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VIA EMAIL, FAX AND FIRST CLASS MAIL

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Re: Comments of Citizens Committee to Complete the Refuge on the Final Program Environmental Impact Report (“EIR”) and Mitigation Monitoring Reporting Program for the Housing Element Update and related General Plan Amendments/Zoning Ordinance Amendments

Dear Mr. Grindall,

On behalf of the Citizens Committee to Complete the Refuge (“CCCR”), we submit these comments for transmittal to the Newark Planning Commission and inclusion in the City’s record on the proposed Housing Element Update (“HEU” or “Project”) and its EIR. We urge the Planning Commission to reject the HEU and its EIR. If approved, the HEU would pose potentially significant environmental impacts on the Don Edwards San Francisco Bay National Wildlife Refuge. The EIR for the HEU fails to address and mitigate these impacts and has other serious flaws precluding its certification, as discussed below.

The HEU’s Final Program EIR’s Reliance on Outdated Documents is Improper and Omits Significant New Information.

The HEU EIR admits that it relies on the EIR for the 2007 General Plan Update, which was written *17 years ago*, in 1992, and the EIR from the Area 2 Specific Plan, which was approved *10 years ago*, in 1999. EIR, p. 29. In its comments on the Draft Program EIR, CCCR questioned the City’s reliance on these obsolete environmental documents. The EIR responded that the documents were “referenced in terms of existing environmental conditions within this area [Area 2].” EIR, p. 17.

The City’s response fails to remedy the EIR’s reliance on these obsolete documents. The environmental setting of an EIR serves as a baseline against which to measure the impacts of the Project. Using a baseline that is anywhere from 10 to 17 years old is improper. The City must determine the environmental setting as it exists now, in 2009.

Furthermore, the EIR’s reliance on documents that are so outdated has resulted in its omission of significant new information that has been discovered since the 1990s. The U.S. Army Corps of Engineers (Corps) has confirmed the presence of wetlands over approximately

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one half of the total acreage of Area 4. The Bay Conservation and Development Commission (BCDC) has released maps that indicate most of Area 4 and portions of Areas 2 and 3 could be inundated by sea level rise. The State of California has passed legislation and Governor Schwarzenegger has taken executive action mandating substantial reductions in greenhouse gas emissions (GHGs). These recent measures include Health and Safety Code sections 38500-38599 ("AB 32"), which mandate reductions in GHGs to 1990 levels by 2020; Public Resources Code sections 21083.05 and 21097 ("SB 97"), which require CEQA analysis of GHG emissions; and Executive Order S-3-05, which requires that GHGs be reduced to 2000 levels by 2010, 1990 levels by 2020, and 80 percent below 1990 levels by 2050. Reduction of vehicle miles traveled is an important means of reducing GHG emissions. Additionally, the City and surrounding areas have experienced significant urban growth over the past two decades, creating new patterns of development resulting in increased traffic and congestion. All of this new information must be addressed in the EIR.

Data That Is Currently Available Must Be Included in the Final Program EIR.

A program EIR should employ "best efforts" to forecast a program's environmental effects and should defer analysis only when it would be unavoidably speculative to do so. CEQA Guidelines § 15144; *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 431; *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 373. There are several environmental conditions and impacts implicated by the HEU, such as the presence and location of liquefaction and other seismic hazards that have not been adequately addressed in the EIR. For example, the City's Notice of Preparation (NOP) of an EIR for the Specific Area Plan for Areas 3 and 4 that predates the preparation of this HEU EIR (May 8, 2007) acknowledges that "[t]he project site is at a location *where historic occurrences in liquefaction and where geotechnical and groundwater conditions indicate the potential for ground displacement and compressible soils.*" [emphasis added] By contrast, this HEU EIR merely states, "Areas 2, 3 and 4 contain areas *likely subject to liquefaction* due to their close proximity to San Francisco Bay." [emphasis added] Information regarding known previous instances of liquefaction in an area where housing is proposed must be presented in a mapped format to allow the public and decision makers to make informed decisions regarding the development to be allowed under the HEU, as required by CEQA.

The Initial Study, Draft Housing Element and EIR Do Not Provide a Clear Description of the Project and How Many Units Will Be Built.

