFWS does not provide any new information that was not known, or could not have been known, at the time of the REIR certification.

REGIONAL AND LOCAL AGENCIES

C. San Francisco Bay Regional Water Quality Control Board (letter dated October 1, 2019)

Comment C.1: The San Francisco Bay Regional Water Quality Control Board (Water Board) appreciates the opportunity to review and comment on the City of Newark's (City's) Draft Compliance Checklist (Checklist) for the Area 4 Sanctuary West Residential Project (Project). Where relevant, the comments in this letter incorporate by reference our January 2010 comments on the Draft Environmental Impact Report for the Newark Areas 3 and 4 Specific Plan (DEIR) and June 2010 comments on the Final Environmental Impact Report for the Newark Areas 3 and 4 Specific Plan (FEIR).

The Project proposes to construct 469 single-family residences in Sub-Areas B and C of Area 4, a 560-acre area of diked, formerly tidal baylands located generally between the Union Pacific Railroad (UPRR) tracks and tidal open water and wetland habitats in Mowry Slough. Sub-Areas B and C make up a little more than 181 acres of Area 4, such that the proposed overall density of the development in Sub-Areas B and C is 2.6 units per acre. The Project proposes to use over 1.6 million cubic yards of largely imported fill to increase elevations in areas proposed for development to +15 ft NAVD, above the current Federal Emergency Management Agency (FEMA) Base Flood Elevation (BFE) of +11 ft NAVD1 and the proposed BFEs of +11 through +13 ft NAVD2.

Water Board staff are concerned that the Project, as described in the Checklist, may impact waters of the State or assigned beneficial uses of waters of the State. Under the authority of the Porter-Cologne Water Quality Act, the Water Board has developed, and implements, the San Francisco Bay Basin Water Quality Control Plan (Basin Plan), which defines the beneficial uses of waters of the State within the San Francisco Bay Region. Because habitats in Newark Area 4 are hydrologically connected to San Francisco Bay, the following beneficial uses of San Francisco Bay are also likely to apply to waters and wetlands in Area 4: estuarine habitat (EST); preservation of rare and endangered species (RARE); contact water recreation (REC1); non-contact water recreation (REC2); shellfish harvesting (SHELL); fish spawning (SPWN); and wildlife habitat (WILD). Implementation of the proposed Project may impact beneficial uses of waters of the State, including but not limited to wildlife habitat and preservation of rare and endangered species in Area 4.

As directed by 14 CCR §15096, the Water Board is a Responsible Agency under the California Environmental Quality Act (CEQA) that must determine the adequacy of a final EIR or negative declaration. Our January and June 2010 comments raised serious concerns about the adequacy of environmental analysis in the programmatic DEIR and FEIR, respectively; these concerns were not addressed in the subsequent Recirculated Draft EIR (RDEIR, August 2014) or Recirculated Final EIR (RFEIR, January 2015). The Checklist raises the following new concerns related to indirect, direct, and cumulative impacts to water quality and beneficial uses:

- Potential impacts to waters of the State are based on out-of-date delineations;
- Potential impacts to rare and endangered species (special status species) habitat are based on out-of-date surveys and fail to consider more recent science, especially regarding potential habitat for federally listed salt marsh harvest mouse;

- The Project will likely require the development of a Habitat Conservation Plan in consultation with the U.S. Fish and Wildlife Service;
- The potential for indirect and cumulative impacts to species habitat is increased by the current project footprint;
- The Checklist fails to consider the potentially significant direct, indirect, and cumulative impacts of the Project on existing and potential water quality and beneficial uses in Area 4 and the adjacent landscape, based on the most recent scientific guidance on bayland habitats and enhancement opportunities; and
- The assessment of impacts in the Checklist fails to adequately address cumulative impacts from proposed Project activities on local and regional flood risks, which are likely to be exacerbated by climate change.

In addition, the City failed to follow proper CEQA procedures by not notifying the Water Board of the availability of the Checklist, and by using the Checklist as a substitute for a tiered project-level Supplemental EIR (see Comment 7 below). In sum, the Water Board finds the Checklist to be inadequate, and requests that the City develop a Supplemental EIR (SEIR) to address potentially significant impacts to resources under the Water Board’s jurisdiction.

Response C.1: The introductory comment provides a summary of specific comments to follow (Comments C.2 through C.10) which are specifically responded to in Responses C.2 through C.10. In addition, the City previously considered and addressed the Water Board’s prior comments in the certified REIR. The certified 2015 REIR is presumed adequate, as a matter of law. The Project has been designed to avoid impacts to waters of the State. The City was not required by CEQA to circulate the Draft Compliance Checklist, but elected to post the Checklist for informational purposes. There is no legal basis for the City to prepare a supplemental EIR for all the reasons set forth in the Checklist and staff report. Because the Project would not result in the placement of fill in waters of the U.S. or waters of the State (as discussed in more detail in Response C.2, below), it should not require any permit or approval from the Regional Board. The City acknowledges, however, that the ultimate determination as to whether the Project requires a permit or approval from the Water Board would be made by the Water Board.

Comment C.2: In assessing potentially significant impacts to jurisdictional waters and special status species, the Checklist relies on out-of-date delineations and protocol-level surveys.

The CEQA Checklist (Checklist) relies on a wetland delineation that was verified by the U.S. Army Corps of Engineers (Corps) in 2007 (Corps File # 2006-400075S), as is acknowledged on page 26 of the Newark Area 4 Biological Resources Report (Biological Report) (H.T. Harvey & Associates, July 25, 2019). That verified delineation expired in 2012. Since that time, there has not been a formal delineation of the extent of jurisdictional waters of the U.S. or jurisdictional waters of the State in Area 4. The discussion of impacts to wetlands is, therefore, based on a delineation that was verified in 2007. Text on page 21 of the Biological Report states:

Waters of the U.S./State. Based on our 2018-19 background review and reconnaissance-level site visits, we determined that there has been no change to the extent and boundaries of

waters of the U.S./State in the study area since the 2009 Biological Resources Report was prepared or since the 2015 RFEIR was certified.

While the Biological Report acknowledges that approximately 253 acres of jurisdictional waters may be present in Area 4, it does not acknowledge that the last Corps-verified delineation was made in 2007, and that both the 2009 Biological Resources Report and the 2015 Recirculated Final Environmental Impact Report (RFEIR) relied on the 2007 verified delineation. In addition, the Biological Resources report does not provide a detailed description of the methodology used to perform the “reconnaissance-level site visits”. Without this information, it is difficult for independent parties including the Water Board to assess the sufficiency of those site visits to support the conclusions presented in the Biological Report with respect to the current extent of jurisdictional waters.

Therefore, the conclusions related to impacts to wetlands and other jurisdictional waters in the Checklist are based predominantly on an out-of-date delineation. This is especially troubling since the development boundaries of the proposed Project appear to go to great lengths to conform precisely to the boundaries of wetlands delineated over ten years ago. In light of the significant acreage of potential jurisdictional waters in Area 4, a new wetland delineation should be performed. The current reliance on out-of- date data to support the conclusions in the Checklist is inappropriate and inadequate.

In addition, the discussion of impacts to special status species is based for the most part on protocol-level surveys conducted in 2008. The Biological Report acknowledges that protocol-level surveys for special status species have not been conducted in over a decade. Therefore, the conclusions related to impacts on special-status species (e.g., salt marsh harvest mouse [SHMH], California black rail [CBR], California ridgways rail [CRR], and burrowing owls [BUOW]) in the Checklist are based predominantly on out-of-date protocol level surveys. In the more than ten years since protocol-level surveys for SMHM were conducted at Area 4, research has demonstrated that SMHM occupy a far broader range of habitats, including upland grasslands and diked/seasonal wetlands (including seasonal fresh, brackish, and saline wetlands) than previously thought. Figure 6 in the Biological Resources report incorrectly limits potential SMHM habitat in Area 4 primarily to areas mapped as aquatic, diked salt marsh, and brackish marsh around the former Pintail Duck Club (see Figure 3 for habitat mapping), and fails to consider potential SMHM habitat elsewhere on the site, especially in the mosaic of uplands and seasonal saline/brackish marsh that dominates the southern portion of Area 4.

In light of the potential presence of several special-status species in the proposed development footprint of Area 4, new protocol-level surveys should be performed and used as the basis for impact assessment in a Supplemental EIR. The Checklist’s reliance on out-of-date surveys to support its conclusions is inadequate.

Response C.2: H.T. Harvey and Associates completed a thorough delineation of Area 4 wetlands and waters during an extensive, months-long hydrology monitoring and mapping effort in 2006 through 2007. The U.S. Army Corps of Engineers (Corps) formally verified that delineation in 2007. The Corps re-verified that delineation on February 19, 2014, following a site visit conducted by Katerina

Galacatos, South Section Chief, Regulatory Branch, San Francisco District Corps office. H. T. Harvey and Associates' mapping and delineation of wetlands and waters on Area 4 included all aquatic features that could constitute "waters of the State" as defined both by State law at the time, and by the recently adopted 2019 State Wetland Definition and Procedures (State Water Resources Control Board, April 2019; takes effect May 2020).

The facts and circumstances surrounding the delineation for both wetlands as defined by the Corps and for waters of the State have remained constant such that its ultimate conclusions remain valid according to H.T. Harvey and Associates. H.T. Harvey and Associates' recent data review and multiple site visits (described in Appendix B of the Draft Compliance Checklist) confirmed that site conditions and uses have not changed. Additionally, due to farming practices and a long history of site manipulation, wetland-upland transition zones on site are very gradual and comprise typically 50 to 200 feet of marginal habitat that may exhibit fewer wetland parameters in drier years. These areas were mapped conservatively during the intensive delineation mapping effort, meaning that transitional areas and marginal wetlands were labeled as jurisdictional wetlands at that time. As a result, there is no reason to believe that any wetlands or other aquatic features exist on Area 4 today that were not identified as wetlands or other aquatic features during the verified mapping and delineation process. Accordingly, the Project would result in no new or substantially more severe impacts to "waters of the State."

The comment stating that the impact assessment of special status species is based on out-of-date protocol-level surveys overlooks the facts that: (a) the impact assessment for all special-status wildlife species except burrowing owls has always been based on habitat assessments and presumption of presence in potentially suitable habitat, not based on surveys, and (b) the impact assessment for the Draft Compliance Checklist was based on a reconnaissance survey that concluded that habitat conditions for special-status wildlife are unchanged (i.e., still as they were assessed previously), and thus the Checklist is based on current habitat assessment information. It is important to note that the majority of the site, including areas considered to be jurisdictional wetlands and including nearly the entire footprint of proposed Project development, is disked regularly and for many months out of the year is not vegetated. When vegetated, these areas contain sown cereal crops intermixed with weedy annual species. Generally, areas not mapped as salt marsh harvest mouse habitat are unvegetated for the majority of the year and do not provide potential salt marsh harvest mouse habitat, unlike typical unfarmed upland ecotones.

It is inaccurate to say that "several special-status species" are present in the proposed development footprint immediately after mentioning listed species such as the salt marsh harvest mouse, California Ridgway's rail, and California black rail. Several listed species may occur on or adjacent to the larger Area 4 site outside the Project footprint, and several California Species of Special Concern species may occur in the Project footprint, but the listed species do not occur in the Project footprint, with the possible exception of one clear span bridge crossing over a ditch supporting pickleweed that is not subject to cultivation activities. This area, which is

acknowledged to provide potential salt marsh harvest mouse habitat, would not be disturbed or impacted by the Project.

Comment C.3: If the proposed Project can be implemented in a manner that avoids impacts to waters of the U.S., the City must prepare a Habitat Conservation Plan in coordination with the U.S. Fish and Wildlife Service.

Prior development proposals in Area 4 would have directly impacted waters of the U.S. In response to these proposed impacts, the Corps would have initiated consultation with the U.S. Fish and Wildlife Service (USFWS), pursuant to Section 7 of the Endangered Species Act. If the Sanctuary West Residential Project can be implemented without impacting waters of the U.S., the City of Newark must initiate consultation with USFWS pursuant to Section 10 of the Endangered Species Act. Consultation under Section 10 of the Endangered Species Act will develop a Habitat Conservation Plan (HCP) for the federally listed species that may be impacted by Project implementation. Development of an HCP pursuant to Section 10 of the Endangered Species Act is a much more complicated and lengthy process than Section 7 consultation. The Checklist should have discussed this change in USFWS consultation for the proposed Project.

The HCP will constitute a federal license for an activity that may result in a discharge to waters of the U.S. since the HCP will permit implementation of the Project that will result in a discharge of runoff during the construction and post-construction phases of Project implementation. Accordingly, the Project is subject to Section 401 of the Clean Water Act thereby requiring water quality certification from us (CWA §401(a)(1) and 33 USC1341(a)(1)). Discharges may impact habitat by carrying contaminants into waters of the State or by altering the salinity and other characteristics of wetland habitats to an extent that compromises habitat suitability for SMHM, CRR, and/or other special-status species. Although the Checklist refers to treatment of stormwater runoff during construction and post-construction periods, the Checklist does not provide sufficient detail related to proposed treatment measures to allow an adequate assessment of the ability of those treatment measures to sustain habitat values for special-status species. In addition, the Checklist does not mention the need to track contaminant levels, salinity levels, and other relevant water quality characteristics in the wetlands in Area 4 that provide habitat for SMHM and CRR. A supplemental EIR should include discussion of the HCP process and provide sufficient detail to assess the potential impacts of stormwater on the water quality and beneficial uses of undeveloped wetlands in Area 4.

Response C.3: The Project would not result in the take of any federally listed wildlife species; therefore, the Project is not required to prepare a Habitat Conservation Plan or seek a federal Incidental Take Permit under the federal Endangered Species Act. There are no tidal wetlands in Area 4 to provide suitable habitat for California Ridgway's rail; these habitats are only located off-site.

Wetlands adjacent to proposed Project development provide very little suitable habitat for salt marsh harvest mouse and do not provide suitable habitat for Ridgway's rail. These wetland areas are currently both disked and cultivated annually, and hydrology in these wetlands is driven by surface water inputs. The REIR and Checklist considered these factors in their analyses. Municipal Regional Permit C.3 standards require site-specific stormwater treatment design features, and

MM BIO-2.1 requires the Project to maintain similar surface hydrologic inputs to these wetlands post-construction. Water draining to the wetlands would be treated and would not substantially decrease habitat quality for salt marsh harvest mouse over existing cultivated conditions. Additionally, MM HYD-1.1 through MM HYD-1.4 prescribe additional measures to protect water quality during both the construction and operational periods, such as requirements for annual first flush stormwater monitoring for the life of the project, mandatory street sweeping and litter control programs, and inclusion of low-impact development principles.

Comment C.4: The current project proposal represents a change in the type of impacts on wetlands and other jurisdictional waters in Area 4 that would result in a potentially significant impact on beneficial uses of Area 4.

Previous CEQA documents for proposed development in Area 4 anticipated that about 85 acres of fill would be placed in jurisdictional waters. Portions of Area 4 that were not included in the development footprint included a mixture of wetlands and uplands. Mitigation proposed in prior CEQA documents included converting some unimpacted uplands to wetlands as part of the proposed compensatory mitigation for impacts on jurisdictional waters.

The Checklist claims that the current development footprint would avoid all jurisdictional waters in Area 4. As is noted in Comment 1, above, the current extent of jurisdictional waters in Area 4 has not been verified by the Corps or us, so it has not been established that the development footprint proposed in the Checklist would actually have no direct impacts on jurisdictional waters of the U.S. or state.

Although the development footprint proposed in the Checklist avoids placing direct fill in wetlands (as delineated in 2007), the preserved area will consist almost entirely of wetlands and other waters. The relative absence of uplands and transitional habitats in the preserved portions of Area 4 would compromise the habitat value of the preserved area since wetland habitat values are highest when they are a constituent of a mosaic of wetlands, seasonally flooded lowlands, and uplands. For example, species that spend much of their lifecycle in wetlands rely on adjacent uplands as refuge from high tide events and ponding associated with precipitation. This is well-illustrated by recent research on SMHM by scientists at UC Davis and CDFW, which indicates that SMHM utilize a far broader suite of habitats – including diked and seasonal fresh and brackish wetlands – than previously understood, and that utilization, survival, and reproduction in these habitats is increased when SMHM have access to adjacent upland areas that can provide refugia from flooding, preferred food items, and preferred vegetation structure.

Without a mosaic of uplands interspersed with wetlands, the only high water refugia in preserved portions of Area 4 would consist of the steep-sided perimeter levees and created transition zones between the grade of the preserved wetlands and the imported fill placed below the development footprint. Reducing high water refugia to levees and the transition zone to imported fill will increase opportunities for predation of listed species seeking refuge from high water on the levees and transition zones.

The creation of a development footprint that avoids all known jurisdictional waters in 2007 has resulted in preserved wetlands that are surrounded on multiple sides by the proposed development areas. The unusual shape of the proposed development footprint results in a much longer interface between developed areas and preserved wetlands. The prior CEQA documents acknowledged that development adjacent to preserved habitat would impact habitat values:

- Indirect effects of development could include an increase in nonnative and urban- adapted native species, and an increase in domestic animals such as cats and dogs, that could prey on more sensitive native species in the on-site conservation areas.
- Populations of nonnative mammals, such as house mice (*Mus musculus*), black rats (*Rattus rattus*), and Norway rats (*Rattus norvegicus*), as well as urban-adaptive natives, such as the raccoon (*Procyon lotor*) are likely to increase in the Project vicinity following development. These species may compete with or prey upon salt marsh harvest mice, salt marsh wandering shrews, and other marsh wildlife.
- Noise levels and nighttime lighting associated with the residential development may discourage wildlife including special-status species from using habitat adjacent to the development footprint.
- Development may fragment habitat for species, resulting in genetic isolation of breeding populations of special status species or insufficient foraging habitat to sustain local populations.

Since the length of the wetland-development interface has been significantly increased by the proposed Project, the Checklist should have assessed the magnitude of increased indirect impacts to habitat.

