March 13, 2013

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

Via electronic mail to bill.roth@sanjoseca.gov

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

Dear Mr. Roth:

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

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

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

1. INADEQUATE PROJECT DESCRIPTION AND PIECEMEALING

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

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

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

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

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

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

2. DEIR INCONSISTENT WITH ECOSYSTEM RECOVERY GOALS FOR SOUTH SAN FRANCISCO BAY

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

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

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

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

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

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

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

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

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

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

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

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

3. DEIR FAILS TO ADEQUATELY ADDRESS FLOOD RISK

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

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

4. "COYOTE DELTA ALTERNATIVE" INAPPROPRIATELY DISMISSED FOR CONSIDERATION

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

5. TIDAL MARSH AND MARSH ECOTONE RESTORATION SHOULD CONSIDER SEA LEVEL RISE

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

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

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

6. BURROWING OWL MITIGATION INSUFFICIENT AND PROJECT JEOPARDIZES THE SOUTH BAY POPULATION

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

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

Sincerely,

Ian Wren
Staff Scientist
San Francisco Baykeeper