"An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193; CEQA Guidelines § 15124. Contrary to this mandate, the EIR presents shifting and conflicting definitions of the Project. The Initial Study, Draft Housing Element and DEIR all state that *1,755 units* are needed under the HEU. Initial Study, p. 4; Draft Housing Element p. 22, 29, 34; DEIR, § 3.2 ("Project Description") and Table 3.1 at pp. 7-8. However, the FEIR, when responding to public comments, states that "[t]he actual numbers of housing units associated with this Project include 1993 dwellings that respond to the City's 'fair share' housing allocation and are expected to be constructed by 2014. In addition, the draft Housing Element plans for 3,739 additional dwellings that could be added to the City in the long-term, after 2014. The total gross number of dwellings would therefore be *5732 dwellings.*" FEIR, p. 30, emphasis added.

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Up until the FEIR's response to comments, the EIR had referred to 1,755 future units, and now, at the end of the process, the public is told that *three times* this many – 5,732 units – will be built. The true number of units proposed to be built was either recently altered, or was known – but not disclosed – at the beginning of the environmental analysis. Either way, the City violated CEQA. By withholding or altering the Project's description in this manner, the EIR has failed to provide a clear and accurate project description and has misled and confused the public and decision makers. This is not an idle, technical violation. Shoehorning triple the population into the few undeveloped parcels remaining creates immense development pressures on uplands immediately adjacent to the Refuge.

The HEU Is Inconsistent With the Open Space and Conservation Goals, Policies and Programs of the Newark General Plan.

CEQA directs that “[t]he EIR shall discuss any inconsistencies between the proposed project and applicable general plans” CEQA Guidelines § 15125(d). The EIR violates this requirement because it ignores the Project's many inconsistencies with the Open Space and Conservation, Recreation and Land Use Elements, as discussed below. These inconsistencies also violate substantive planning law. Government Code section 65300.5 requires that general plans be internally consistent. The proposed HEU deviates from this mandate because it poses numerous specific conflicts with other elements of the General Plan, which we summarize here.

The HEU presents conflicts with three of the six Open Space and Conservation Goals, and numerous Open Space and Conservation Policies and Programs, of the Newark General Plan. The HEU does not “[e]ncourage the conservation and preservation of unique open space and conservation resources that help to define the quality and character of the City,” contrary to Goal 1. City of Newark, General Plan Open Space and Conservation Element, p. 6-7. Policy “a” under Goal 1 is to protect and enhance public open space. *Id.* The HEU takes a conflicting approach by calling for development of the only substantial remaining open space in the City. The HEU is also inconsistent with Policy b, which encourages private property owners to preserve open space and natural features. *Id.* The FEIR attempts to avoid analyzing the impacts on open space in Area 4 on the grounds it is privately owned. EIR at p. 20. This attempted excuse makes no sense, because the General Plan applies to private and public lands alike. Indeed, the General Plan has a policy of encouraging private landowners to preserve their open space land, including lands within Area 4. General Plan Open Space and Conservation Element at Goal 1, Policy a.

Goal 2 of the General Plan is to “[a]cknowledge the San Francisco Bay National Wildlife Refuge acquisition, and its value as a community resource.” General Plan, p. 6-8. Policy a of Goal 2 is to preserve and maintain the Refuge. *Id.* Yet the HEU calls for the development of housing on low-lying areas immediately adjacent to the Refuge, posing a potential conflict with preservation of the Refuge's habitat, wildlife, scenic and recreational values, contrary to Goal 2 and policy a.

Goal 5 calls for conservation and enhancement of the city's water resources and protection of development from flood hazards. General Plan, p. 6-8. Policy c calls for flood plain areas to be protected and to “avoid placing development in areas subject to flooding.” General Plan, p. 6-9. Figure 6-5 in the General Plan shows that all of the western and southern portions of

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Newark, including Areas 2 and 4, are all within the 100 year flood zone. The HEU calls for development in all of these areas, posing yet another violation of Goal 5 and Policy c.

The HEU Is Inconsistent With the Recreation Element of the Newark General Plan.