In an attempt to discount the impacts of development on adjacent habitats, text on page 30 of the Biological Report notes that CBR have been documented nesting and foraging near the Alviso Marina County Park, and asserts that impacts from park users would be commensurate with impacts from residents adjacent to habitat for special status species. Park users are only present during daylight hours, do not require nighttime lighting, and do not bring domestic cats with them to the park. Residential developments are in use 24 hours per day, seven days a week. The analogy between park users and full-time residents is flawed and should not be included in the Checklist to justify an adequate assessment of the significance of indirect impacts of residential development on the Beneficial Uses of wildlife habitat and the preservation of rare and endangered species.

In addition, the mitigation measures offered for those impacts appear to be largely speculative, and the CEQA documents provide no documentation related to any studies that might have demonstrated the effectiveness of such measures on preserving habitat value in preserved wetlands or providing adequate safeguards to protect special status species.

- MM BIO-4.5A. This measure states that any onsite mitigation habitat for BUOW should consist of at least 50 percent uplands, to provide adequate habitat for the ground squirrels and other burrowing animals upon which BUOW depend for habitat. This would be impossible with the development footprint proposed for the Sanctuary West Residential Project.

- MM BIO-4.7. This measure requires the development of a predator management program (e.g. no outdoor pet feeding, no outdoor cats, outdoor dogs must be on leash, containment of food wastes) and education of residents. No assessment of the effectiveness or feasibility of these measures at other residential developments adjacent to habitat is provided.
- MM BIO-8.4 proposes to protect SMHM habitat within 100 feet of the development envelope by the future development of a habitat mitigation and monitoring plan. The mitigation measure provides no justification for limiting impacts to areas within 100 feet of the development envelope (dogs and cats may easily travel more than 100 feet into SHMH habitat) and lacks sufficient detail, including performance standards, to assess its likely effectiveness. The proposed mitigation also lacks any discussion of controls measures to mitigate increased numbers of non-native mammals, such as house mice, black rats, and Norway rats, as well as urban-adaptive natives such as the raccoon.
- MM BIO-9.2 proposes to protect species in preserved marshes by placing signs along levees and the slough that describe the ecological value of the wetland areas and instruct to people to stay out of sensitive habitats and keep dogs on leashes. The measure does not reference any studies of the effectiveness or feasibility of such signage in protecting species habitat.
- MM BIO-10.1 asserts that only birds using habitat within 300 feet of the development envelope will be impacted by the adjacent development. The mitigation measure provides no justification for limiting impacts to areas within 300 feet of the development envelope. The future development of a mitigation plan for impacts on birds using wetlands is required. But the requirement for the development of a future mitigation plan lacks sufficient detail, including performance standards, to assess its likely effectiveness.

The City should produce a Supplemental EIR that (1) addresses the potentially significant impacts to beneficial uses in Area 4 (including RARE and WILD) from the loss of upland habitats and flood refugia within the preserved wetland mosaic in Area 4, (2) addresses the potentially significant impacts to beneficial uses in Area 4 (including RARE and WILD) from the substantial increase in the length of the proposed interface between preserved wetlands and developed areas, and (3) proposes mitigation measures that have been documented to be effective in preserving habitat values adjacent to development. The significantly increased length of the interface, including some preserved areas that will be bordered on three or four sides by development, should be addressed as essentially a new significant impact to preserved habitat at Area 4.

Response C.4: The commenter is incorrect in stating that the non-developed area would consist almost entirely of wetlands and other waters, and that the only high water refugia would consist of steep-sided perimeter levees and created transition zones. The portions of Area 4 that would not be developed or altered by the Project do contain a mosaic of uplands and wetlands. The difference between the potential development analyzed in the REIR, and the actual development represented by the Project, is that under the Project the undeveloped areas would include far more wetlands, due to the avoidance of all wetland fill. The avoidance of wetland fill implements both State and federal policy which call for no net loss of wetlands. The lack of wetland fill is not a new impact requiring additional CEQA analysis and is instead an environmentally beneficial attribute of the Project.

The prior CEQA documents acknowledged that development adjacent to preserved habitat would impact habitat values. While the Specific Plan and certified REIR authorized the development of 316 acres, including 180 acres between Sub-Areas B and C, the Project would only develop 96.5 acres, resulting in substantially more preserved habitats and substantially fewer indirect impacts to preserved habitats than analyzed in the REIR. The wetland-development interface would be longer under the current design than it would be under one contiguous development; however, it should be noted that Project development is less than one-third the size of REIR Area 4 development. Additionally, as noted in Response C.3 above, MM BIO-1.2 requires the Project to adapt stormwater discharge design to the proposed interface, prescribing minimum numbers of outfalls and minimum distances between outfalls, further reducing indirect impacts to wetlands and salt marsh harvest mouse habitat.

Currently, the wetland areas along the proposed interface are disked and cultivated annually, and do not provide high-quality habitat. These farming practices may continue to regularly affect these habitats following project implementation; therefore, an increased interface length would not substantially degrade habitat quality as compared to existing conditions or what was analyzed in the REIR. Alternatively, the avoided areas may be taken out of cultivation and allowed to return to unfarmed transitional and wetland habitat, in which case the Project's indirect impacts to salt marsh harvest mouse habitat along with the wetland-development interface would be offset by the increase in habitat value from less intensive site management. For these reasons, the issues raised in the comment would not result in a new significant impact or an impact that was not considered in the Project analysis.

Indirect impacts to California black rail (and other species) were addressed in the certified REIR, and were updated in the Draft Compliance Checklist. The purpose of the Checklist example of the Alviso Marina, with respect to the colonization and persistence of breeding California black rail at that location, was that California black rail at that location tolerate having substantial numbers of vehicles, and humans on boardwalks and trails, immediately adjacent to, and even above, areas occupied by the rails. In Area 4, the vast majority of potential black rail habitat is remote from areas accessible by humans. Also, MM BIO-4.7 would require a predator management plan for burrowing owl and salt marsh harvest mouse that would address potential effects of cats on a variety of species, including the California black rail.

The comment references numerous specific mitigation measures, and asserts that they appear to be largely speculative. Those mitigation measures were included in the certified REIR, and are presumed to be adequate as a matter of law.

MM BIO-4.5A does not require on-site mitigation for impacts to burrowing owls; it provides on-site mitigation as an option (with MM BIO-4.5B providing an option for off-site mitigation), and it is therefore irrelevant whether all burrowing owl mitigation can be provided on-site.

Predator management programs such as that required by MM BIO-4.7 have been required as CEQA mitigation measures for prior projects in the South Bay, and as conditions of a USFWS-issued Biological Opinion for at least one project in the South Bay, and are expected to be effective in reducing predation on sensitive species.

The distance of 100 feet from the development envelope required by MM BIO-8.4 was based on the consulting biologists' best professional judgment and represents a conservative approach to requiring compensatory mitigation for indirect impacts.

MM BIO-9.2 reflects a commonly used, standard approach where special-status species occur and human activity and dogs would be introduced.

MM BIO-10.1 does not assert that only birds using habitat within 300 feet of the development envelope would be impacted. It provides a minimum distance of such mitigation areas from the development to minimize the potential for disturbance of birds using the mitigation areas.

Comment C.5: The Checklist fails to address potential contamination of the preserved wetlands from imported fill dirt.

The Project proposes to import significant amounts of fill in the development footprint to raise building pads out of the 100-year floodplain. The ground surface of the development footprint will transition to the elevation of the preserved wetlands at a slope of no greater than 2:1 (horizontal:vertical). Runoff flowing over the transition zone and into the preserved wetlands may carry some of the fill dirt and any associated contaminants into the wetlands. Therefore, any soil imported to the Project site for use in the transition zones must be tested to confirm that it does not contain any constituents at concentrations that could impair species present in the preserved wetlands.

Soil imported to create the transition zones should be reviewed in conformance with contaminant screening criteria for wetland surface material presented in the Beneficial Reuse of Dredged Materials: Sediment Screening and Testing Guidelines. Draft staff report (Water Board, May 2000). Imported soil that meets the wetland surface material criteria is considered chemically suitable to come in contact with wetland flora and fauna. The City of Newark should develop a protocol for screening and managing imported fill soil to ensure that only soils that meet the wetlands surface material requirements are placed in the transition zones.

Response C.5: Prior to acceptance, imported fill would be tested in accordance with California Department of Toxic Substances Control (DTSC) fill import guidelines for residential sites. Imported fill materials would be approved by the site geotechnical and environmental engineers prior to importing. Fill material would be free of construction debris (wood, brick, asphalt, concrete, and metal), high organic content, and toxic contaminants. Because the imported fill would be placed in upland areas, there is no legal requirement that it meet standards for wetland surface material.

Runoff would not be designed to overland flow over the transition zone. Runoff would be captured in inlets and directed to the designated bioretention area before being discharged through one of 18 proposed discharge points. Runoff over the slope would be limited to precipitation that lands directly on the slope.

As a condition of approval and as a requirement for construction projects greater than one acre in size, a Stormwater Pollution Prevention Plan (SWPPP) would be filed with the State. Mitigation measures MM BIO-12.1 through MM BIO-12.3 require the Project to incorporate Best Management Practices (BMPs) for water quality to minimize impacts in the surrounding wetland environment, sloughs and channels, and the San Francisco Bay during construction. These BMPs would include numerous practices outlined within the SWPPP. Additionally, following completion of slope grading, all western-facing slopes would be rip-rap protected to eliminate potential erosion from waves and tidal flooding of the wetland area. Consistent with standard construction practices, exposed areas that are left inactive for more than 10 days would be hydroseeded to further reduce the potential for erosion.

Comment C.6: The Checklist fails to consider the most recent regional planning guidance, including the 2015 Baylands Ecosystem Habitat Goals Science Update and the 2019 San Francisco Bay Shoreline Adaptation Atlas, when assessing potentially significant impacts to existing and potential water quality and beneficial uses.

In the Water Board's January 12, 2010, comment letter on the Draft Environmental Impact Report for the Newark Areas 3 and 4 Specific Plan (SCH No.: 200705205), we noted the significance of the tidal marsh/upland transition zone in Area 4:

The San Francisco Bay Area Wetlands Ecosystem Habitat Goals Project recommended that the tidal marsh/upland transition zone of Area 4 be protected and enhanced, including the tidal marsh/upland transition at the upper end of Mowry Slough and in the area of the Pintail Duck Club (all located in Area 4). In addition, the Don Edwards San Francisco Bay National Wildlife Refuge (Refuge) has expressed strong interest in acquiring Area 4, because of its significance as habitat for endangered species and location adjacent to the Refuge, and the Bay Conservation and Development Commission (BCDC) has expressed interest in restoring the diked historic baylands in Area 4 to tidal action and enhancing the wildlife values of the onsite wetlands.

Since 2010, subsequent studies of baylands ecosystems in San Francisco Bay have reinforced and elaborated upon the importance of preserving the unique landscape characteristics in Area 4, including but not limited to upland-wetland transition zones, due to their existing habitat values and functions as well as their potential to support local and regional resilience to the impacts of climate change and sea level rise. The conclusions of those studies are summarized in the 2015 Baylands Ecosystem Habitat Goals Science Update³ (2015 Baylands Goals, Goals Project 2015) and the 2019 San Francisco Bay Shoreline Adaptation Atlas⁴ (Adaptation Atlas, SFEI 2019). Both of these guidance documents (a) were developed via collaborative processes that included representatives from resource and regulatory agencies including the Water Board, regional planning and transportation agencies, and a broad range of other stakeholders and (b) are being used by these same

stakeholders to make local and regional decisions about the future configuration of the SF Bay shoreline. The Water Board is in the process of preparing a Basin Plan amendment that will integrate guidance from the 2015 Baylands Goals and 2019 Adaptation Atlas into an updated suite of policies, regulations, and permitting requirements related to estuarine wetlands and climate change. Neither document was available to the public when the RFEIR was circulated in 2015. In determining the need for additional review of impacts associated with the proposed Project, the Checklist fails to adequately consider and integrate the science and recommendations presented in these documents.

The 2015 Baylands Goals highlights how water quality and beneficial uses of tidal wetlands and nearshore waters are most effectively protected where there is landscape- scale connectivity between subtidal (open water), intertidal (marsh and mudflat), and supratidal (upland) habitats. The report especially emphasizes the importance of upland-wetland transition zones in supporting existing beneficial uses, as well as providing space for the future sea level rise-driven movement of tidal wetlands (and their associated beneficial uses) upslope. The 2015 Baylands Goals describes the following ecosystem services provided by transition zones; services that directly support beneficial uses of wetlands and waters of the State in the region are bolded (Figure 1 [see Appendix A]):

- Buffering for the landward effects of tidal processes and the bayward effects of fluvial and terrestrial processes, which helps control pollution, biological invasions, and erosion
- Flood protection where channels, floodplains, and floodwater storage areas exist
- Sea-level rise migration space for the baylands, especially for tidal marsh and the tidal reaches of rivers and streams
- Nutrient processing in transition zone wetlands
- Groundwater recharge during floods in riverine floodplains and stormwater retention basins that are part of the transition zone
- Support of diverse native wildlife (including fish) through the provision of
 - Habitat for transition zone species, including important pollinators for marsh plants and invertebrate prey for marsh fauna
 - Refuge from predators and physical stressors like high water
 - Foraging areas
 - Movement corridors along the shore or up into watersheds (especially important for allowing certain species to find the right salinity in variable conditions)
 - Landscape complexity by increasing the number of habitats and combinations of adjacent habitats
 - A wide range of conditions that promote the physiological, behavioral, and other adaptations necessary for population persistence
- Cultural amenities, including recreation and educational activities
- Carbon sequestration

Though Area 4 is primarily a non-tidal system, its habitat characteristics and hydrologic and landscape connectivity to tidal wetlands and waters along the Mowry Slough system indicate that it is already providing many of these services in support of water quality and beneficial uses in the slough and adjacent waters of the State. Impacts to terrestrial and transition zone habitats in Area 4, including filling to support development, would therefore negatively impact water quality and beneficial uses in Mowry Slough and adjacent waters of the State.

The potential significance of these impacts is underscored by recent analysis performed by SFEI to produce the 2019 Adaptation Atlas. The Atlas uses a rigorous science-based framework to identify where along the SF Bay shoreline natural and nature-based measures can enhance existing and future beneficial uses and provide long-term resilience to the impacts of climate change and rising sea levels. One of the key measures highlighted by the Atlas is protecting and preparing space for the future SLR- driven upslope migration/transgression of tidal wetland habitats. As demonstrated in the 2015 Baylands Goals and multiple modeling efforts, without adequate suspended sediment and space to move upslope, tidal wetlands in SF Bay will largely be “squeezed” between rising sea levels on their bayward edge, and a largely urban landscape on their landward end. This is especially true of South San Francisco Bay in the vicinity of the Project, which has lost almost all of its formerly extensive transition zones due to development.

The following figures [see Appendix A] are based on those presented in the 2019 Adaptation Atlas, and provide a focused look at opportunities for tidal wetland restoration and migration space preparation in Area 4 and the broader Mowry Slough region. Consistent with the Atlas, the maps display the Mowry “Operational Landscape Unit” or OLU. OLUs are a practical way to manage the physical and jurisdictional complexity of the Bay shoreline in support of climate change adaptation: they cross traditional jurisdictional boundaries of cities and counties, but adhere to the boundaries of natural processes like tides, waves, and sediment movement. OLUs address the portion of a region’s land area that is potentially vulnerable to future sea level rise, and include areas along and adjacent to the shore that can support geographically specific and science-based sea level rise adaptation strategies.

Figure 2 overlays the boundaries of Sub-Areas B, C, and D of Area 4 over the portions of Area 4 with elevations and characteristics suitable to support tidal wetlands (green) and transition zone habitats (orange). Uniquely for this region of the Bay, all three Sub- Areas have the potential to support landscape connectivity between tidal wetland and transition zone habitats. The unique nature of these characteristics is underscored when looking at the Mowry OLU as a whole. Figure 3 demonstrates how, outside of the active Cargill salt production ponds and already-protected Warm Springs Unit of Don Edwards National Wildlife Refuge, proposed areas of development within Area 4 represent some of the best opportunities to restore functional estuarine-terrestrial gradients within the entire OLU. Since the Mowry OLU contains 10% of the lands around the entire Bay that are suitable for the long-term migration of tidal wetlands, Sub-Areas B, C, and D represent not just significant opportunities to protect and enhance beneficial uses within the OLU, but within the entire South Bay.

As a responsible agency under CEQA, the Water Board is required to consider not only how a project may impact existing beneficial uses of wetlands and waters, but also potential beneficial uses of wetlands and waters. The Checklist fails to consider the most recent science and guidance presented in the 2015 Baylands Goals and 2019 Adaptation Atlas, and therefore does not adequately address potentially significant impacts to existing and potential water quality and beneficial uses in Area 4, adjacent habitats in Mowry Slough, and the broader baylands landscape around the site. We request that the City include this analysis in a Supplemental EIR.

Response C.6: Refer to Responses A.2 and B.2 above regarding the Refuge expansion boundary and the 2013 Recovery Plan. The commenter has not identified anything that indicates that the Project would result in any new significant impact that was not already analyzed and disclosed in the REIR. Further, climate change and sea level rise were analyzed and addressed in the REIR. The REIR found that the development planned by the Specific Plan would not create a cumulatively considerable contribution to significant cumulative climate change impacts. Regarding sea-level rise, CEQA does not require an analysis of the environment on the project. Nevertheless, the REIR examined sea-level rise, finding that development in the Specific Plan area would abide by the City’s Municipal Code Flood Ordinance, which provides flood protection for the life of the project, and the proposed project would provide sufficient freeboard from 100-year flood events under low, intermediate, and high sea level rise projections. The fact that new planning-level documents were released (e.g., the Baylands Goals and Adaptation Atlas documents) does not represent new information which was not known or could not have been known with the exercise of reasonable diligence at the time the REIR was certified as complete. Further, these documents do not represent local plans, policies, or regulations that impose mandatory requirements, compliance with which is required in order to avoid significant CEQA impacts. Instead, these documents identify broad, regional planning objectives and information that could be used in the development of future mandatory land use restrictions.

