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June 24, 2014

VIA E-MAIL AND HAND DELIVERY

Planning Commission  
City of Petaluma  
11 English Street  
Petaluma, CA 94952

Re: Comments on the Final Environmental Impact Report for the Riverfront  
Mixed-Use Project (SCH #2013062004)

Dear Chairman Wolpert and Planning Commissioners:

We are writing on behalf of **Petaluma Residents for Responsible Development** regarding the Final Environmental Impact Report ("FEIR") prepared by the City of Petaluma ("City") for the Riverfront Mixed Use Project ("Project") proposed by Basin Street Properties, LLC ("Applicant"). The Project requires a Tentative Subdivision Map and Zoning Map Amendment for the development of a new mixed-use community on 39.4 acres of riverfront land. The Project includes 273 residential units (single-family homes, apartments, and townhomes), a 120-room hotel, 60,000 square feet of office space, 30,000 square feet of retail space, and 4 acres of parks. It also includes an emergency access route along Old Lakeville Street, a 3.65-acre riverfront park on state-owned property, and the dedication of land for a community boat house and boat launch.

The City prepared an environmental impact report ("EIR") for the Project after receiving comments from Petaluma Residents for Responsible Development and others, which raised concerns about the impacts associated with the Project. The City's FEIR, however, does not adequately address the concerns raised in prior comments, and does not commit the Applicant to mitigation measures that would reduce environmental impacts to less than significant levels. As explained more fully below, the FEIR is significantly flawed and does not comply with the requirements of the California Environmental Quality Act ("CEQA"), Public

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Resources Code section 21000 *et seq.* The Planning Commission should not recommend Project approval until these flaws in the FEIR are remedied.

We are reviewing the recently released FEIR and its technical appendices with assistance from technical consultants, to analyze the new data and analysis in the FEIR, before it is considered by the City Council.

## **I. INTRODUCTION**

### **A. Interest of Commenters**

Petaluma Residents for Responsible Development (“Petaluma Residents”) is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards and environmental and public service impacts of the Project. The association includes Mitch Clarey, Frank Cuneo, Richard Kenney, Roger Burk, **the Sonoma, Mendocino, and Lake Counties Building and Construction Trades Council, its affiliated local unions,** and their members and their families who live and/or work in the City of Petaluma and Sonoma County.

Individual members of Petaluma Residents and its affiliated organizations live, work, recreate, and raise their families in Sonoma County, including the City of Petaluma. They would be directly affected by the Project’s environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist onsite. Petaluma Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there.

### **B. Summary of Comments**

As explained below and described in detail in prior comment letters, the Project will generate a multitude of impacts in a number of impact areas, including air quality, greenhouse gas emissions, hazardous materials, and geologic hazards. The FEIR either mis-characterizes, mis-analyzes, underestimates or fails to identify

many of these impacts. Furthermore, many of the mitigation measures described in the FEIR will not in fact mitigate impacts to the extent claimed. The EIR must be revised to resolve its inadequacies and must be recirculated for public review and comment.

1. Inadequate analysis of air quality impacts during construction

- The FEIR relies on two contradictory air quality analyses. The first one looks at the whole project and adds over 700 working days to the construction schedule for projects of similar size. This includes over 400 days of building and almost 300 days of painting. Even though the air quality model encourages agencies to “overlap” construction phases such as building and painting, the FEIR explains that the stand-alone painting schedule was extended to accommodate for interior building. (The painting phase produces much lower air pollution emissions than the building phase.)
- The second analysis looks at all construction except the single-family homes, and does not extend the construction schedule at all. The FEIR unsuccessfully tries to explain why both of these analyses were proper, even though they are contradictory.
- In the first analysis, the effect of extending the construction schedule, particularly the painting phase, is to reduce the “average daily emissions,” which allows the Applicant to avoid construction-related air quality mitigation (cleaner burning engines, greater dust control measures, etc.)
- The effect of *not* extending the construction schedule in the second analysis is to reduce the reported health risks to nearby residents from construction-related diesel fumes and other pollution, which also allows the Applicant to avoid mitigation.
- The air quality analyses are not supported by substantial evidence. Both analyses must be revised to reflect a realistic and consistent construction schedule.