The Recreation Element of the General Plan identifies neighborhood, local and other park facilities available in Newark, including the Don Edwards San Francisco Bay Wildlife Refuge. General Plan, p. 7-7. The General Plan addresses the fact that the U.S. Fish and Wildlife Service has proposed to expand the boundaries of the Refuge, and states that:

*It is the policy of the City of Newark, that all wetland and other areas set aside for the Refuge as a result of these negotiations be, as determined appropriate by the City, considered **Conservation Open Space** even though a different use may be shown on the plan diagram.*

General Plan, p. 7-8, emphasis in original. Chapter 3 of the General Plan defines Conservation Open Space as “sites for the protection of wildlife habitats and wetlands, generally in areas not used directly for human habitation or work.” General Plan, p. 3-17. By calling for the development of housing in Areas 2 and 4 without any analysis of potential conflicts with protection of the Refuge and its expanded boundaries, the HEU conflicts with both the Recreation Element and the related park protection policies of the Land Use Element of the General Plan.

The Final Program EIR Must Disclose and Analyze the Impacts of Development on Portions of Areas 2 and 4, Which Are Within the Refuge Expansion Boundary.

_____ The EIR fails to acknowledge that portions of Areas 2 and 4 are within the congressionally approved Don Edwards National Wildlife Refuge Expansion Boundary due to their significant habitat and wildlife values. *See*, Environmental Assessment, Potential Additions to the San Francisco Bay National Wildlife Refuge. The public and decision makers must be aware that Areas 2, 3 and 4, serve as the last remaining substantial open space in Newark, and that portions of Area 2 and most of Area 4 have significant and undeniable values as wildlife habitat.

Visual and Aesthetic Impacts are Not Adequately Addressed or Mitigated.

CCCR has repeatedly raised the issue of the adverse visual and aesthetic impacts that development in Areas 2 and 4 could unleash. The FEIR dismisses such impacts as “somewhat speculative” and asserts that since housing will likely be developed on the eastern portions of Areas 2 and 4, significant impacts on views and biological resources will be avoided. FEIR, p. 20. Developing the eastern portions of Areas 2 and 4, however, will certainly have an impact on views both from the Refuge eastward and from Areas 2 and 4 westward toward the Refuge and the Bay.

The HEU Will Adversely Impact the Wildlife Refuge.

The EIR attempts to downplay the impacts of the HEU on visitors to the Refuge by stating that such “impacts on Refuge visitor ‘experience’ are highly subjective and are not an

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appropriate topic for an EIR.” EIR, p. 21. This claim is directly contrary to settled CEQA law. In *The Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App. 4th 903, 937 the court held that “courts have recognized that aesthetic issues ‘are properly studied in the EIR to assess the impacts of a project.’” *Id.*, quoting *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App. 4th 447, 492. As the courts have repeatedly ruled, aesthetic impacts are real and must be assessed, not ignored.

EIR also claims that since it is not known where development will occur on the site, analysis of impacts is not proper at this time. *Id.* To make matters even worse, the draft HEU and its EIR propose 1070 new housing units on the most sensitive lands – Areas 2 and 4 adjacent to the Refuge – but *neglect to identify the specific areas of development*, preventing effective public review and comment regarding management of the City’s most important open space resource. This sidesteps the City’s duty under CEQA to examine such impacts fully, by forecasting patterns of development. CEQA Guidelines section 15144 requires that the City “use its best efforts to find out and disclose all that it reasonably can.” Surely if the City can project the *specific density* and the *exact number* of housing units in Areas 2 (357) and 3 and 4 (713) by 2014 – just 5 years hence – it can also project their *location* within those areas. Draft HEU (2/18/09) Table 5-36 and Appendix 2. The public is entitled to this vital information to make informed decisions about what – and where – development is to be allowed.

Moreover, the City expects substantial additional development of Areas 2, 3 and 4 after 2014. The Draft Housing Element says that in addition to the transit-oriented development planned for Area 2, “approximately 2,070 new housing units” are also expected in the long run. Draft HEU, p. 33. The Draft Housing Element also predicts 1,260 housing units to be built on Areas 3 and 4. *Id.* Building over 3,300 new housing units on these currently uninhabited, largely open space lands poses a potentially significant impact on the Refuge, including significantly degraded recreational experiences for all who visit the Refuge. These impacts need to be analyzed and mitigated *now*, at the program EIR level. The Final Program EIR should require mitigation measures to avoid or reduce all impacts on the Refuge to a less-than-significant level.

The HEU’s Significant and Unavoidable Impacts on Air Quality Can Be Further Mitigated.

The HEU poses significant impacts on air quality and global warming. Simply requiring that public-transit amenities, like those listed in Mitigation Measure 4.2 of the DEIR, be available does not adequately address, much less mitigate, these impacts. The mitigation measures proposed are inadequate in that overall they are voluntary and unenforceable. There is no assurance the significant impacts of the HEU can or will be reduced to a level that is less than significant.