Comment C.7: The Checklist does not adequately address the cumulative impacts of the proposed Project on local and regional flood risks, which are likely to be exacerbated by climate change.

A technical memo provided in support of the Checklist’s findings with regard to water quality and hydrology (Schaaf and Wheeler 2019) addresses the Project’s consistency with the 2018 State of California Sea-Level Rise Guidance developed by the Ocean Protection Council (OPC) with support from the OPC’s Science Advisory Team (SAT).

The memo suggests that a “low risk aversion” approach to Project design and initial construction is appropriate based on “proposed setbacks to developed neighborhoods within Area 4 and the amount of remaining open space” outside the Project’s developed footprint. This approach results in a proposed minimum building pad elevation of +15 ft NAVD, based on anticipated sea level rise (SLR) of 1.9 ft by 2070 (the Project’s proposed 50-year lifespan) under a high-emissions (RCP 8.5) scenario on top of the proposed FEMA BFE of +13 ft NAVD. The memo does not indicate how setbacks and open space would contribute to flood protection, as the proposed Project (a) does not include any improvements to the non-FEMA-certified levees that surround Area 4 and (b) fills roughly one third of Area 4, significantly reducing the accommodation space for tidal and fluvial floodwaters that otherwise is provided by leaving the site’s existing topography untouched. This loss of flood accommodation space could increase not only local flood risks, but regional flood risks due to the networked nature of flood vulnerabilities along the San Francisco Bay shoreline.

Response C.7: The adaptive management plan framework suggested follows the Treasure Island model. A “low risk aversion” approach is taken because there is adequate space for future adaptation measures against sea level rise impacts. A “high

risk aversion” approach is more suited to project sites where future adaptive options are more limited. For context, building pad elevations are proposed at a minimum of 15 feet NAVD. FEMA’s “San Francisco Bay Tidal Datums and Extreme Tides Study” (AECOM, 2016) shows a one-percent tide of 11.32 feet NAVD near Area 4. The proposed pad elevations would provide 3.7 feet of resilience against the one-percent stormwater surge associated with a future sea level.

The OPC-SAT guidelines indicate probabilities of projected sea level rise for various emissions scenarios. For the high emissions scenario (RCP 8.5), there is 99.5 percent certainty (“high risk aversion”) that the Project would be resilient to the one-percent storm surge through 2070, which is the established 50-year Project life. This means the Project has taken a high risk aversion approach. Using the “low risk aversion” but high emissions projections, the Project would be resilient to the one-percent storm surge through end of century (2100). Based on the OPC-SAT projections, the Project is expected (as likely as not) to be resilient to the one-percent storm surge through 2140 under a high emissions scenario. Setbacks and open space allow for future mitigation, including the potential for increasing flood accommodation, should that technique be scientifically proven to reduce flood hazard elevations on a small scale. Area 4 does not provide flood accommodation space, and would not provide flood accommodation space unless the existing levees are breached or removed. The Project would not result in breaching or removal of the levees. There is no clear evidence that an area as relatively small as Area 4, even if it provided flood accommodation space, could significantly affect San Francisco Bay levels during any particular tide cycle. Further, surveys show the existing levee elevations are generally at or above the one percent stillwater. The shoreline is already hardened; filling a part of an already protected area does not impact regional flood risks.

Comment C.8: We disagree with the conclusion that placing 469 units of housing in partially subsidized, flood-prone formerly tidal baylands is a planning scenario that calls for a low risk aversion approach to flood protection. It should go without saying that given the limited ingress and egress to the proposed development, flooding of developed areas would put considerable lives at risk. Flooding of the proposed Project would also expose Bay waters and sensitive habitats throughout the Mowry Slough complex (including tidal wetlands, flats, and open waters that support listed species) to potentially significant impacts from contamination and exposure from the release of household chemicals, including petroleum products, pesticides, herbicides, and other priority contaminants regulated under the Water Board’s Basin Plan.

These impacts to water quality would be exacerbated further if the loss of flood accommodation space in Area 4 increased the risk of flooding nearby industrial and commercial areas that drain to the Alameda County Water Conservation and Flood Control District’s (ACWCFCD) Lines B, D, and N. We understand from Refuge staff that wet winters (such as the one of 2016-2017) can trigger flooding of Area 4, partially from ponding from local rainfall but also potentially from failure of local flood control infrastructure such as levees and tidegates (C. Barr, personal communication). It’s likely that Area 4 provides important flood accommodation space for the region’s stormwater drainage system, and that filling much of Area 4 could result in potentially significant cumulative impacts to local and regional flood risks. Climate change is likely to increase local flood risks in two

ways: (1) by increasing local tailwater elevations through sea level rise, raising the elevation threshold at which infrastructure will drain, and (2) increasing the intensity and severity of storm events that must drain through infrastructure designed to handle historic events. This creates another mechanism through which the Project may generate significant and cumulative impacts to local and regional flood risks.

The Checklist fails to adequately address these concerns. We request that the City include in a Supplemental EIR consideration how the loss of flood accommodation space within Area 4 could affect fluvial, tidal, and combined fluvial + tidal flood risks both within the Project site and its broader region of hydrologic influence, under existing conditions and consistent with the “high risk aversion” approach consistent with the 2018 State of California Sea-Level Rise Guidance to Project design.

Response C.8: Resilience to sea level rise and flood risk are addressed above (refer to Response C.7). The Project would provide protection against flood hazards having a one percent chance of annual occurrence with a 99.5 percent reliability that this protection level would remain intact through 2070, assuming present-day emission rates remain unchanged. The risk of flooding is low, and the risk of exposing Bay waters and sensitive habitats to contamination and exposure from the release of household hazardous materials is commensurately low and does not rise to the level of significant. Area 4 does not provide flood accommodation space, and would not provide flood accommodation space unless the existing levees are breached or removed. The Project would not result in breaching or removal of the levees. There is no clear evidence that an area as relatively small as Area 4, even if it provided flood accommodation space, could significantly affect San Francisco Bay levels during any particular tide cycle. The anecdotal information provided in the comment does not change the conclusions of the Draft Compliance Checklist or 2015 REIR.

Comment C.9: By not providing the Water Board with adequate notice of the Checklist, and by developing the Checklist instead of preparing a Supplemental EIR, the City failed to follow proper procedures under CEQA.

When the City released the Checklist on September 11, 2019 and notified some members of the public of the availability of the document for review, it selected an arbitrary 20-day review period. The City failed to notify all of the state and/or local Responsible and/or Trustee agencies who have previously commented on inadequate impact assessments in the original DEIR and the FREIR, including the Water Board. This approach has denied the Water Board, our partner resource and regulatory agencies, and the public adequate opportunity to evaluate the new information presented in the Checklist and its supporting documentation. The City appears to have based their decision to consider only a 20-day review period on the assertion in the Checklist that the Project would not require permits from the Water Board. Decisions about Water Board jurisdiction and permits are made by the Water Board, not the City; as documented in the comments above, we believe the proposed Project would require a Water Quality Certification under Section 401 of the Clean Water Act and/or Waste Discharge Requirements under the Porter-Cologne Water Quality Control Act. We therefore request that the City re-circulate the Checklist with a standard 45-day comment period to

allow Water Board staff adequate time to review the Checklist and its supporting studies, and follow up with a properly notified and circulated Supplemental EIR.

Response C.9: The Newark Areas 3 and 4 Specific Plan REIR was certified in 2015, and that certification action is final. The Project is exempt from further CEQA review under Government Code Section 65457. Public circulation of the Draft Compliance Checklist is not required; the Checklist will be attached to the REIR, pursuant to CEQA Guidelines Section 15164(c). The Checklist also serves to document that the Project is within the scope of the REIR pursuant to CEQA Guidelines Section 15168. The City of Newark elected to post the Checklist for informational purposes for a 20-day period.

The 2015 REIR identified and analyzed up to 86 acres of direct impacts to wetlands; however, the currently proposed Project was designed to avoid directly impacting any wetland, marsh, or aquatic habitat. The proposed Project does not propose grading, fill, or development in wetland areas, and would not require permits pursuant to the Clean Water Act or Porter-Cologne Water Quality Control Act.

Comment C.10: Page S-10 of the FREIR states:

“Because the analysis [in the FREIR] is at a programmatic level for Area 4, it is likely that CEQA will require tiering from this EIR to prepare project-level analysis [emphasis added] prior to approving a tentative map for residential development or a use permit for a golf course or other recreational activity in Area 4.”

The City asserts that the Checklist may serve as tiered project-level analysis under CEQA based on language in the CEQA Guidelines (14 CCR §15168(c)(4)) that states:

“where the later activities involve site-specific operations [emphasis added], the agency should use a written checklist...to document the evaluation of the site and the activity to determine whether the environmental effects of the operation were within the scope of the program EIR.”

The proposed Project described in the Checklist encompasses much more than site-specific operations; it is instead a specific development project that falls under the auspices of 14 CCR §15168(c)(1), which requires tiered project-level analysis in the form of an Initial Study (which would be circulated to responsible agencies including but not limited to the Water Board) leading to an EIR or Negative Declaration. Given the Water Board’s concerns about the proposed Project’s potentially significant direct, indirect, and cumulative impacts to water quality and beneficial uses (Comments 1-6), we request that the City develop and circulate a Supplemental EIR that adequately assesses these impacts and proposes appropriate alternatives and mitigations that would reduce impacts to a less than significant level.

Response C.10: The Newark Areas 3 and 4 Specific Plan REIR was certified in 2015. Once an EIR has been certified, CEQA provides (Public Resources Code Section 21166, and CEQA Guidelines Section 15162) that the circumstances

requiring or allowing further CEQA review, or calling for supplemental or subsequent environmental reviews, are limited to specific situations involving substantial changes in the proposed Project; or the circumstances under which the Project is being undertaken; or new, previously unknowable, information of substantial importance which shows a need for new detailed investigation or analysis. The Draft Compliance Checklist thus serves as an Addendum pursuant to CEQA Guidelines Section 15164 by documenting that the Project would not result in any new or substantially more severe impacts than those previously identified in the REIR.

Separately but similarly, Section 65457 of the California Government Code provides that residential development projects, including a subdivision, that implement and are consistent with a specific plan for which a lead agency certified an EIR are exempt from further CEQA review, unless an event as specified in Public Resources Code Section 21166 has occurred after adoption of the specific plan.

The Draft Compliance Checklist, prepared pursuant to CEQA Guidelines Section 15168(c)(4) and Government Code Section 65457, concluded that no further environmental review is called for, because the Project is within the scope of the Specific Plan REIR certified in 2015, and because none of the events specified in Public Resources Code Section 21166 or CEQA Guidelines Section 15162 have occurred since certification of the REIR. A supplemental or subsequent EIR is not required or warranted, and the Project is exempt from further CEQA review.

ORGANIZATIONS, BUSINESSES, AND INDIVIDUALS

D. Jonna Sokail (verbal comments dated September 26, 2019)

Comment D.1: The Area 4 site is low in elevation, with wetlands and ponded water filled by springs. It is the site of the former Pintail Duck Club, but there is no existing infrastructure. Homes are proposed in upland areas to escape wetland permitting, and are very spread out. Bay Area agencies (the San Francisco Estuary Institute and Regional Board) recently released a Climate Adaptation Strategy to look at future flood risks and areas of suitability for managed retreat. Area 4 with 25 centimeters of sea level rise is at a 45 percent risk of inundation. At 150 centimeters, Area 4 is at a 65 percent risk of inundation for total area. The only area with greater risk is Redwood City.

The study includes adaptation strategies, and says Area 4 is suitable for tidal marsh restoration, upland marsh mitigation and restoration, and marsh migration. The number one strategy that cities can implement is preventing intensification of development in these future flooding areas.

Response D.1: Area 4 is part of the approved Areas 3 and 4 Specific Plan, which was the subject of a certified REIR in 2015. The Draft Compliance Checklist, like the 2015 REIR, included a Hydrology and Water Quality Report analyzing effects of climate change and sea level rise. The Water Quality and Hydrology Section Update (March 2019) was prepared by Schaaf & Wheeler Consulting Civil Engineers pursuant to 2018 California Ocean Protection and Council Science Advisory Team (OPC-SAT) guidance for selection of appropriate sea level rise projections. Refer to Response C.7 above regarding the flood risk and proposed mitigation for the Project.

Comment D.2: Request for a time extension to review the Area 4 Checklist. There is too much material to get through in 20 days.

Response D.2: The Newark Areas 3 and 4 Specific Plan REIR was certified in 2015, and that certification action is final. The Project is exempt from further CEQA review under Government Code Section 65457. Public circulation of the Draft Compliance Checklist is not required; the Checklist will be attached to the REIR, pursuant to CEQA Guidelines Section 15164(c). The Checklist also serves to document that the Project is within the scope of the REIR pursuant to CEQA Guidelines Section 15168. The City of Newark elected to post the Checklist for informational purposes for a 20-day period.

Comment D.3: Request for more information on the continuing review process. I know the project is going to Planning Commission on October 22, but don't know anything beyond that.

Response D.3: The Newark City Council certified the REIR for the Newark Areas 3 and 4 Specific Plan in 2015, and that certification action is final at this point. The City of Newark prepared the Draft Compliance Checklist to determine the currently proposed Project's consistency with the approved Areas 3 and 4 Specific Plan and certified 2015 REIR. The Checklist concluded that: (a) the Project is within the scope of the REIR; (b) the Project implements and is consistent with the Specific Plan; and

(c) none of the major changes, new information, or other environmentally significant events specified in Public Resources Code Section 21166 and CEQA Guidelines Section 15162 have occurred since 2015. The proposed Area 4 Project's consistency with the certified REIR will be considered at the October 22 Planning Commission hearing.

Comment D.4: Request for City meeting on climate change. What will the City do to grapple with direct impacts (sea level rise)? What can the community do?

Response D.4: The comment is noted. The comment does not raise issues regarding the CEQA analysis. No further response is necessary.

E. Grassetti Environmental Consulting (letter dated September 27, 2019)

Comment E.1: The City has prepared a “checklist/addendum” to the 2015 Final Recirculated EIR (FREIR) that it claims finds no new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete and, therefore, no Subsequent or Supplemental EIR need be prepared. Further, the City selected an arbitrary 20-day review period for this checklist and then notified some members of the public of the availability of the document for review “for informational purposes”. As detailed below, the use of this Checklist and abbreviated comment period are not permissible under CEQA. This impermissible approach has denied both the public and resource-protection agencies with adequate opportunity to evaluate the new information for adequacy.

The apparent logic in this approach is that, because (the Checklist claims) no permits would be required from these agencies, then they need not review this document. The obvious logical flaw in this approach is that it is the resources agencies, not the City or applicant, who ultimately determines their permitting jurisdiction, and absent any review of the project-level plans or additional environmental review documentations, the agencies cannot make those determinations. Therefore the resources agencies must be provided this document and its supporting studies for a full review of not less than 30 days. Given that this review is substituting for a Supplemental EIR, and that the document in question involves over 170 pages of text and several hundred pages of supporting studies, the document should logically be subject to standard 45-day CEQA EIR review period.

Response E.1: The Newark Areas 3 and 4 Specific Plan REIR was certified in 2015, and that certification action is final. The Project is exempt from further CEQA review under Government Code Section 65457. Public circulation of the Draft Compliance Checklist is not required; the Checklist will be attached to the REIR, pursuant to CEQA Guidelines Section 15164(c). The Checklist also serves to document that the Project is within the scope of the REIR pursuant to CEQA Guidelines Section 15168. The City of Newark elected to post the Checklist for informational purposes for a 20-day period. There is no comment period for the Checklist, and the Checklist remains available on the City's website.

Comment E.2: Typically, EIR Addendums are prepared when, as envisioned in the CEQA Guidelines, only minor changes are made to a project, background conditions, or impacts (the inverse

of the situations described in CEQA Guidelines Section 15162). However, in tiering off of a Program EIR, Section 15168 (c)(1) of the CEQA Guidelines states “If a later activity would have effects not examined in the FEIR, a new Initial Study would need to be prepared, leading to either an EIR or a Negative Declaration.” The FREIR is a program EIR (PEIR) for Area 4, and must follow the requirements for subsequent review under PEIRs. As described in the EIR itself,

“ In Area 4, the EIR provides a programmatic level of analysis of the environmental impacts from the construction and operation of new houses and a golf course, including analysis of impacts on wetlands, burrowing owls, salt marsh harvest mice, wandering shrew, water birds, special status plant species, trees, archeological resources, geotechnical resources related to liquefaction, undocumented fill, differential settlement, and corrosive soils, and potential hazardous materials. Because the analysis is at a programmatic level for Area 4, it is likely that CEQA will require tiering from this EIR to prepare project-level analysis prior to approving a tentative map for residential development or a use permit for a golf course or other recreational activity in Area 4.” (FREIR, p. S-10)

Rather than follow this clear Guidelines direction for future site-specific development of areas assessed programmatically in a PEIR, the City has chosen to hang its hat on another section of the Guidelines, which states that “where the later activities involve site-specific operations [emphasis added], the agency should use a written checklist...to document the evaluation of the site and the activity to determine whether the environmental effects of the operation were within the scope of the program EIR.” This checklist approach applies only to later operations, not later development, as is proposed in this project. For later development, section 15168(c)(1) applies.

The Checklist cites the 2005 Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency decision as supporting this approach, but that case applies to Master EIRs, not program (or project) EIRs. They are distinct documents under CEQA, with separate and distinct processes spelled out in the Guidelines (Program EIR procedures are described under Guidelines Section 15168 while MEIRs are addressed in Guidelines section 15175, and are described therein as an “alternative to project, staged, or program EIRs”). Similarly, the cited Friends of College of San Mateo Gardens v. San Mateo County Community College Dist. (2016) decision shines no light on the use of a Checklist rather than an Initial Study. In fact, that decision appears to support the use of an Initial Study in cases such as this. Note that the document in that case was a project-level document, while, in this case, the document was acknowledged to be a program EIR, addressing several proposed development areas, and lacking in site-specific information on cultural resources, biological resources, air pollutant and GHG emissions, among other items, specific to Area 4. In fact, the Checklist acknowledges this in including Area 4- specific studies for biological resources, noise, and air quality, among other resources.