2. Persistent failure to address geotechnical problems like sinking bay mud, and a new mitigation measure that itself would cause impacts

- Six successive geotechnical reports were prepared for the Project. Each one identifies issues with sinking bay mud as a result of increased weight from the Project buildings and infrastructure.
- Most of the proposed measures to mitigate for sinking bay mud have already been expressly rejected as too time consuming, costly, or infeasible.
- New mitigation has been added requiring a *further* (seventh) geotechnical study and the development of mitigation later. Not only is this an improper deferral of mitigation under CEQA, but one of the possible measures would require removal of existing fill and replacement with lightweight fill, which would have air quality and traffic impacts that have not been analyzed.

3. Greenhouse gas analysis relies on speculative guesses to avoid mitigation

- Even though the City Council has conditioned the Project's exemption from the 2013 SmartCode on obtaining a certificate of occupancy by 2019, the greenhouse gas ("GHG") emissions analysis in the FEIR relies on an occupancy date of 2020. This is inconsistent—the GHG analysis should be based on occupancy no later than 2019.
- The FEIR also uses speculative 2020 GHG emissions estimates from a document published by PG&E "for informational purposes," which is "not to be used" for regulatory compliance. The estimates in that document have not been accurate in recent years, as they do not take into account the very real effects of California's drought on PG&E's GHG emissions. The FEIR cannot rely on this speculative informational estimate, and must be revised.

4. The FEIR must require soil testing closer than four feet from the surface to confirm the absence of soil contamination

- Pictures taken at the Project site several years ago depict dozens of barrels of fuel and unidentified chemicals, some tipped over, some without lids, and fuel storage tanks. This is in the area now proposed for an active park and ball field.

- The only soil samples in this area that were tested for contaminants such as lead were collected from four to six feet beneath the soil surface. At four feet, a lead concentration of 75 mg/kg was detected, which is very close to the human health threshold of 80 mg/kg. At six feet, the lead dissipated to only 15 mg/kg.
  - Despite numerous requests, the City has refused to test soil samples from this area at a depth of less than four feet from the surface. There is a risk of near-surface soil contamination that could affect workers, residents, and future users of the active park. The FEIR must be revised to properly analyze and mitigate this risk.
5. The proposed location of the community boathouse presents many challenges to development
- The Applicant has designated a small area on the southeast Project site for a potential future community boathouse. The Draft EIR said that although the boathouse was not part of the Project, “the City has included it in this environmental analysis to help facilitate future development.” The Final EIR, however, retreats from this statement and notes that the boathouse is not evaluated in the EIR.
  - The boathouse site has a number of challenges to development: (1) a portion of the site will likely be inundated by sea level rise; (2) development of the site may impact the “fully protected” salt marsh harvest mouse; and (3) the site is within the 100-foot buffer area that is susceptible to soil lurching, and therefore a future boathouse would require a very deep foundation beneath the bay mud to bedrock, which is a costly endeavor.
  - In sum, it now appears that the designated boathouse site may be too close to the Petaluma River, and should be set back a reasonable distance to accommodate for future sea level rise, soil instability, and potential habitat impacts. The City should require the Applicant to dedicate a site free from such substantial problems before it approves the Project.

6. New “voluntary” biological mitigation measures must be mandatory, enforceable, and specific

- The California Department of Fish and Wildlife (“CDFW”) has requested mitigation measures in the EIR for development adjacent to salt marsh vegetation, which is known to support the protected salt marsh harvest mouse.
- The FEIR states that the requested measures will be “implemented voluntarily by the applicant,” and does not incorporate them as binding mitigation measures.
- CEQA requires that mitigation measures be mandatory, enforceable, and specific, and the proposed “voluntary” measures are not. The measures are clearly mitigation measures agreed to by the Applicant in response to concerns about potential impacts by CDFW. Courts will not hesitate to find that if something walks like a mitigation measure and talks like a mitigation measure, it is a mitigation measure. The FEIR should be revised to include these measures as mandatory and enforceable mitigation.