The proposal of developing areas that would require residents to get into vehicles to get to their jobs, perform daily chores, etc. is counter to the intent of AB 32, SB 97 and Executive Order S-3-05. One of the goals of the enacted legislation is to reduce vehicle miles traveled by placing development close to hubs of public transportation. To the limited extent that some development of Area 3 is considered, it must be contingent on the extension of public transit service to any such projects. The City should require developers to pay their fair-share for transit improvements, including hybrid buses, new transit lines and increased frequency on

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transit lines that currently exist to serve Area 3. The EIR should address the need for public transit as an enforceable mitigation measure as required by CEQA Guidelines section 15126.4(a)(2).

The Final Program EIR Failed to Analyze a Reasonable Range of Alternatives.

CEQA requires that a reasonable range of alternatives be considered for each project that can feasibly attain *most* of the project's objectives while *avoiding* or *lessening* significant impacts of the project. CEQA Guidelines § 15126.6. The Draft EIR did not analyze any action-alternatives to the Project. The DEIR only analyzed the "no project" alternative, as required by CEQA, and a "No Project/No Development" alternative. DEIR, pp. 116-20. Two action-alternatives were considered but rejected from analysis because they had greater environmental impacts and did not meet project objectives. DEIR, p. 119. The EIR must also evaluate a reasonable range of action-alternatives to the proposed HEU that will meet the initial goal of providing 1,755 units, but will do so in a less environmentally harmful way. Alternatives that would avoid development of areas that would increase vehicle miles traveled thus increasing GHG emissions, or that avoid placing development in areas that will be prone to flooding or seismic hazards, should be considered.

Recommendations in a recent paper, "The Impacts of Sea-Level Rise on the California Coast," May 2009, from the California Climate Change Center (Heberger, Cooley, Herrera, Gleick, and Moore), impel inclusion of an alternative that avoids development of Area 4:

- "Wetlands and potential migratory paths should be protected."
- "Development should be prohibited on natural lands that are immediately adjacent to wetlands at risk. These buffer areas may be the only areas for future wetland restoration projects."
- "Future development should be limited in areas that are at risk from rising seas."
- "In regions at risk that are not yet heavily developed, local communities and coastal planning agencies have the opportunity to limit development and reduce future threats to life and property. Policies that maintain such low-lying areas will help to accommodate rising seas."

The City has steadfastly refused to consider an alternative that would avoid development of Area 4 because the General Plan finalized in 1992 earmarked that area for residential development and a golf course. In contrast, Area 3, designated in that same General Plan for light industrial, is now being considered for residential development. It would appear not all General Plan designations are irreversible.

The proposed HEU would allow 5,732 more housing units. HEU FEIR p. 30. As noted above, this abrupt expansion of the EIR's project description violates CEQA. The City should consider alternatives that meet the previous objective of providing just 1,755 units, but no more.

Finally, the EIR selects one of the two "No Project" alternatives as the CEQA-mandated "Environmentally Superior Alternative." This fails to comply with CEQA's direction that "[i]f the environmentally superior alternative is the no-project alternative, the EIR shall also identify an environmentally superior alternative *among the other alternatives*." CEQA Guidelines section 15126(e)(2), emphasis added.

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Conclusion

One of the fundamental purposes of CEQA is to “[i]nform governmental decision makers and the public about potential, significant environmental effects of proposed activities.” CEQA Guidelines § 15002. Another is to provide decision-makers a range of alternatives to consider, including those that would be less environmentally damaging. Contrary to these objectives, this EIR fails to disclose the fact that this Project would substantially increase the City’s population by allowing rapid and large-scale development of Areas 2, 3 and 4, posing both direct and indirect threats to the wildlife habitat, water quality, aesthetics and recreational resources of the refuge and existing residents of Newark. The document also fails to adequately consider new information and recommendations regarding planning for sea level rise, in particular, the importance of maintaining undeveloped low-lying areas to accommodate rising seas. And, the EIR fails to adequately address and propose mitigation for these impacts. Accordingly, the EIR may not be certified, and neither the Planning Commission nor the City Council may approve the Project.

Thank you for considering our comments on this important matter.

Very truly yours,

/S/ Stephan C. Volker

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