Response E.2: Pursuant to CEQA Guidelines Section 15168 and Government Code Section 65457, the Draft Compliance Checklist was prepared to determine (a) whether the Project is within the scope of the 2015 REIR analysis, and (b) whether any events or circumstances that might call for supplemental or subsequent CEQA review have occurred since 2015. In order to make these determinations, updated biological resources, noise, and air quality reports (among others) were prepared for the Project. Based upon the information and analyses in the updated reports, the

Checklist concluded that the Project is within the scope of the 2015 REIR, and no events or circumstances require supplemental or subsequent CEQA review. The Checklist also serves as an Addendum pursuant to CEQA Guidelines Section 15164 by documenting that the Project would not result in any new or substantially more severe impacts than those previously identified in the REIR.

The comment section addresses Section 15168 (c)(1) of the CEQA Guidelines: “If a later activity would have effects not examined in the FEIR, a new Initial Study would need to be prepared, leading to either an EIR or a Negative Declaration.” However, the Checklist determined that the Project would not result in “effects not examined in the FEIR”; therefore, additional CEQA review is not required or warranted.

Comment E.3: The City’s failure to use an Initial Study has resulted in several resources agencies, as well as the public, being materially and substantially deprived of meaningful input on the document. As described above, an Initial Study would have been circulated to relevant state agencies via the State Clearinghouse. These agencies include:

- The California Regional Water Quality Control Board, which has jurisdiction over wetlands and water quality that may be affected either directly or indirectly by the project, including Section 401 of the Clean Water Act certification.
- The California Department of Fish and Wildlife, which has jurisdiction over special- status species such as the salt-marsh harvest mouse, which uses the certain upland areas of the site as well as wetlands.
- The Bay Area Air Quality Management Agency, which has jurisdiction over construction and operational emissions, and frequently evaluates CEQA air quality assessments for adequacy.
- The Native American Heritage Commission, which has jurisdiction over cultural resources evaluation under CEQA, as well as AB 52 compliance.

Response E.3: Refer to Response E.1 above. The abovenamed agencies each participated in the REIR process, and their comments and concerns were considered in the design of the proposed Sanctuary West Project. While not required by law, the City of Newark elected to post the Checklist for informational purposes for a 20-day period. Comment letters were received from federal, State, and local/regional agencies, and the City is voluntarily providing responses in this report.

Comment E.4: Additionally, neither the Checklist nor the Recirculated Final EIR addresses Tribal Cultural Resources (TCRs), as required under state law (AB52). (Note that the Holman and Associates March 14, 2019 letter (Checklist Appendix C) is limited to traditional cultural resources, not TCRs. This is a substantial omission because it denies relevant Native American tribal representatives their lawful right to consult with the local and state agencies regarding the project’s impacts to TCRs, as established under AB52. The tribal representatives must be contacted by the City and given a minimum of 30 days to comment on the TCR analysis. Because no TCR analysis has been done, the City must include that analysis in an Initial Study of the project, followed by the requisite consultation.

Response E.4: The Newark Areas 3 and 4 Specific Plan REIR was certified in January 2015, and that certification action is final and beyond any possible legal challenge. Assembly Bill (AB) 52 went into effect in July 2015, after certification of the REIR; therefore, implementation of the Specific Plan is not subject to AB 52.

The currently proposed Project is within the scope of the REIR, and implements and is consistent with the Specific Plan. The Project is exempt from further CEQA review, including AB 52 consultation, under Government Code Section 65457. The Checklist is not a new CEQA document; therefore, consultation regarding Tribal Cultural Resources under AB 52 is not required. It should be noted, however, that the Native American Heritage Commission and key tribal representatives have been notified of and participated in the Areas 3 and 4 Specific Plan implementation process to date.

Comment E.5: Finally, the Checklist states that it is intended to support findings for an exemption under Guidelines section 65457. Absent expert agency review and adequate time for public review, it is unclear how the City can consider the contents of the Checklist adequate to support such findings. Further, our preliminary review has found several major flaws in the air quality assessment that substantially underestimate the project's impacts¹. In other cases, detailed analysis is deferred to post-approval activities. Given these flaws and improper deferrals of analysis, the Checklist does not appear to be adequate to support the proposed exemption. The comment includes a footnote, stating the following:

The Checklist Air Quality Appendix (Appendix A) emission estimates include the 160,000 truck trips needed to move the 1.6 million cu. yd. of fill, but all were assumed to happen in year 2020. But to assess significance, those emissions are improperly averaged over the full 5 years of project construction. The NOx threshold would be exceeded in 2020, but not when averaged over 5 years. Also, had the model been run under default assumptions, it would have taken 7 years for Project full buildout and all construction equipment would have been assumed to run 8 hours per workday. Instead, the Appendix A assumptions have been "tweaked" to reduce that to 5-year buildout with equipment running 4 hours or less per workday. Without those "tweaked" assumptions, the total construction emissions are substantially increased and would be significant, not less-than-significant as assumed in the Checklist.

Response E.5: Pursuant to CEQA Guidelines Section 15168(c)(4) and Government Code Section 65457, the Draft Compliance Checklist concluded that (a) the proposed Project is consistent with the Areas 3 and 4 Specific Plan; (b) none of the events listed in Public Resources Code Section 21166 and CEQA Guidelines Section 15162 have occurred; and (c) the proposed Project would not result in any new or substantially more significant environmental impacts from changes to the Project or changes in circumstances beyond those previously evaluated and disclosed in the REIR. As discussed above, these conclusions are supported by updated information and analyses in appendix reports. The Checklist also serves as an Addendum pursuant to CEQA Guidelines Section 15164 by documenting that the Project would not result

in any new or substantially more severe impacts than those previously identified in the REIR

See Response F.2 below for discussion of the Bay Area Air Quality Management District (BAAQMD) CEQA Air Quality Guidelines thresholds, which are based on average emissions.

F. Geoffrey H. Hornek Environmental Air Quality and Acoustical Consulting (letter dated September 30, 2019)

Comment F.1: For construction emissions estimates, the AQAU (Air Quality Assessment Update), in most cases, uses the CalEEMod model defaults for the Area 4 equipment number, equipment type, horsepower rating and load factor, as shown in Table 2 [see Appendix A]. However, for the equipment daily work hours, in most cases, the AQAU uses values substantially lower than what the model would have chosen (i.e., the latter as shown by the red numbers in parentheses – for example “(8)” in the first row last column below; the model would have used 8 hours, but the AQAU used 6 hours). This is an especially important change because the CEQA threshold is a limit on average daily emissions. Doubling the number of work days in a phase will have no effect on average daily emissions, but increasing the work hours per day will have a proportional effect on daily emissions (e.g., increasing a backhoe’s daily hours from 4 to 8 will double its daily emissions).

Response F.1: The comment suggests that CalEEMod be used with default values for daily hours and usage. CalEEMod recommends that projects use actual projections when those data are available. Additionally, the BAAQMD CEQA Guidelines state, “Where project-specific information is available, modify URBEMIS model assumptions...”¹ A construction schedule and projection of equipment usage was available and, therefore, was used in the Compliance Checklist Air Quality Assessment Update (AQAU). The actual Project estimates are less than CalEEMod default values because each piece of construction equipment is not normally used eight hours per day for every day of the construction phase. This is especially true for residential building construction, which does not rely on continuous intensive use of construction equipment. The assumption that each piece of equipment would operate eight hours per day would overestimate emissions, as shown in the comment letter’s emissions computations.

Comment F.2: The AQAU makes the significance call on Area 4 construction emissions by taking the total emissions for each pollutant over the 5-year total construction period and dividing by the total number of work days in five years (i.e., 1280 days). This is neither legitimate analytically nor acceptable professional practice. Many major air pollutants have agency- designated annual average ambient standards. Also, air quality monitoring data is grouped by year and compared with air quality goals that often involve not exceeding ambient standards by more than a specified number per

¹ Bay Area Air Quality Management District CEQA Guidelines May 2017, Appendix B. Air Quality Modeling Instructions and Project Examples, Page B-7.

year. Often, averaging a project's construction pollutant emissions over a similar phase shorter than a year is justified, but averaging emissions over a longer period risks hiding potential problems that might arise during more intense work periods over the full course of construction. For example: what construction emissions would CalEEMod predict for a project building 496 single-family homes requiring import of 1,674,650 cubic yards of fill, the latter occurring mostly during the 2nd year of construction? Table 3 shows a substantial increase in daily pollutant emissions during the 2nd year when most of the about 85,000 haul truck trips moving fill to the site would occur, resulting in an extremely significant impact (over 6 times the significance threshold). In contrast, the AQAU 5-year average estimate (as shown in that report's "Table 1 Project Construction and Operation Emissions for Build Out of Area 4") give much smaller values for the emissions, which are all well below the CEQA thresholds.

Response F.2: The REIR Air Quality analysis and Checklist AQAU calculated the total construction emissions, based upon project-specific construction equipment use, and then averaged the total emissions over the total construction period and compared the results to the thresholds recommended in the BAAQMD Air Quality Guidelines. This is common and accepted professional practice, particularly for large projects when the exact duration of specific construction phases is not known. BAAQMD CEQA Guidelines and air quality impact assessment guidance do not require speculation as to what year of a large project various phases of construction would occur. In the case of the proposed project, an overall five-year construction period is quite aggressive, when a large volume of fill is required. It is highly speculative to assume the majority of fill would be acquired and transported to the site in one year (as noted in the comment) and physically it is not likely feasible. A five-year construction period equates to 1,300 work days. The 85,000 haul trips spread out evenly over the five years results in over 65 haul trucks per day, or one truck every 7.3 minutes over an 8-hour work day or one truck every 5.5 minutes over a 6-hour work day. Spreading out the construction emissions over longer than the estimated five year duration would further reduce the projected daily emissions. To be conservative, the Checklist AQAU assumed the shortest construction build-out period that is feasible. Construction activity would vary over time, and some phases may last longer and/or be delayed.

Comment F.3: The AQAU uses the model default haul trip length of 20 miles for the trucks carrying fill to the site. This is reasonable for projects requiring relatively small amounts of fill (e.g., a few hundred, even a few thousand truckloads total). But are there fill sources within 20 miles of the Area 4 site that can provide about 85,000 truckloads (nearly 1.7 million cubic yards) of fill? Immediately to the west of the site are baylands and waters, and to the east are completely developed with urban uses. There are no quarries or other large sources of material within 10 miles of the site, not are there any identified projects that would generate such fill quantities. Further, given sea-level-rise projections, there are and will be extensive competition for any available fill. Therefore, it is likely that more distant sources need to be tapped and the increased daily emissions from the haul truck trips will be proportional to the increased average length of the trips.

Response F.3: BAAQMD CEQA Guidelines state that default assumptions for haul trip lengths should be used where project-specific information is not available.

Because the source of the fill material is unknown, the AQAU relied upon the CalEEMod default average one-way trip length of 20 miles. A 20-mile radius around the project site extends to Los Gatos in the South Bay, Livermore in the East Bay, and San Mateo on the Peninsula, and encompasses a number of urban areas with large construction projects where fill likely is or will become available by the time it is needed by the project. The 20-mile radius assumption is thus reasonable and appropriate, and is the same trip length that was included in the REIR.

Comment F.4: Moving on to the AQAU treatment of TAC Impacts. It merely states that there would be no significant TAC impacts because “the closest sensitive receptors to the project are located beyond 1,000 feet of the project boundaries.” This might be true if the project site were limited to Area 4. But the AQAU needs to consider the buildout of Specific Plan Area 3 and Area 4 in assessing TACs. There is an existing residential area just north of Cherry Street that forms the north boundary of Area 3. There is also the Silliman Recreational Center, Ohlone College and Newark Memorial High School. And soon there will be existing residential development on Area 3 now building-out under the approved RDEIR.

Back in 2014 and before, when the RDEIR was being assembled, the BAAQMD CEQA Guidelines were still a relatively new methodology and many of the data items called for in its assessment methodologies were still being developed and/or distributed by the BAAQMD for consultants use. This includes the stationary source location maps and the availability of health risk data for each stationary source in BAAQMD files. The RDEIR mentions only two TAC sources in the vicinity of Area 3 and Area 4: an emergency generator at Ohlone College and one industrial source (i.e., the CertainTeed Corporation). The most recent version of the BAAQMD TAC data base available on Google Earth shows many more TAC sources in the Area 3/Area 4 vicinity, as shown in the aerial below and listed in Table 4. Also, BAAQMD methodologies require inclusion of substantial local mobile TAC sources in the cumulative assessment and provide spreadsheet tools to estimate health risk to local receptors. Mowry Avenue, Cherry Street and Stevenson Boulevard are potentially significant local TAC sources that must be considered for inclusion in the cumulative TAC model, as must TAC impacts from the Union Pacific Railroad line that splits Area 3 from Area 4.

Response F.4: The 2015 certified REIR evaluated the overall Areas 3 & 4 Specific Plan impacts, including cumulative construction impacts, and that certification action is final. The current Project does not include Area 3. The purpose of the AQAU was to evaluate the current Area 4 Project, based upon the more detailed information available, and determine whether it (a) would result in any new impacts, or (b) is within the umbrella of impacts identified in the certified 2015 Areas 3 and 4 Specific Plan REIR. The impacts of the Area 4 Project are within the umbrella of impacts identified in the certified REIR. In addition, Area 4 is greater than 1,000 feet from both Area 3 and the sensitive receptors located outside Areas 3 and 4; therefore, based on BAAQMD’s screening threshold, the proposed project would not result in significant TAC impacts to surrounding sensitive receptors. Further, the analysis requested by the commenter, which would analyze the environment’s impacts on the project, is not required under CEQA.

Comment F.5: Once the above-mentioned corrections are applied to the emissions model, the project greenhouse gas (GHG) emissions should also be redetermined and reevaluated with respect to the BAAQMD service population threshold. That threshold was not found to be exceeded in the AQAU, but the finding may change if GHG emissions are found to increase substantially under the updated assumptions.

Response F.5: The quantified GHG impacts reported in the AQAU are based on operational emissions and reported as per capita emissions. Comments made, and addressed above, do not affect any of the GHG per capita emissions or significance findings.

Appendix A: Draft Compliance Checklist Comment Letters

From: [Squires, Kim](#)
To: [SOFIA MANGALAM](#)
Cc: [Brown, Matthew](#)
Subject: [WARNING-EXTERNAL EMAIL]Notice of the Compliance Checklist for the Recirculated Environmental Report for the Newark Specific Plan Area 4 -"Sanctuary West Residential Project"
Date: Thursday, September 26, 2019 3:11:24 PM

Dear Ms. Mangalam

The U.S. Fish and Wildlife Service's (Service) San Francisco Bay-Delta Office is providing comments pursuant to the Notice of the Compliance Checklist for the Recirculated Environmental Report for the Newark Specific Plan Area 4 -"Sanctuary West Residential Project". These comments are prepared pursuant to the Endangered Species Act of 1973, as amended (16 U.S.C.1531 *et seq.*) (Act).

It is unclear if the City of Newark is reopening the CEQA public comment period. Given the level of interest from State and Federal agencies, as well as, non-profit and constituent interest, it may be prudent to allow the public to comment on the new project.

This area is ecologically important for listed species recovery and marsh restoration. The Tidal Marsh Recovery Plan which underwent public review and comment delineated Area 4 as a area for Future Ecotone Restoration. Actions under the Recovery Plan are voluntary but are consistent with other restoration planning efforts in the Bay like the Habitat Goals Project and the expansion of the Refuge as previously discussed in the U.S. Fish and Wildlife Service's Don Edwards San Francisco Bay National Wildlife Refuge's previous comment letter.

The site is important for the federally and state listed (fully protected) salt marsh harvest mouse, which occurs on site. The Service is concerned over the very impacts (habitat loss including loss of function from isolation/bifurcation, predators, construction impacts, etc.) the 2019 Biological Resources Technical Report discusses. There are mitigation measures provided to lessen the level of significance (CEQA definition) but MM-BIO 8.2 and 8.3 in the RDEIR are not viable mitigation measures as the Service and the California Department of Fish and Wildlife do not allow capture and translocation of salt marsh harvest mice as a mitigation measure. These project effects and measures clearly result in "incidental take" not scientific take for recovery purposes and is an inappropriate use of a section 10(a)(1)(A) recovery permit.

The Service appreciates the City's Notice for informational purposes and suggests circulating a supplemental EIR. Thank you for the opportunity to review. If you have any questions regarding our concerns please feel free contact me directly.

Regards,

Kim Squires
Section 7 Division Chief
US Fish and Wildlife Service
Bay Delta Fish & Wildlife Office
650 Capitol Mall, Suite 8-300
Sacramento, CA, 95814

O: 916-930-5634
C: 916-799-0089

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United States Department of the Interior



FISH AND WILDLIFE SERVICE
San Francisco Bay National Wildlife Refuge
Complex 9500 Thornton Avenue
Newark, California 94560

October 1, 2019

Sent via electronic mail: No hardcopy to follow

Mr. Arturo Interiano
Acting Community Development Director
Community Development Program
City of Newark
37171 Newark Blvd.
Newark, CA 94560
Arturo.Interiano@newark.org

Dear Mr. Interiano,

The San Francisco Bay National Wildlife Refuge Complex (Refuge) appreciates the opportunity to provide comments pursuant to the Notice of the Compliance Checklist for the 2015 Recirculated Environmental Report (REIR) for the Newark Specific Plan Area 4-“Sanctuary West Residential Project”.

The City has prepared the Draft 2019 compliance checklist for the 2015 Final Recirculated EIR (FREIR) and finds no new information of substantial importance, at the time the previous EIR was certified as complete and, therefore, no Subsequent or Supplemental EIR needed. The Refuge has provided comment letters regarding Area 4 to the City of Newark, since 1985 and we reiterate and incorporate by reference any of our previous concerns expressed in our comment letters. Unfortunately, due to the short 20-day time period we did not have adequate time for a complete review, or time to meet with City staff to understand how our previous concerns as an adjacent landowner have been considered and/or addressed.