**C. Request for Recirculation**

CEQA requires recirculation of an EIR for public review and comment when significant new information must be added to the EIR following public review, but before certification.<sup>1</sup> The CEQA Guidelines clarify that new information is significant if the EIR “is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the Project or a feasible way to mitigate or avoid such an effect.”<sup>2</sup> The purpose of recirculation is to give the public and other agencies an opportunity to evaluate the new data and the validity of conclusions drawn from it.<sup>3</sup> As discussed below, the EIR does not adequately analyze the Project’s impacts, the Project will result in significant environmental impacts that are not analyzed in the EIR, and there are feasible mitigation measures available to reduce significant impacts that have not

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<sup>1</sup> CEQA, Pub. Resources Code § 21092.1.

<sup>2</sup> CEQA “Guidelines,” 14 Cal. Code Regs. § 15088.5.

<sup>3</sup> *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (1981) 122 CalApp3d 813, 822.

been required in the EIR. These changes must be addressed in a revised EIR that is circulated for public review and comment.

**II. THE CITY LACKS SUBSTANTIAL EVIDENCE TO SUPPORT ITS CONCLUSIONS REGARDING THE PROJECT'S SIGNIFICANT IMPACTS; THE FEIR FAILS TO INCORPORATE ALL FEASIBLE MITIGATION MEASURES NECESSARY TO REDUCE SUCH IMPACTS TO A LEVEL OF INSIGNIFICANCE**

A full description of CEQA's requirements was provided in our previous comments on the Draft EIR for the Project, and those comments are incorporated herein by reference.

**A. The FEIR Fails to Adequately Disclose, Analyze and Mitigate Significant Air Quality Impacts**

The air pollution analysis was improperly manipulated to avoid mitigation. The FEIR estimates that the Project will be constructed over a period of five years, and will be in *active* construction for more than 1,300 workdays. The FEIR relies on two analyses of construction-related air pollution generated by the Project. The first reviews construction of the entire Project, and assumes that it will take twice as long to construct the Project buildings, and ten times as long to paint the buildings, compared to similarly sized projects. The analysis adds 440 building construction days and 290 painting days to the Project construction schedule, for a total schedule of 1,320 construction days. As a result, the Project's construction emissions are spread over a longer period, with fewer "average daily emissions." Based on these low average daily emissions, the Project does not exceed the CEQA threshold of significance and does not require mitigation.

The FEIR explains that the reason for adding more than 730 workdays to the construction schedule is that "the various components of the project (single-family homes, town homes, mixed use building, hotel and office building) will be built at different times given the proposed phasing," which "will increase the overall period of construction of the project compared to constructing all five components of the project at the same time."<sup>4</sup>

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<sup>4</sup> FEIR p. 4-108.

The second analysis reviews construction of all Project components except the single-family homes. The purpose of the second analysis is to analyze the health risks of diesel fumes and other air pollution if the single-family homes are constructed and occupied before the remaining Project components. The second analysis does not add any building construction or painting days to the construction schedule, and the total schedule for constructing the hotel, townhomes, apartments, and office and commercial buildings is 520 construction days. As a result, the calculated amount of toxic air contaminants that will adversely affect human health is lower than it would be if the construction schedule was extended. The second analysis concludes that no thresholds of significance are exceeded and no mitigation is required.

The FEIR explains that 520 construction days is a reasonable schedule for constructing four of the five Project components, and 800 construction days is a reasonable schedule for site preparation, grading, and construction of the single-family homes, because “the single family homes are by far the largest single portion of the project.”<sup>5</sup>

Each of the two air quality analyses uses different assumptions about the construction schedule in order to avoid a finding of significant impacts. The FEIR provides inconsistent justifications for these differing approaches: first, the FEIR states that the construction schedule was extended by more than 730 days because the Project involves five components and will be built in phases, and second, the FEIR states that four of the Project components will not be built on an extended schedule and only one component, the single-family homes, requires the 730-day extension.<sup>6</sup> These inconsistencies cannot be reconciled. The FEIR must be revised to accurately reflect air quality impacts and health risks during construction.

The FEIR is incorrect when it states that “[e]xtending the length of the construction period for the project does not necessarily result in a reduction in daily emissions.”<sup>7</sup> First, as the FEIR acknowledges, an increased construction period results in lower estimated emissions and associated impacts because emission rates

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<sup>5</sup> FEIR p. 4-109.

<sup>6</sup> FEIR pp. 4-108 to 4-109.

<sup>7</sup> FEIR p. 4-108.



for construction equipment are assumed to decrease over time.<sup>8</sup> The more the schedule is extended, the fewer total emissions are estimated.