The Draft Compliance Checklist concludes that there are no new circumstances involving new significant impacts or increase in the severity of impacts for any sensitive or special status species or substantial interference with their movement. However, the Checklist and the associated analysis fail to consider new research, ongoing and planned wetland restoration activities, climatic data analysis, and most recent regional planning guidance that highlight the significance of the project area for species like the federally listed Salt Marsh Harvest Mouse (SMHM) and Ridgeway’s Rail (RIRA). In 1990, Congress identified Area 4 as important wildlife habitat, and the Tidal Marsh Recovery Plan (2013), which underwent public review and comment, delineated Area 4 as an area for potential future Baylands Ecotone Restoration.

The Refuge managed ponds adjacent to Area 4 are still planned for restoration to tidal influence, in furtherance of the 2015 Baylands Ecosystem Habitat Goals Science Update, a regional guidance document, emphasizes the importance of the upland-wetland restoration zones. Area 4 could support existing habitat needs of marsh wildlife and allow space for marsh migration caused by sea-level rise. The higher elevation areas of Area 4 that the project seeks to develop could provide valuable ecotonal habitat transitioning from restored wetlands to upland areas. These higher areas provide critical high tide refugia for marsh species like the salt marsh harvest mouse and Ridgeway’s rail. Since, the projected sea-level rise acceleration will increase frequency and severity of flooding events (NRC 2012) and the surrounding lands have already been developed, higher elevation areas of Area 4 could be one of the potential habitat refugia to these species. In addition, new research on the movements and diet of SMHM indicate the important role of these upland areas for preferred food items and vegetation structure (Smith and Kelt 2019).

The Draft Compliance Checklist should address the impact of the project to the Western burrowing owls. Once abundant on the upland areas of the Baylands, the burrowing owl (BUOW) population has steadily decreased in the South Bay primarily due to habitat loss for development. In the recent five years, the South Bay Burrowing Owl Science Team, a local team of experts, has warned on the potential of the species extirpation and highlighted the need of coordination at a Regional scale to improve conditions for the species. Since 2015, the Refuge has collaborated with the Santa Clara Valley Habitat Agency to enhance habitat for the burrowing owl on Warm Springs Unit as part of a habitat management plan. Among others, several artificial burrows were installed at Stevenson's Subunit, which is located adjacent to Area 4. The proposed development jeopardizes the efforts to rebound the owl population by removing potential nesting habitat and equally importantly foraging habitat. Studies show that burrowing owls may travel as much as 2 miles away from their nest to forage and they forage in diversity of habitats that include farmland (Haug and Oliphant 1990). Nesting burrows at Warm Springs are less than a mile away from Area 4.

The current REIR and associated analysis do not provide a comprehensive cumulative impact analysis on the impact of the Project on the groundwater hydrology, under appreciates the interconnected hydrology of the Baylands. Therefore, we feel the REIR does not adequately address the potential impacts on the Vernal pool and Seasonal wetland habitats found on the adjacent Refuge lands. The vernal pools, host the federally endangered vernal pool tadpole shrimp and federally threatened California tiger salamander. Groundwater hydrology and changes to groundwater hydrology from the proposed project may affect the inundation regime of the pools, which is associated with reproductive success. Water runoff and salt-water intrusion in the pools due to increased flooding potential can have detrimental effects on these species either via the introduction of predators like fish or directly through the alteration of salinity and water pollution.

The proposed project can result in loss of flood accommodation space, REIR and the Checklist in our opinion does not adequately describe current research to address the cumulative impacts from flooding (Wang et al. 2018). We reiterate our previous comment that Area 4 has potential to provide natural and economical flood protection from sea-level rise, extreme storm events and 100-year flooding potential. Tidal marsh restoration can increase the resiliency to extreme storms. The Bay Area Council's report on the risks from severe storms recommends incorporating up to date climate change predictions, including sea-level rise and changes in rainfall, into flood risk analyses. The REIR uses data that is outdated to assess impacts on flooding and ignores regional strategies that seek to increase resilience to sea-level rise .

The REIR and the Checklist, also do not address the impact of the project on the spread of invasive species, the potential for an increase in nuisance species, such as crows and gulls, in the proposed landscaped public use areas, and the creation of tall perching spots for avian predators that affect species like the SMHM, RIRA, BUOW and other ground nesting species in the Refuge lands. The increased predation pressure combined with lack of high tide refugia can be critical for SMHM and RIRA. The REIR and the Checklist should address cumulative impacts on wildlife. Furthermore, mitigation measures to address invasive species and predator control lack measurable objectives and success criteria.

The Refuge encourages the City to provide additional time for City staff to work with the various regulatory agencies before making a final decision that the 2015 Recirculated Environmental Impact Report (REIR) adequately assesses cumulative impacts and that a supplemental EIR is not needed.

Thank you for the opportunity to review. We recommend that you contact U.S. Fish and Wildlife Service Endangered Species Division to discuss consultation required of any impacts to listed species habitat. Should you have any questions regarding our concerns, please feel free to contact me directly.

Sincerely,

Christopher J. Barr

Deputy Complex Manager,
San Francisco Bay National Wildlife Refuge

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San Francisco Bay Regional Water Quality Control Board

October 1, 2019
Place ID No. 748275

Mr. Arturo Interiano
Acting Community Development Director Community Development Program
City of Newark
37171 Newark Blvd.
Newark, CA 94560
Arturo.Interiano@newark.org

Dear Mr. Interiano,

The San Francisco Bay Regional Water Quality Control Board (Water Board) appreciates the opportunity to review and comment on the City of Newark's (City's) Draft Compliance Checklist (Checklist) for the Area 4 Sanctuary West Residential Project (Project). Where relevant, the comments in this letter incorporate by reference our January 2010 comments on the Draft Environmental Impact Report for the Newark Areas 3 and 4 Specific Plan (DEIR) and June 2010 comments on the Final Environmental Impact Report for the Newark Areas 3 and 4 Specific Plan (FEIR).

The Project proposes to construct 469 single-family residences in Sub-Areas B and C of Area 4, a 560-acre area of diked, formerly tidal baylands located generally between the Union Pacific Railroad (UPRR) tracks and tidal open water and wetland habitats in Mowry Slough. Sub-Areas B and C make up a little more than 181 acres of Area 4, such that the proposed overall density of the development in Sub-Areas B and C is 2.6 units per acre. The Project proposes to use over 1.6 million cubic yards of largely imported fill to increase elevations in areas proposed for development to +15 ft NAVD, above the current Federal Emergency Management Agency (FEMA) Base Flood Elevation (BFE) of +11 ft NAVD¹ and the proposed BFEs of +11 through +13 ft NAVD.²

Water Board staff are concerned that the Project, as described in the Checklist, may impact waters of the State or assigned beneficial uses of waters of the State. Under the authority of the Porter-Cologne Water Quality Act, the Water Board has developed, and implements, the *San Francisco Bay Basin Water Quality Control Plan* (Basin Plan), which defines the beneficial uses of waters of the State within the San Francisco Bay

¹ FEMA Flood Insurance Rate Map (FIRM) panel 06001C0444G, effective August 3, 2009.

² FEMA Preliminary FIRM panels 060010444H, 06001C0463H, and 06001C0582H, issued September 1, 2017.

Region. Because habitats in Newark Area 4 are hydrologically connected to San Francisco Bay, the following beneficial uses of San Francisco Bay are also likely to apply to waters and wetlands in Area 4: estuarine habitat (EST); preservation of rare and endangered species (RARE); contact water recreation (REC1); non-contact water recreation (REC2); shellfish harvesting (SHELL); fish spawning (SPWN); and wildlife habitat (WILD). Implementation of the proposed Project may impact beneficial uses of waters of the State, including but not limited to wildlife habitat and preservation of rare and endangered species in Area 4.

As directed by 14 CCR §15096, the Water Board is a Responsible Agency under the California Environmental Quality Act (CEQA) that must determine the adequacy of a final EIR or negative declaration. Our January and June 2010 comments raised serious concerns about the adequacy of environmental analysis in the programmatic DEIR and FEIR, respectively; these concerns were not addressed in the subsequent Recirculated Draft EIR (RDEIR, August 2014) or Recirculated Final EIR (RFEIR, January 2015). The Checklist raises the following new concerns related to indirect, direct, and cumulative impacts to water quality and beneficial uses:

- Potential impacts to waters of the State are based on out-of-date delineations;
- Potential impacts to rare and endangered species (special status species) habitat are based on out-of-date surveys and fail to consider more recent science, especially regarding potential habitat for federally listed salt marsh harvest mouse;
- The Project will likely require the development of a Habitat Conservation Plan in consultation with the U.S. Fish and Wildlife Service;
- The potential for indirect and cumulative impacts to species habitat is increased by the current project footprint;
- The Checklist fails to consider the potentially significant direct, indirect, and cumulative impacts of the Project on existing and potential water quality and beneficial uses in Area 4 and the adjacent landscape, based on the most recent scientific guidance on bayland habitats and enhancement opportunities; and
- The assessment of impacts in the Checklist fails to adequately address cumulative impacts from proposed Project activities on local and regional flood risks, which are likely to be exacerbated by climate change.

In addition, the City failed to follow proper CEQA procedures by not notifying the Water Board of the availability of the Checklist, and by using the Checklist as a substitute for a tiered project-level Supplemental EIR (see Comment 7 below). In sum, **the Water Board finds the Checklist to be inadequate, and requests that the City develop a Supplemental EIR (SEIR) to address potentially significant impacts to resources under the Water Board's jurisdiction.**

Comment 1. In assessing potentially significant impacts to jurisdictional waters and special status species, the Checklist relies on out-of-date delineations and protocol-level surveys.

The CEQA Checklist (Checklist) relies on a wetland delineation that was verified by the U.S. Army Corps of Engineers (Corps) in 2007 (Corps File # 2006-400075S), as is acknowledged on page 26 of the *Newark Area 4 Biological Resources Report* (Biological Report) (H.T. Harvey & Associates, July 25, 2019). That verified delineation expired in 2012. Since that time, there has not been a formal delineation of the extent of jurisdictional waters of the U.S. or jurisdictional waters of the State in Area 4. The discussion of impacts to wetlands is, therefore, based on a delineation that was verified in 2007. Text on page 21 of the Biological Report states:

***Waters of the U.S./State.** Based on our 2018-19 background review and reconnaissance-level site visits, we determined that there has been no change to the extent and boundaries of waters of the U.S./State in the study area since the 2009 Biological Resources Report was prepared or since the 2015 RFEIR was certified.*

While the Biological Report acknowledges that approximately 253 acres of jurisdictional waters may be present in Area 4, it does not acknowledge that the last Corps-verified delineation was made in 2007, and that both the 2009 *Biological Resources Report* and the 2015 Recirculated Final Environmental Impact Report (RFEIR) relied on the 2007 verified delineation. In addition, the Biological Resources report does not provide a detailed description of the methodology used to perform the “reconnaissance-level site visits”. Without this information, it is difficult for independent parties including the Water Board to assess the sufficiency of those site visits to support the conclusions presented in the Biological Report with respect to the current extent of jurisdictional waters.

Therefore, the conclusions related to impacts to wetlands and other jurisdictional waters in the Checklist are based predominantly on an out-of-date delineation. This is especially troubling since the development boundaries of the proposed Project appear to go to great lengths to conform precisely to the boundaries of wetlands delineated over ten years ago. In light of the significant acreage of potential jurisdictional waters in Area 4, a new wetland delineation should be performed. The current reliance on out-of-date data to support the conclusions in the Checklist is inappropriate and inadequate.

In addition, the discussion of impacts to special status species is based for the most part on protocol-level surveys conducted in 2008. The Biological Report acknowledges that protocol-level surveys for special status species have not been conducted in over a decade. Therefore, the conclusions related to impacts on special-status species (e.g., salt marsh harvest mouse [SHMH], California black rail [CBR], California ridgeways rail [CRR], and burrowing owls [BUOW]) in the Checklist are based predominantly on out-of-date protocol level surveys. In the more than ten years since protocol-level surveys for SMHM were conducted at Area 4, research has demonstrated that SMHM occupy a far broader range of habitats, including upland grasslands and diked/seasonal wetlands (including seasonal fresh, brackish, and saline wetlands) than previously thought (see Barthman-Thompson 2017, Smith and Kelt 2019, and related publications

from CDFW, USGS, and UC Davis researchers). Figure 6 in the Biological Resources report incorrectly limits potential SMHM habitat in Area 4 primarily to areas mapped as aquatic, diked salt marsh, and brackish marsh around the former Pintail Duck Club (see Figure 3 for habitat mapping), and fails to consider potential SMHM habitat elsewhere on the site, especially in the mosaic of uplands and seasonal saline/brackish marsh that dominates the southern portion of Area 4.

In light of the potential presence of several special-status species in the proposed development footprint of Area 4, new protocol-level surveys should be performed and used as the basis for impact assessment in a Supplemental EIR. The Checklist's reliance on out-of-date surveys to support its conclusions is inadequate.

Comment 2. If the proposed Project can be implemented in a manner that avoids impacts to waters of the U.S., the City must prepare a Habitat Conservation Plan in coordination with the U.S. Fish and Wildlife Service.

Prior development proposals in Area 4 would have directly impacted waters of the U.S. In response to these proposed impacts, the Corps would have initiated consultation with the U.S. Fish and Wildlife Service (USFWS), pursuant to Section 7 of the Endangered Species Act. If the Sanctuary West Residential Project can be implemented without impacting waters of the U.S, the City of Newark must initiate consultation with USFWS pursuant to Section 10 of the Endangered Species Act. Consultation under Section 10 of the Endangered Species Act will develop a Habitat Conservation Plan (HCP) for the federally listed species that may be impacted by Project implementation. Development of an HCP pursuant to Section 10 of the Endangered Species Act is a much more complicated and lengthy process than Section 7 consultation. The Checklist should have discussed this change in USFWS consultation for the proposed Project.

The HCP will constitute a federal license for an activity that may result in a discharge to waters of the U.S. since the HCP will permit implementation of the Project that will result in a discharge of runoff during the construction and post-construction phases of Project implementation. **Accordingly, the Project is subject to Section 401 of the Clean Water Act thereby requiring water quality certification from us** (CWA §401(a)(1) and 33 USC1341(a)(1)). Discharges may impact habitat by carrying contaminants into waters of the State or by altering the salinity and other characteristics of wetland habitats to an extent that compromises habitat suitability for SMHM, CRR, and/or other special-status species. Although the Checklist refers to treatment of stormwater runoff during construction and post-construction periods, the Checklist does not provide sufficient detail related to proposed treatment measures to allow an adequate assessment of the ability of those treatment measures to sustain habitat values for special-status species. In addition, the Checklist does not mention the need to track contaminant levels, salinity levels, and other relevant water quality characteristics in the wetlands in Area 4 that provide habitat for SMHM and CRR. A supplemental EIR should include discussion of the HCP process and provide sufficient detail to assess the potential impacts of stormwater on the water quality and beneficial uses of undeveloped wetlands in Area 4.

Comment 3. The current Project proposal represents a change in the type of impacts on wetlands and other jurisdictional waters in Area 4 that would result in a potentially significant impact on beneficial uses of Area 4.

Previous CEQA documents for proposed development in Area 4 anticipated that about 85 acres of fill would be placed in jurisdictional waters. Portions of Area 4 that were not included in the development footprint included a mixture of wetlands and uplands. Mitigation proposed in prior CEQA documents included converting some unimpacted uplands to wetlands as part of the proposed compensatory mitigation for impacts on jurisdictional waters.

The Checklist claims that the current development footprint would avoid all jurisdictional waters in Area 4. As is noted in Comment 1, above, the current extent of jurisdictional waters in Area 4 has not been verified by the Corps or us, so it has not been established that the development footprint proposed in the Checklist would actually have no direct impacts on jurisdictional waters of the U.S. or state.

Although the development footprint proposed in the Checklist avoids placing direct fill in wetlands (as delineated in 2007), the preserved area will consist almost entirely of wetlands and other waters. The relative absence of uplands and transitional habitats in the preserved portions of Area 4 would compromise the habitat value of the preserved area since wetland habitat values are highest when they are a constituent of a mosaic of wetlands, seasonally flooded lowlands, and uplands. For example, species that spend much of their lifecycle in wetlands rely on adjacent uplands as refuge from high tide events and ponding associated with precipitation. This is well-illustrated by recent research on SMHM by scientists at UC Davis and CDFW, which indicates that SMHM utilize a far broader suite of habitats – including diked and seasonal fresh and brackish wetlands – than previously understood, and that utilization, survival, and reproduction in these habitats is increased when SMHM have access to adjacent upland areas that can provide refugia from flooding, preferred food items, and preferred vegetation structure (Barthman-Thompson 2017, Smith and Kelt 2019).

Without a mosaic of uplands interspersed with wetlands, the only high water refugia in preserved portions of Area 4 would consist of the steep-sided perimeter levees and created transition zones between the grade of the preserved wetlands and the imported fill placed below the development footprint. Reducing high water refugia to levees and the transition zone to imported fill will increase opportunities for predation of listed species seeking refuge from high water on the levees and transition zones.

The creation of a development footprint that avoids all known jurisdictional waters in 2007 has resulted in preserved wetlands that are surrounded on multiple sides by the proposed development areas. The unusual shape of the proposed development footprint results in a much longer interface between developed areas and preserved wetlands. The prior CEQA documents acknowledged that development adjacent to preserved habitat would impact habitat values:

- Indirect effects of development could include an increase in nonnative and urban-adapted native species, and an increase in domestic animals such as cats and

dogs, that could prey on more sensitive native species in the on-site conservation areas.

- Populations of nonnative mammals, such as house mice (*Mus musculus*), black rats (*Rattus rattus*), and Norway rats (*Rattus norvegicus*), as well as urban-adaptive natives, such as the raccoon (*Procyon lotor*) are likely to increase in the Project vicinity following development. These species may compete with or prey upon salt marsh harvest mice, salt marsh wandering shrews, and other marsh wildlife.
- Noise levels and nighttime lighting associated with the residential development may discourage wildlife including special-status species from using habitat adjacent to the development footprint.
- Development may fragment habitat for species, resulting in genetic isolation of breeding populations of special status species or insufficient foraging habitat to sustain local populations.