Second, the painting phase has much lower daily emissions than any other phase, and therefore adding 290 days to the painting phase results in a much lower average daily emissions rate. The Draft EIR (“DEIR”) estimated that emissions during the painting (or “architectural coatings”) phase total 0.65 unmitigated tons of Nitrogen Oxides (“NOx”) over 325 construction days, an average of 0.002 tons per day.<sup>9</sup> In comparison, unmitigated emissions of NOx during the building construction phase average 0.02 tons per day, which is 10 times higher than the painting phase.<sup>10</sup> Unmitigated emissions of NOx during the site preparation phase average 0.03 tons per day, 15 times higher than the painting phase. Unmitigated emissions of NOx during the grading phase average 0.04 tons per day, 20 times higher than the painting phase.

By calculating the Project’s construction emissions under an assumption that the painting phase will take up 25% of the total construction schedule (this phase normally takes only 3% of a construction schedule), the average daily emissions are greatly reduced, which allows the City to avoid a finding of significant impacts, and allows the Applicant to avoid air quality mitigation measures during construction.

The FEIR states that the painting phase was extended because the Applicant suggested to staff that painting buildings and striping roads and parking lots for this Project would take much longer than predicted, and because interior construction work would overlap with the painting phase.<sup>11</sup> There is no substantial evidence why painting the Project buildings and parking lots should take ten times longer than a similarly sized project. Moreover, it is perfectly fine to overlap phases of construction when modeling air quality impacts, such as the building phase and the architectural coatings phase.<sup>12</sup> It is unacceptable and inaccurate, however, to not overlap these phases and instead extend the painting phase by ten times its anticipated length, simply because that work will overlap with interior building

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<sup>8</sup> *Ibid.*

<sup>9</sup> DEIR, Appendix C-1, Attachment 1, pp. 10, 27, and 29.

<sup>10</sup> DEIR, Appendix C-1, Attachment 1, pp. 10, 17, 19, 21, and 23.

<sup>11</sup> FEIR p. 4-110.

<sup>12</sup> BAAQMD’s 2011 CEQA Guidance, pp. 8-2, 8-5, *available at:*

<http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/BAAQMD%20CEQA%20Guidelines%20May%202011.ashx?la=en>

construction. The CalEEMod model is the computer program used to calculate air quality impacts. It specifically defines the building construction phase and architectural coatings phase.<sup>13</sup> The City lacks substantial evidence for its presumption that the architectural coatings phase for the Project will take 290 working days longer than predicted by the CalEEMod model.

Because the air quality model was improperly manipulated, the FEIR concludes that the Project will not exceed thresholds of significance for construction air quality, and does not require mitigation for criteria air pollutants or for fugitive dust during and after mass grading of the Project site, which the BAAQMD would otherwise require. Thus, the Applicant gets a double windfall—avoiding full mitigating for equipment exhaust, and for dust generation. The result is a cost savings for the Applicant but an undue threat to the health and air quality of the City’s residents and workers. This section of the EIR must be revised and recirculated.

**B. The FEIR Fails to Adequately Disclose, Analyze and Mitigate Significant Impacts Regarding Geotechnical Problems on the Site**

Six successive geotechnical reports were prepared for the Project between 2006 and 2014, and the Applicant still cannot provide the City with a concrete plan for avoiding the problem of sinking bay muds on the Project site.<sup>14</sup> In the southern portion of the Project site where bay muds are thickest, the Applicant and its consultants have rejected the three main recommended measures from the geotechnical reports: preloading the soil (too time consuming), using deep foundations (too deep), and using rammed aggregate piers (not feasible). The most recent geotechnical report predicts that the greatest potential problem with sinking bay muds will be in the areas that require the most soil fill, particularly around the future Caulfield Lane Extension Bridge.

The only solution suggested in the FEIR is a new mitigation measure, which would requires a *further* geotechnical report to verify what measures are available

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<sup>13</sup> CalEEMod User’s Guide, p. 25, *available at* [www.caleemod.com](http://www.caleemod.com).