Since the length of the wetland-development interface has been significantly increased by the proposed Project, the Checklist should have assessed the magnitude of increased indirect impacts to habitat.

In an attempt to discount the impacts of development on adjacent habitats, text on page 30 of the Biological Report notes that CBR have been documented nesting and foraging near the Alviso Marina County Park, and asserts that impacts from park users would be commensurate with impacts from residents adjacent to habitat for special status species. Park users are only present during daylight hours, do not require nighttime lighting, and do not bring domestic cats with them to the park. Residential developments are in use 24 hours per day, seven days a week. The analogy between park users and full-time residents is flawed and should not be included in the Checklist to justify an adequate assessment of the significance of indirect impacts of residential development on the Beneficial Uses of wildlife habitat and the preservation of rare and endangered species.

In addition, the mitigation measures offered for those impacts appear to be largely speculative, and the CEQA documents provide no documentation related to any studies that might have demonstrated the effectiveness of such measures on preserving habitat value in preserved wetlands or providing adequate safeguards to protect special status species.

- MM BIO-4.5A. This measure states that any onsite mitigation habitat for BUOW should consist of at least 50 percent uplands, to provide adequate habitat for the ground squirrels and other burrowing animals upon which BUOW depend for habitat. This would be impossible with the development footprint proposed for the Sanctuary West Residential Project.
- MM BIO-4.7. This measure requires the development of a predator management program (e.g. no outdoor pet feeding, no outdoor cats, outdoor dogs must be on leash, containment of food wastes) and education of residents. No assessment

of the effectiveness or feasibility of these measures at other residential developments adjacent to habitat is provided.

- MM BIO-8.4 proposes to protect SMHM habitat within 100 feet of the development envelope by the future development of a habitat mitigation and monitoring plan. The mitigation measure provides no justification for limiting impacts to areas within 100 feet of the development envelope (dogs and cats may easily travel more than 100 feet into SHMH habitat) and lacks sufficient detail, including performance standards, to assess its likely effectiveness. The proposed mitigation also lacks any discussion of controls measures to mitigate increased numbers of non-native mammals, such as house mice, black rats, and Norway rats, as well as urban-adaptive natives such as the raccoon.
- MM BIO-9.2 proposes to protect species in preserved marshes by placing signs along levees and the slough that describe the ecological value of the wetland areas and instruct to people to stay out of sensitive habitats and keep dogs on leashes. The measure does not reference any studies of the effectiveness or feasibility of such signage in protecting species habitat.
- MM BIO-10.1 asserts that only birds using habitat within 300 feet of the development envelope will be impacted by the adjacent development. The mitigation measure provides no justification for limiting impacts to areas within 300 feet of the development envelope. The future development of a mitigation plan for impacts on birds using wetlands is required. But the requirement for the development of a future mitigation plan lacks sufficient detail, including performance standards, to assess its likely effectiveness.

The City should produce a Supplemental EIR that (1) addresses the potentially significant impacts to beneficial uses in Area 4 (including RARE and WILD) from the loss of upland habitats and flood refugia within the preserved wetland mosaic in Area 4, (2) addresses the potentially significant impacts to beneficial uses in Area 4 (including RARE and WILD) from the substantial increase in the length of the proposed interface between preserved wetlands and developed areas, and (3) proposes mitigation measures that have been documented to be effective in preserving habitat values adjacent to development. The significantly increased length of the interface, including some preserved areas that will be bordered on three or four sides by development, should be addressed as essentially a new significant impact to preserved habitat at Area 4.

Comment 4. The Checklist fails to address potential contamination of the preserved wetlands from imported fill dirt.

The Project proposes to import significant amounts of fill in the development footprint to raise building pads out of the 100-year floodplain. The ground surface of the development footprint will transition to the elevation of the preserved wetlands at a slope of no greater than 2:1 (horizontal:vertical). Runoff flowing over the transition zone and into the preserved wetlands may carry some of the fill dirt and any associated contaminants into the wetlands. Therefore, any soil imported to the Project site for use

in the transition zones must be tested to confirm that it does not contain any constituents at concentrations that could impair species present in the preserved wetlands.

Soil imported to create the transition zones should be reviewed in conformance with contaminant screening criteria for wetland surface material presented in the *Beneficial Reuse of Dredged Materials: Sediment Screening and Testing Guidelines. Draft staff report* (Water Board, May 2000). Imported soil that meets the wetland surface material criteria is considered chemically suitable to come in contact with wetland flora and fauna. The City of Newark should develop a protocol for screening and managing imported fill soil to ensure that only soils that meet the wetlands surface material requirements are placed in the transition zones.

Comment 5. The Checklist fails to consider the most recent regional planning guidance, including the 2015 Baylands Ecosystem Habitat Goals Science Update and the 2019 San Francisco Bay Shoreline Adaptation Atlas, when assessing potentially significant impacts to existing and potential water quality and beneficial uses.

In the Water Board's January 12, 2010, comment letter on the *Draft Environmental Impact Report for the Newark Areas 3 and 4 Specific Plan* (SCH No.: 200705205), we noted the significance of the tidal marsh/upland transition zone in Area 4:

The San Francisco Bay Area Wetlands Ecosystem Habitat Goals Project recommended that the tidal marsh/upland transition zone of Area 4 be protected and enhanced, including the tidal marsh/upland transition at the upper end of Mowry Slough and in the area of the Pintail Duck Club (all located in Area 4). In addition, the Don Edwards San Francisco Bay National Wildlife Refuge (Refuge) has expressed strong interest in acquiring Area 4, because of its significance as habitat for endangered species and location adjacent to the Refuge, and the Bay Conservation and Development Commission (BCDC) has expressed interest in restoring the diked historic baylands in Area 4 to tidal action and enhancing the wildlife values of the onsite wetlands.

Since 2010, subsequent studies of baylands ecosystems in San Francisco Bay have reinforced and elaborated upon the importance of preserving the unique landscape characteristics in Area 4, including but not limited to upland-wetland transition zones, due to their existing habitat values and functions as well as their potential to support local and regional resilience to the impacts of climate change and sea level rise. The conclusions of those studies are summarized in the 2015 *Baylands Ecosystem Habitat Goals Science Update*³ (2015 Baylands Goals, Goals Project 2015) and the 2019 *San Francisco Bay Shoreline Adaptation Atlas*⁴ (*Adaptation Atlas*, SFEI 2019). Both of these guidance documents (a) were developed via collaborative processes that included representatives from resource and regulatory agencies including the Water Board,

³ Online at <https://baylandsgoals.org/wp-content/uploads/2019/06/Baylands-Complete-Report.pdf>

⁴ Online at https://www.sfei.org/sites/default/files/biblio_files/SFEI%20SF%20Bay%20Shoreline%20Adaptation%20Atlas%20April%202019_highres.pdf

regional planning and transportation agencies, and a broad range of other stakeholders and (b) are being used by these same stakeholders to make local and regional decisions about the future configuration of the SF Bay shoreline. The Water Board is in the process of preparing a Basin Plan amendment that will integrate guidance from the *2015 Baylands Goals* and *2019 Adaptation Atlas* into an updated suite of policies, regulations, and permitting requirements related to estuarine wetlands and climate change. Neither document was available to the public when the RFEIR was circulated in 2015. In determining the need for additional review of impacts associated with the proposed Project, the Checklist fails to adequately consider and integrate the science and recommendations presented in these documents.

The *2015 Baylands Goals* highlights how water quality and beneficial uses of tidal wetlands and nearshore waters are most effectively protected where there is landscape-scale connectivity between subtidal (open water), intertidal (marsh and mudflat), and supratidal (upland) habitats. The report especially emphasizes the importance of upland-wetland transition zones in supporting existing beneficial uses, as well as providing space for the future sea level rise-driven movement of tidal wetlands (and their associated beneficial uses) upslope. The *2015 Baylands Goals* describes the following ecosystem services provided by transition zones; services that directly support beneficial uses of wetlands and waters of the State in the region are bolded (Figure 1):

- ***Buffering for the landward effects of tidal processes and the bayward effects of fluvial and terrestrial processes, which helps control pollution, biological invasions, and erosion***
- *Flood protection where channels, floodplains, and floodwater storage areas exist*
- *Sea-level rise migration space for the baylands, especially for tidal marsh and the tidal reaches of rivers and streams*
- ***Nutrient processing in transition zone wetlands***
- ***Groundwater recharge during floods in riverine floodplains and stormwater retention basins that are part of the transition zone***
- ***Support of diverse native wildlife (including fish) through the provision of***
 - ***Habitat for transition zone species, including important pollinators for marsh plants and invertebrate prey for marsh fauna***
 - ***Refuge from predators and physical stressors like high water***
 - ***Foraging areas***
 - ***Movement corridors along the shore or up into watersheds (especially important for allowing certain species to find the right salinity in variable conditions)***
 - ***Landscape complexity by increasing the number of habitats and combinations of adjacent habitats***

- ***A wide range of conditions that promote the physiological, behavioral, and other adaptations necessary for population persistence***
- *Cultural amenities, including **recreation** and educational activities*
- *Carbon sequestration*

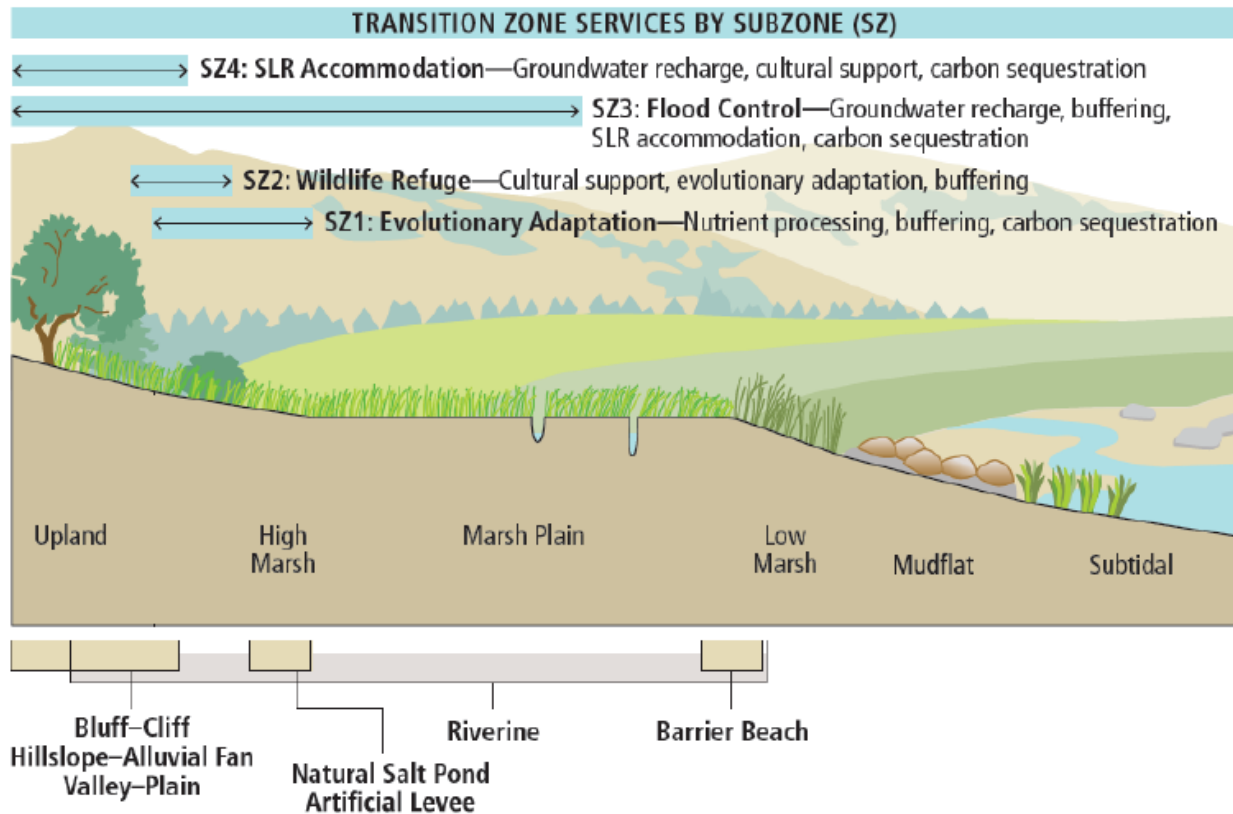


Figure 1. A conceptual diagram of a “complete” tidal wetland system, showing how different portions of the estuarine-terrestrial transition zone provide different ecosystem services. (Image: Goals Project 2015)

Though Area 4 is primarily a non-tidal system, its habitat characteristics and hydrologic and landscape connectivity to tidal wetlands and waters along the Mowry Slough system indicate that it is already providing many of these services in support of water quality and beneficial uses in the slough and adjacent waters of the State. Impacts to terrestrial and transition zone habitats in Area 4, including filling to support development, would therefore negatively impact water quality and beneficial uses in Mowry Slough and adjacent waters of the State.

The potential significance of these impacts is underscored by recent analysis performed by SFEI to produce the *2019 Adaptation Atlas*. The Atlas uses a rigorous science-based framework to identify where along the SF Bay shoreline natural and nature-based measures can enhance existing and future beneficial uses and provide long-term resilience to the impacts of climate change and rising sea levels. One of the key measures highlighted by the Atlas is protecting and preparing space for the future SLR-driven upslope migration/transgression of tidal wetland habitats. As demonstrated in the *2015 Baylands Goals* and multiple modeling efforts (e.g. Stralberg et. al 2011, Swanson

et al. 2013, Schile et al. 2014), without adequate suspended sediment and space to move upslope, tidal wetlands in SF Bay will largely be “squeezed” between rising sea levels on their bayward edge, and a largely urban landscape on their landward end. This is especially true of South San Francisco Bay in the vicinity of the Project, which has lost almost all of its formerly extensive transition zones due to development.

The following figures are based on those presented in the *2019 Adaptation Atlas*, and provide a focused look at opportunities for tidal wetland restoration and migration space preparation in Area 4 and the broader Mowry Slough region. Consistent with the *Atlas*, the maps display the Mowry “Operational Landscape Unit” or OLU. OLUs are a practical way to manage the physical and jurisdictional complexity of the Bay shoreline in support of climate change adaptation: they cross traditional jurisdictional boundaries of cities and counties, but adhere to the boundaries of natural processes like tides, waves, and sediment movement. OLUs address the portion of a region’s land area that is potentially vulnerable to future sea level rise, and include areas along and adjacent to the shore that can support geographically specific and science-based sea level rise adaptation strategies.

Figure 2 overlays the boundaries of Sub-Areas B, C, and D of Area 4 over the portions of Area 4 with elevations and characteristics suitable to support tidal wetlands (green) and transition zone habitats (orange). Uniquely for this region of the Bay, all three Sub-Areas have the potential to support landscape connectivity between tidal wetland and transition zone habitats. The unique nature of these characteristics is underscored when looking at the Mowry OLU as a whole. Figure 3 demonstrates how, outside of the active Cargill salt production ponds and already-protected Warm Springs Unit of Don Edwards National Wildlife Refuge, proposed areas of development within Area 4 represent some of the best opportunities to restore functional estuarine-terrestrial gradients within the entire OLU. Since the Mowry OLU contains 10% of the lands around the entire Bay that are suitable for the long-term migration of tidal wetlands, Sub-Areas B, C, and D represent not just significant opportunities to protect and enhance beneficial uses within the OLU, but within the entire South Bay.

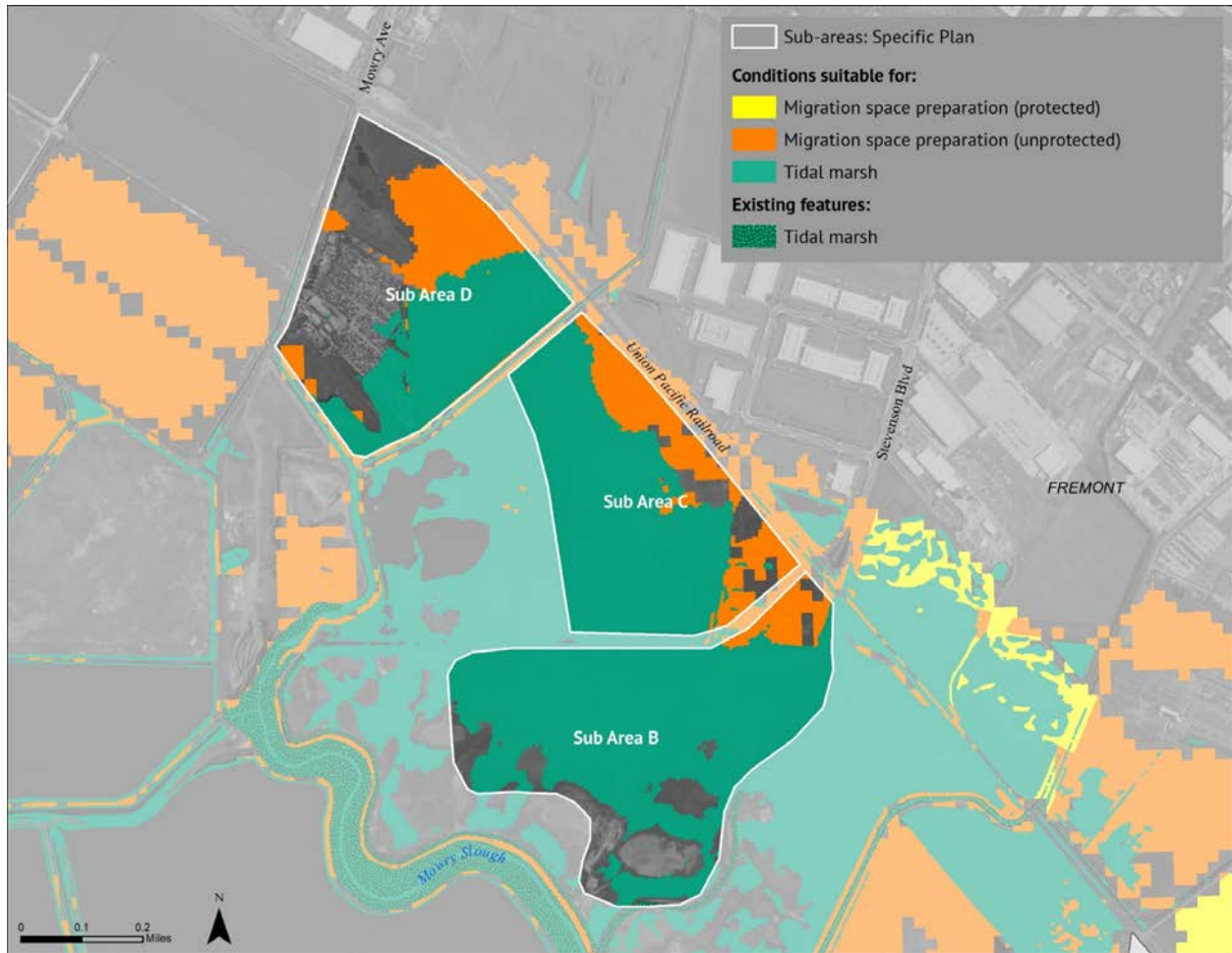


Figure 2. Sub-areas planned for residential and golf course development in Sanctuary West Area 4, overlaid with selected opportunities for nature-based adaptation measures from the SF Bay Shoreline Adaptation Atlas.

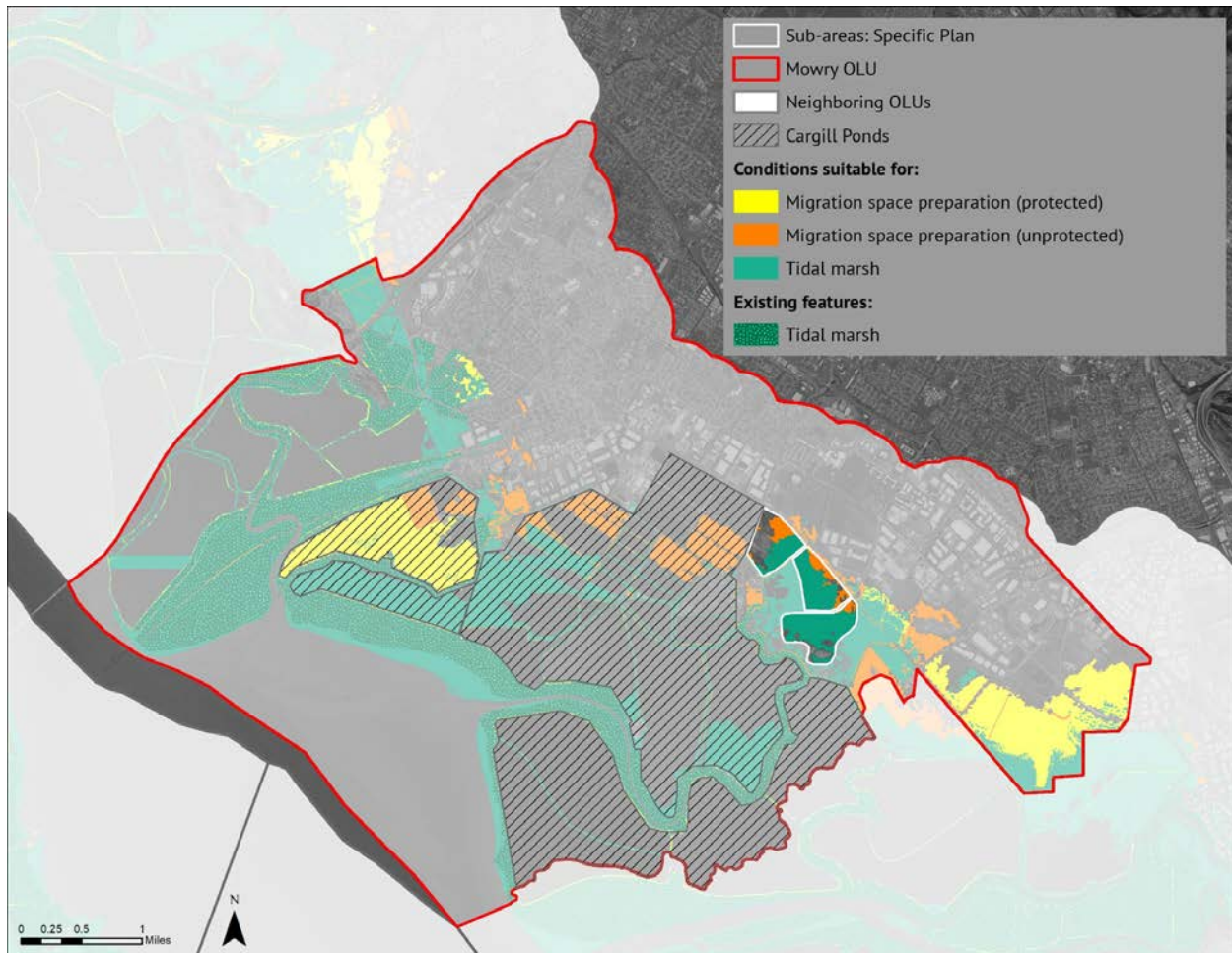


Figure 3. Sanctuary West Area 4 is located within the Mowry Operational Landscape Unit (OLU). Planned development areas are shown here in the context of the OLU, along with selected opportunities for nature-based adaptation measures from the SF Bay Shoreline Adaptation Atlas.

As a responsible agency under CEQA, the Water Board is required to consider not only how a project may impact *existing* beneficial uses of wetlands and waters, but also *potential* beneficial uses of wetlands and waters. The Checklist fails to consider the most recent science and guidance presented in the *2015 Baylands Goals* and *2019 Adaptation Atlas*, and therefore does not adequately address potentially significant impacts to existing and potential water quality and beneficial uses in Area 4, adjacent habitats in Mowry Slough, and the broader baylands landscape around the site. We request that the City include this analysis in a Supplemental EIR.

Comment 6. The Checklist does not adequately address the cumulative impacts of the proposed Project on local and regional flood risks, which are likely to be exacerbated by climate change.

A technical memo provided in support of the Checklist's findings with regard to water quality and hydrology (Schaaf and Wheeler 2019) addresses the Project's consistency with the 2018 State of California Sea-Level Rise Guidance developed by the Ocean Protection Council (OPC) with support from the OPC's Science Advisory Team (SAT).

The memo suggests that a “low risk aversion” approach to Project design and initial construction is appropriate based on “*proposed setbacks to developed neighborhoods within Area 4 and the amount of remaining open space*” outside the Project’s developed footprint. This approach results in a proposed minimum building pad elevation of +15 ft NAVD, based on anticipated sea level rise (SLR) of 1.9 ft by 2070 (the Project’s proposed 50-year lifespan) under a high-emissions (RCP 8.5) scenario on top of the proposed FEMA BFE of +13 ft NAVD. The memo does not indicate how setbacks and open space would contribute to flood protection, as the proposed Project (a) does not include any improvements to the non-FEMA-certified levees that surround Area 4 and (b) fills roughly one third of Area 4, significantly reducing the accommodation space for tidal and fluvial floodwaters that otherwise is provided by leaving the site’s existing topography untouched. This loss of flood accommodation space could increase not only local flood risks, but regional flood risks due to the networked nature of flood vulnerabilities along the San Francisco Bay shoreline (Wang et al. 2018).

We disagree with the conclusion that placing 469 units of housing in partially subsided, flood-prone formerly tidal baylands is a planning scenario that calls for a *low risk aversion* approach to flood protection. It should go without saying that given the limited ingress and egress to the proposed development, flooding of developed areas would put considerable lives at risk. Flooding of the proposed Project would also expose Bay waters and sensitive habitats throughout the Mowry Slough complex (including tidal wetlands, flats, and open waters that support listed species) to potentially significant impacts from contamination and exposure from the release of household chemicals, including petroleum products, pesticides, herbicides, and other priority contaminants regulated under the Water Board’s Basin Plan.

These impacts to water quality would be exacerbated further if the loss of flood accommodation space in Area 4 increased the risk of flooding nearby industrial and commercial areas that drain to the Alameda County Water Conservation and Flood Control District’s (ACWCFCD) Lines B, D, and N. We understand from Refuge staff that wet winters (such as the one of 2016-2017) can trigger flooding of Area 4, partially from ponding from local rainfall but also potentially from failure of local flood control infrastructure such as levees and tidegates (C. Barr, personal communication). It’s likely that Area 4 provides important flood accommodation space for the region’s stormwater drainage system, and that filling much of Area 4 could result in potentially significant cumulative impacts to local and regional flood risks. Climate change is likely to increase local flood risks in two ways: (1) by increasing local tailwater elevations through sea level rise, raising the elevation threshold at which infrastructure will drain, and (2) increasing the intensity and severity of storm events that must drain through infrastructure designed to handle historic events (Swain et al. 2018, Polade et al. 2017). This creates another mechanism through which the Project may generate significant and cumulative impacts to local and regional flood risks.

The Checklist fails to adequately address these concerns. We request that the City include in a Supplemental EIR consideration how the loss of flood accommodation space within Area 4 could affect fluvial, tidal, and combined fluvial + tidal flood risks both within the Project site and its broader region of hydrologic influence, under existing

conditions and consistent with the “high risk aversion” approach consistent with the 2018 State of California Sea-Level Rise Guidance to Project design.

Comment 7. By not providing the Water Board with adequate notice of the Checklist, and by developing the Checklist instead of preparing a Supplemental EIR, the City failed to follow proper procedures under CEQA.

When the City released the Checklist on September 11, 2019 and notified some members of the public of the availability of the document for review, it selected an arbitrary 20-day review period. The City failed to notify all of the state and/or local Responsible and/or Trustee agencies who have previously commented on inadequate impact assessments in the original DEIR and the FREIR, including the Water Board. This approach has denied the Water Board, our partner resource and regulatory agencies, and the public adequate opportunity to evaluate the new information presented in the Checklist and its supporting documentation. The City appears to have based their decision to consider only a 20-day review period on the assertion in the Checklist that the Project would not require permits from the Water Board. Decisions about Water Board jurisdiction and permits are made by the Water Board, not the City; as documented in the comments above, we believe the proposed Project would require a Water Quality Certification under Section 401 of the Clean Water Act and/or Waste Discharge Requirements under the Porter-Cologne Water Quality Control Act. We therefore request that the City re-circulate the Checklist with a standard 45-day comment period to allow Water Board staff adequate time to review the Checklist and its supporting studies, and follow up with a properly notified and circulated Supplemental EIR.

Page S-10 of the FREIR states:

*“Because the analysis [in the FREIR] is at a programmatic level for Area 4, it is likely that CEQA will require tiering from this EIR to prepare **project-level analysis** [emphasis added] prior to approving a tentative map for residential development or a use permit for a golf course or other recreational activity in Area 4.”*

The City asserts that the Checklist may serve as tiered *project-level analysis* under CEQA based on language in the CEQA Guidelines (14 CCR §15168(c)(4)) that states:

*“where the later activities involve **site-specific operations** [emphasis added], the agency should use a written checklist...to document the evaluation of the site and the activity to determine whether the environmental effects of the operation were within the scope of the program EIR.”*

The proposed Project described in the Checklist encompasses much more than site-specific *operations*; it is instead a specific **development** project that falls under the auspices of 14 CCR §15168(c)(1), which requires tiered project-level analysis in the form of an Initial Study (which would be circulated to responsible agencies including but not limited to the Water Board) leading to an EIR or Negative Declaration. Given the Water Board’s concerns about the proposed Project’s potentially significant direct,

indirect, and cumulative impacts to water quality and beneficial uses (Comments 1-6), we request that the City develop and circulate a Supplemental EIR that adequately assesses these impacts and proposes appropriate alternatives and mitigations that would reduce impacts to a less than significant level.

Thank you for your consideration, and please contact Brian Wines at brian.wines@waterboards.ca.gov or 510-622-5680 with any questions.

Sincerely,

Xavier Fernandez, Chief
Planning and TMDL Division

cc:

California Department of Fish and Wildlife:

Marcia Grefsrud, marcia.grefsrud@wildlife.ca.gov

Laureen Barthman-Thompson, laureen.thompson@wildlife.ca.gov

Bay Conservation and Development Commission:

Brad McCrea, brad.mccrea@bcdca.gov

Jessica Fain, jessica.fain@bcdca.gov

Bay Area Air Quality Management District:

Gregory Nudd, gnudd@baaqmd.gov

Henry Hilken, hhilken@baaqmd.gov

Josephine Fong, jfong@baaqmd.gov

U.S. Army Corps of Engineers:

Katerina Galactos, katerina.galactos@usace.army.mil

Gregory Brown, gregory.g.brown@usace.army.mil

U.S. Fish and Wildlife Service, Bay Delta Fish & Wildlife Office:

Kim Squires, kim_squires@fws.gov

Don Edwards San Francisco Bay National Wildlife Refuge:

Anne Morkill, anne_morkill@fws.gov

Chris Barr, chris_barr@fws.gov

City of Newark:

Sofia Mangalam, sofia.mangalam@newark.org

Citizens Committee to Complete the Refuge:

Carin High, cccrrefuge@gmail.com



Mr. Arturo Interiano
Acting Community Development Director
City of Newark
37101 Newark Blvd.
Newark, CA 94560

September 27, 2019

**SUBJECT: REQUEST FOR EXTENDED PUBLIC AND AGENCY REVIEW OF
NEWARK SPECIFIC PLAN AREA 4 – “SANCTUARY WEST RESIDENTIAL PROJECT”
CEQA COMPLIANCE CHECKLIST**

Dear Mr. Interiano;

Grassetti Environmental Consulting (GECO) is submitting this letter on behalf of Citizens Committee to Complete the Refuge (CCCR). CCCR, among others, submitted numerous comments on the 2009 Draft Environmental Impact Report. One of our main concerns was that the City would abuse the EIR process in such a way as to create a “shell game” where site-specific environmental issues were deferred in the original (programmatic) EIR to a future project-level review, and then claim that those issues were adequately assessed in the original programmatic EIR. Not only has the City engaged in this approach, but it has done so in a manner that eliminates essential review from responsible state and local agencies with jurisdiction and expertise over the site’s environmental resources.

Therefore, we are requesting the City re-issue a project-level CEQA review for the Sanctuary West project to a list of recipients that includes all responsible and trustee agencies, as well as any other entities or individuals that commented on the 2009 Draft EIR or 2015 Recirculated Draft EIR. At a minimum, this review must be the full 30 days required for any document that involves State Clearinghouse distribution. This request is discussed further below.

Discussion

The City has prepared a “checklist/addendum” to the 2015 Final Recirculated EIR (FREIR) that it claims finds no new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete and, therefore, no Subsequent or Supplemental EIR need be prepared. Further, the City selected an arbitrary 20-day review period for this checklist and then notified some members of the public of the availability of the document for review “for informational purposes”. As detailed below, the use of this Checklist and abbreviated comment period are not permissible under CEQA. This impermissible approach has denied both the public and resource-protection agencies with adequate opportunity to evaluate the new information for adequacy.

The apparent logic in this approach is that, because (the Checklist claims) no permits would be required from these agencies, then they need not review this document. The obvious logical flaw in this approach is that it is the resources agencies, not the City or applicant, who ultimately determines their permitting jurisdiction, and absent any review of the project-level plans or additional environmental review documentations, the agencies cannot make those determinations. Therefore the resources agencies must be provided this document and its supporting studies for a full review of not less than 30 days. Given that this review is substituting for a Supplemental EIR, and that the document in question involves over 170 pages of text and several hundred pages of supporting studies, the document should logically be subject to standard 45-day CEQA EIR review period.

Typically, EIR Addendums are prepared when, as envisioned in the CEQA Guidelines, only minor changes are made to a project, background conditions, or impacts (the inverse of the situations described in CEQA Guidelines Section 15162). However, in tiering off of a Program EIR, Section 15168 (c)(1) of the CEQA Guidelines states “If a later activity would have effects not examined in the FEIR, a new Initial Study would need to be prepared, leading to either an EIR or a Negative Declaration.” The FREIR is a program EIR (PEIR) for Area 4, and must follow the requirements for subsequent review under PEIRs. As described in the EIR itself,

“ In Area 4, the EIR provides a programmatic level of analysis of the environmental impacts from the construction and operation of new houses and a golf course, including analysis of impacts on wetlands, burrowing owls, salt marsh harvest mice, wandering shrew, water birds, special status plant species, trees, archeological resources, geotechnical resources related to liquefaction, undocumented fill, differential settlement, and corrosive soils, and potential hazardous materials. Because the analysis is at a programmatic level for Area 4, it is likely that CEQA will require tiering from this EIR to prepare project-level analysis prior to approving a tentative map for residential development or a use permit for a golf course or other recreational activity in Area 4.” (FREIR, p. S-10)

Rather than follow this clear Guidelines direction for future site-specific development of areas assessed programmatically in a PEIR, the City has chosen to hang its hat on another section of the Guidelines, which states that “where the later activities involve site-specific *operations* [emphasis added], the agency should use a written checklist...to document the evaluation of the site and the activity to determine whether the environmental effects of the *operation* were within the scope of the program EIR.” This checklist approach applies only to later *operation's*, not later *development*, as is proposed in this project. For later *development*, section 15168(c)(1) applies.

The Checklist cites the 2005 *Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency* decision as supporting this approach, but that case applies to Master EIRs, not program (or project) EIRs. They are distinct documents under CEQA, with separate and distinct processes spelled out in the Guidelines (Program EIR procedures are described under Guidelines Section 15168m while MEIRs are addressed in Guidelines section 15175, and are described therein as an “alternative to project, staged, or program EIRs”). Similarly, the cited *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) decision shines no light on the use of a Checklist

¹ An example of later “operations” would be implementation of the SF Bay Estuary Invasive Spartina Control Program at specific locations around the bay, where there would be later operations of the program, but no new development.

rather than an Initial Study. In fact, that decision appears to support the use of an Initial Study in cases such as this. Note that the document in that case was a project-level document, while, in this case, the document was acknowledged to be a program EIR, addressing several proposed development areas, and lacking in site-specific information on cultural resources, biological resources, air pollutant and GHG emissions, among other items, specific to Area 4. In fact, the Checklist acknowledges this in including Area 4-specific studies for biological resources, noise, and air quality, among other resources.

The City's failure to use an Initial Study has resulted in several resources agencies, as well as the public, being materially and substantially deprived of meaningful input on the document. As described above, an Initial Study would have been circulated to relevant state agencies via the State Clearinghouse. These agencies include:

- The California Regional Water Quality Control Board, which has jurisdiction over wetlands and water quality that may be affected either directly or indirectly by the project, including Section 401 of the Clean Water Act certification.
- The California Department of Fish and Wildlife, which has jurisdiction over special-status species such as the salt-marsh harvest mouse, which uses the certain upland areas of the site as well as wetlands.
- The Bay Area Air Quality Management Agency, which has jurisdiction over construction and operational emissions, and frequently evaluates CEQA air quality assessments for adequacy.
- The Native American Heritage Commission, which has jurisdiction over cultural resources evaluation under CEQA, as well as AB 52 compliance.

Additionally, neither the Checklist nor the Recirculated Final EIR addresses Tribal Cultural Resources (TCRs), as required under state law (AB52). (Note that the Holman and Associates March 14, 2019 letter (Checklist Appendix C) is limited to traditional cultural resources, not TCRs. This is a substantial omission because it denies relevant Native American tribal representatives their lawful right to consult with the local and state agencies regarding the project's impacts to TCRs, as established under AB52. The tribal representatives must be contacted by the City and given a minimum of 30 days to comment on the TCR analysis. Because no TCR analysis has been done, the City must include that analysis in an Initial Study of the project, followed by the requisite consultation.

Finally, the Checklist states that it is intended to support findings for an exemption under Guidelines section 65457. Absent expert agency review and adequate time for public review, it is unclear how the City can consider the contents of the Checklist adequate to support such findings. Further, our preliminary review has found several major flaws in the air quality assessment that substantially underestimate the project's impacts². In other

² The Checklist Air Quality Appendix (Appendix A) emission estimates include the 160,000 truck trips needed to move the 1.6 million cu. yd. of fill, but all were assumed to happen in year 2020. But to assess significance, those emissions are improperly averaged over the full 5 years of project construction. The NO_x threshold would be exceeded in 2020, but not when averaged over 5 years. Also, had the model been run under default assumptions, it would have taken 7 years for Project full buildout and all construction equipment would have been assumed to run 8 hours per workday. Instead, the Appendix A assumptions have been "tweaked" to reduce that to 5-year buildout with equipment running 4 hours or less per workday. Without those "tweaked" assumptions, the total construction emissions are substantially increased and would be significant, not less-than-significant as assumed in the Checklist.

cases, detailed analysis is deferred to post-approval activities. Given these flaws and improper deferrals of analysis, the Checklist does not appear to be adequate to support the proposed exemption.

Conclusions

It is my professional opinion, supported by the facts summarized above, that the City has used an improper CEQA document, improper notification, and an improper review period for this project. We therefore are requesting that the City revise and re-circulate the Checklist as an Initial Study for the statutory 30-day minimum review period, noticing (or re-noticing) all potentially affected and interested agencies and parties, as set forth in the CEQA Guidelines.

Sincerely



Richard Grassetto
Principal
Grassetto Environmental Consulting

Further, the 2019 Checklist fails to consider that residences in Area 3 will be built out and occupied prior to work on Area 4. This becomes an issue for project-level and cumulative Toxic Air Contaminants (TAC) analysis because those residents would be subject to potentially significant TAC emissions from Area 4 construction. This issue is not evaluated in the Checklist or Appendix A.

GEOFFREY H. HORNEK

Environmental Air Quality and Acoustical Consulting
1032 Irving Street, #768
San Francisco, CA 94122
(414) 241-0236
ghornek@sonic.net

September 30, 2019

Subject: Newark Areas 3 and 4 Specific Plan Project – Comments on Updates to the Air Quality Assessment based on Revised Plans for Area 4.

Mr. Richard Grassetti
Grassetti Environmental Consulting
7008 Bristol Drive
Berkeley, CA 94705

Dear Mr. Grassetti:

At your request, I have reviewed the CEQA document, *Draft Compliance Checklist – Area 4 Sanctuary West Residential Project* (DCC, September 2019), and its appended air quality study, *Newark Area 4 Air Quality Assessment Update* (AQUA, April 2019). I found out very quickly from the DCC's Executive Summary that it presents an updated analysis of changes to a project considered in an earlier CEQA document, *Newark Areas 3 and 4 Specific Plan Project - Recirculated Draft Environmental Impact Report* (RDEIR, August 2014). Essentially the project considered in the RDEIR was a 1260-unit single-family residential development on two parcels (designated "Area 3" and "Area 4") in the City of Newark. But plans for these parcels have changed since the RDEIR was issued: 386 single-family residential units will be built on Area 3 (with their construction currently in progress) and 469 single-family residential units are proposed on Area 4 along with the raising of its elevation through the import/grading of 1,674,650 cubic yards of fill.

My review of and comments on the DCC were limited to its air quality analysis, identified impacts, and findings of significance as presented in the AQUA and supported modeling data. Most of my comments below are on the specific aspects of the air quality analysis and significance findings for the currently proposed Area 4 development. However, with respect to health risks, both Areas 3 and 4 impacts must be considered together. The 2014 RDEIR air quality analysis and findings considered the impacts of emissions and health risks from sources associated with both areas on local and regional air quality. In contrast, the 2019 AQUA considers the emissions and health risks only from Area 4 sources, as if development on that parcel were an independent, stand-alone project. The

AQAU needs to include the updated Area 3 impacts along with those of Area 4 and base its significance findings on the combined effects of both developments on air quality and public health.

In the Bay Area, CEQA air quality issues are typically addressed using the Bay Area Air Quality Management District (BAAQMD) methodologies and significance thresholds as specified in their *CEQA Air Quality Guidelines* (May 2017). The major air pollutant emissions needing evaluation are ozone precursors - reactive organic compounds (ROG) and nitrogen oxides (NOx) - and two forms of airborne particulate matter - PM₁₀ and PM_{2.5}. Health risks from project and cumulative airborne exposures to toxic air contaminants (TACs) also need evaluation. According to the *CEQA Air Quality Guidelines*, any project would have a significant potential for causing a local air quality standard violation, making a cumulatively considerable contribution to a regional air quality problem, or presenting a substantial health risk to local sensitive receptors if its pollutant or TAC emissions would exceed any of the thresholds presented in **Table 1** during construction or operation.

Table 1: CEQA Air Quality Significance Thresholds

Pollutant	Construction Thresholds	Operational Thresholds	
	Average Daily Emissions (pounds/day)	Average Daily Emissions (pounds/day)	Annual Average Emissions (tons/year)
Criteria Air Pollutants			
ROG	54	54	10
NOx	54	54	10
PM ₁₀	82*	82	15
PM _{2.5}	54*	54	10
Fugitive Dust	BAAQMD Best Management Practices (BMPs)	Not Applicable	
Project-Level Health Risk/Hazard/PM_{2.5} Thresholds			
Excess Cancer Risk	10 per one million		
Chronic or Acute Hazard Index	1.0		
Incremental annual average PM _{2.5}	0.3 µg/m ³		
Cumulative Health Risk/Hazard/PM_{2.5} Thresholds (total contribution from all sources within the Project site Zone of Influence)			
Excess Cancer Risk	100 per one million		
Chronic Hazard Index	10.0		
Annual Average PM _{2.5}	0.8 µg/m ³		
Notes: *PM ₁₀ and PM _{2.5} thresholds for construction apply only to exhaust emissions and do not include the fugitive dust component. µg/m ³ = micrograms per cubic meter			

The AQAU acknowledges the authority of the *CEQA Air Quality Guidelines* and uses the BAAQMD significance thresholds to determine impact significance. Also, it uses the correct emission models to determine Area 4 air pollutant emissions, specifically CalEEMod (Version 2016.3.2) for the overall construction and operational source emissions and CT-EMFAC (Version 6.0.0.18677) for the fill haul-truck emissions. However, there were important decisions made in modeling assumptions that cause the models to substantially underestimate Area 4 emissions:

- For construction emissions estimates, the AQAU, in most cases, uses the CalEEMod model defaults for the Area 4 equipment number, equipment type, horsepower rating and load factor, as shown in **Table 2**. However, for the equipment daily work hours, in most cases, the AQAU uses values substantially lower than what the model would have chosen (i.e., the latter as shown by the red numbers in parentheses – for example “(8)” in the first row last column below; the model would have used 8 hours, but the AQAU used 6 hours). This is an especially important change because the CEQA threshold is a limit on average daily emissions. Doubling the number of work days in a phase will have no effect on average daily emissions, but increasing the work hours per day will have a proportional effect on daily emissions (e.g., increasing a backhoe’s daily hours from 4 to 8 will double its daily emissions).
- The AQAU makes the significance call on Area 4 construction emissions by taking the total emissions for each pollutant over the 5-year total construction period and dividing by the total number of work days in five years (i.e., 1280 days). This is neither legitimate analytically nor acceptable professional practice. Many major air pollutants have agency-designated annual average ambient standards. Also, air quality monitoring data is grouped by year and compared with air quality goals that often involve not exceeding ambient standards by more than a specified number per year. Often, averaging a project’s construction pollutant emissions over a similar phase shorter than a year is justified, but averaging emissions over a longer period risks hiding potential problems that might arise during more intense work periods over the full course of construction. For example: what construction emissions would CalEEMod predict for a project building 496 single-family homes requiring import of 1,674,650 cubic yards of fill, the latter occurring mostly during the 2nd year of construction? **Table 3** shows a substantial increase in daily pollutant emissions during the 2nd year when most of the about 85,000 haul truck trips moving fill to the site would occur, resulting in an ***extremely significant impact (over 6 times the significance threshold)***. In contrast, the AQAU 5-year average estimate (as shown in that report’s “Table 1 Project Construction and Operation Emissions for Build Out of Area 4”) give much smaller values for the emissions, which are all ***well below*** the CEQA thresholds.
- The AQAU uses the model default haul trip length of 20 miles for the trucks carrying fill to the site. This is reasonable for projects requiring relatively small amounts of fill (e.g., a few hundred, even a few thousand truckloads total). But are there fill sources within 20

miles of the Area 4 site that can provide about 85,000 truckloads (nearly 1.7 million cubic yards) of fill? Immediately to the west of the site are baylands and waters, and to the east are completely developed with urban uses. There are no quarries or other large sources of material within 10 miles of the site, not are there any identified projects that would generate such fill quantities. Further, given sea-level-rise projections, there are and will be extensive competition for any available fill. Therefore, it is likely that more distant sources need to be tapped and the increased daily emissions from the haul truck trips will be proportional to the increased average length of the trips.

Table 2: CalEEMod Construction Equipment Input Parameters

Equipment Number	Phase/Equipment Type	Horsepower	Load Factor	Daily Work Hours
	Site Preparation			
3	Rubber Tired Dozers	255	0.4	6 (8)
4	Tractors/Loaders/Backhoes	97	0.37	4 (8)
	Grading			
2	Scrapers	361	0.48	6 (8)
2	Excavators	162	0.38	4 (8)
1	Graders	174	0.41	6 (8)
2 (1)	Rubber Tired Dozers	255	0.4	6 (8)
2	Tractors/Loaders/Backhoes	97	0.37	4 (8)
	Trenching			
2 (0)	Tractors/Loaders/Backhoes	97	0.37	4
2 (0)	Excavators	162	0.38	6
	Building - Exterior			
1	Cranes	226	0.29	2 (7)
3	Forklifts	89	0.2	2 (8)
1	Generator Sets	84	0.74	4 (8)
3	Tractors/Loaders/Backhoes	97	0.37	2 (7)
1	Welders	46	0.45	2 (8)
	Building - Interior/Architectural Coat			
1	Air Compressors	78	0.48	4 (6)
1 (0)	Forklifts	89	0.2	2
	Paving			
2 (0)	Cement & Mortar Mixers	9	0.56	4
2	Pavers	125	0.42	6 (8)
2	Paving Equipment	130	0.36	6 (8)
2	Rollers	80	0.38	6 (8)

Table 3: Area 4 Construction Pollutant Emissions using Model Default Assumptions (lbs. /day)

Construction Year	ROG	NO _x	PM ₁₀	PM _{2.5}
	lbs./day			
2019	4.4	45.6	2.4	2.2
2020	13.4	352.6	3.1	2.9
2021	2.7	23.2	1.0	0.9
2022	2.4	21.1	0.8	0.8
2023	2.2	18.6	0.7	0.7
2024	2.1	17.6	0.6	0.6
Significance Thresholds	54	54	82	54
Significant Impact?	No	Yes	No	No

Moving on to the AQAU treatment of TAC Impacts. It merely states that there would be no significant TAC impacts because “the closest sensitive receptors to the project are located beyond 1,000 feet of the project boundaries.” This might be true if the project site were limited to Area 4. But the AQAU needs to consider the buildout of Specific Plan Area 3 and Area 4 in assessing TACs. There is an existing residential area just north of Cherry Street that forms the north boundary of Area 3. There is also the Silliman Recreational Center, Ohlone College and Newark Memorial High School. And soon there will be existing residential development on Area 3 now building-out under the approved RDEIR.

Back in 2014 and before, when the RDEIR was being assembled, the BAAQMD CEQA Guidelines were still a relatively new methodology and many of the data items called for in its assessment methodologies were still being developed and/or distributed by the BAAQMD for consultants use. This includes the stationary source location maps and the availability of health risk data for each stationary source in BAAQMD files. The RDEIR mentions only two TAC sources in the vicinity of Area 3 and Area 4: an emergency generator at Ohlone College and one industrial source (i.e., the CertainTeed Corporation). The most recent version of the BAAQMD TAC data base available on Google Earth shows many more TAC sources in the Area 3/Area 4 vicinity, as shown in the aerial below and listed in **Table 4**. Also, BAAQMD methodologies require inclusion of substantial local mobile TAC sources in the cumulative assessment and provide spreadsheet tools to estimate health risk to local receptors. Mowry Avenue, Cherry Street and Stevenson Boulevard are potentially significant local TAC sources that must be considered for inclusion in the cumulative TAC model, as must TAC impacts from the Union Pacific Railroad line that splits Area 3 from Area 4.



Table 4: Cumulative TAC Impacts on Existing Maximally Exposed Sensitive Receptor (MESR) in the Project Site Zone of Influence

Source #	Facility Type	Address	Cancer Risk*	Hazard Index*	PM2.5 Concentration*
From Permitted Stationary TAC Sources (Consultant to select sources impacting MESR and apply BAAQMD distance adjustments, if applicable)					
18728	Ohlone College (Emergency Generator)	39399 Cherry St.	1.435	0.0017	0.0018
12749	CertainTeed Corporation	6400 Stevenson Blvd.	0.4415	0.0032	13.048
14486	Valassis	6955 Mowry Ave.	15.849	0.0082	0.0206
11852	VM Services	6701 Mowry Ave.	----	0.0009	0
21489	ShoreTel	38897 Cherry St.	----	0	0.0001
18059	Bunzi Distribution (Emergency Generator)	40999 Boyce Rd.	1.3514	0.0018	0.0017
21350	Oncore Manufacturing Services	6600 Stevenson Blvd.	----	0.0019	0
12001	Quikrete Northern California	6950 Stevenson Blvd.	0.3574	0.0027	110.27
21002	Biochain Institute	39600 Eureka Dr.	10.1522	0.0105	0.0130
21125	Membrane Technology & Research	39630 Eureka Dr.	----	0.0016	0
21879	Resin Designs	39714 Eureka Dr.	----	0.0009	0
0	Apple (Emergency Generator)	39800 Eureka Dr.	3.332	0.0099	0.0040
0	Apple (Emergency Generator)	39800 Eureka Dr.	26.2352	0.0198	0.0339
20404	Smart Modular Technology (Emergency Generator)	39870 Eureka Dr.	0.1390	0.0004	0.0001
From Major Roadways and Railways (Consultant to use BAAQMD roadway screening tool and an appropriate railroad risk model)					
Mowry Avenue			?	?	?
Cherry Street			?	?	?
Stevenson Boulevard			?	?	?
Union Pacific Railroad			?	?	?
From Project Sources (Consultant to use SCREEN3 or AERMOD to estimate construction TAC impact at MESR)					
Project Construction Area 3			?	?	?
Project Construction Area 4			?	?	?
Total Cumulative Impacts			?	?	?
Significance Thresholds			100	10	0.8
Significant Impact?			Yes/No?	Yes/No?	Yes/No?

* The BAAQMD stationary source cancer risks, hazard indexes, and PM_{2.5} concentrations are from its Google Earth database and are the maximum TAC impacts at locations close to the sources. The BAAQMD also provides distance adjustment factors for some source types to estimate risks, hazards and concentrations at more distant locations. These distance adjustments should be applied to obtain the cancer risks, hazard indexes, and PM_{2.5} concentrations at the MESR, the closest existing residential area to the Project site.

Once the above-mentioned corrections are applied to the emissions model, the project GHG emissions should also be redetermined and reevaluated with respect to the BAAQMD service population threshold. That threshold was not found to be exceeded in the AQAU, but the finding may change if GHG emissions are found to increase substantially under the updated assumptions.

As indicated in the comments above, the AQAU included as an appendix to the Checklist is flawed such that it substantially understates air pollution effects of the project, both individually and in a cumulative context. It appears from my calculations, using generally accepted modelling factors and approaches, that new significant impacts related to air quality would result from the project.

Sincerely,

A handwritten signature in blue ink, appearing to read "Geoffrey Hornek", is written over a horizontal line.

Geoffrey Hornek