<sup>14</sup> FEIR, Appendix B, Geotechnical Peer Review, and Appendix C-4 (note that the most recent Geotechnical Peer Review in Appendix B mainly focused on the *first* geotechnical study, and did not address the fact that most of the identified mitigation measures in that study were subsequently rejected).

to address this impact.<sup>15</sup> However, under CEQA, deferral of the formulation of mitigation measures to post-approval studies is generally impermissible.<sup>16</sup> A lead agency cannot defer to a later date its responsibility for developing feasible mitigation measures, with measurable standards for compliance, *in the FEIR itself*, not after Project approval. An agency may not call for an unspecified mitigation plan to be devised based on future studies,<sup>17</sup> or rely on mitigation measures of uncertain efficacy or feasibility.<sup>18</sup> The proposed mitigation in the geotechnical studies is acknowledged to be of uncertain efficacy and feasibility, and the City cannot put off a full assessment until a later review.

Furthermore, revised Mitigation Measure GEO-3 suggests that up to ten feet of lightweight fill may be required around the future Caulfield Lane Extension Bridge, instead of redistributing existing soils from the north of the Project site to the south.<sup>19</sup> The FEIR also suggests that soils may need to be excavated from this area and replaced with lightweight fill.<sup>20</sup> This mitigation measure would itself create impacts that are not analyzed in the FEIR, including air quality and traffic impacts associated with importing lightweight fill and exporting existing soils from the north of the Project site if they cannot be redistributed on site. The FEIR must be revised to analyze these potential impacts.

**C. The FEIR contradicts itself because it acknowledges that the Project must be occupied by 2019, but analyzes greenhouse gas impacts using a 2020 occupancy date**

In Section 2 of the City's recently adopted 2013 SmartCode, the City granted a specific exemption for the Project. One of the limitations on this exemption is that the Project must be built and ready for occupancy by 2019, within six years of the 2013 SmartCode adoption. As stated in the FEIR, "[e]ssentially, certificates of occupancy would need to be obtained by July 2019 in order to strictly comply with

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<sup>15</sup> FEIR p. 2-9, Mitigation Measure GEO-3.

<sup>16</sup> *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; *see also* CEQA Guidelines § 15126.4(a)(1)(B).

<sup>17</sup> *City of Long Beach v. Los Angeles School Dist.* (2009) 179 Cal.App.4th 889, 915; *Communities for a Better Env't v. City of Richmond* (2010) 184 Cal.App.4th 70, 95; *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 669.

<sup>18</sup> *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28.

<sup>19</sup> FEIR p. 2-9.

<sup>20</sup> FEIR p. 4-170.

Section 2 of the Amended SmartCode.”<sup>21</sup> If the Project is not constructed and ready for occupancy by that time, the site will need to be redesigned.<sup>22</sup>

However, despite repeated comments urging the City to remedy its GHG emissions analysis, the FEIR continues to rely on a 2020 occupancy date, and also relies on speculative figures for electricity-related GHG emissions in 2020. The use of these figures is not supported by substantial evidence.

As discussed in Petaluma Residents’ prior comments, the use of PG&E’s speculative future GHG emission factor for 2020 is not appropriate under CEQA. The FEIR relies on a PG&E guidance document from April 2013, which is based on a GHG “calculator” developed in 2010. The guidance document specifically states that it is “for informational purposes only” and is “not to be used” for regulatory compliance.<sup>23</sup> It estimates that by 2020, PG&E’s GHG emissions factor will drop to 290.

Instead of relying on the Bay Area Air Quality Management District’s (“BAAQMD”) approved value of 641 pounds for the GHG emissions factor associated with PG&E’s electric energy, the EIR reduces this factor by 55%. This is despite the fact that in PG&E’s guidance document, in addition to stating that it should not be used for regulatory compliance, talks repeatedly about the “third party verification” process that PG&E goes through in order to verify its GHG emissions factor each year. The guidance document also explains that the GHG emissions factor will vary from year to year depending on how much precipitation falls in California, which is directly correlated with the availability of clean hydro power.

The currently approved PG&E emissions factor of 641 is the most accurate, verified, and up-to-date number that has been reported to the BAAQMD by PG&E, and it is the number that is used and recommended in the most recent 2013 CalEEMod program.<sup>24</sup> As described in the CalEEMod User’s Guide, this emissions factor is “based on Table G6 of the California Air Resources Board (ARB) Local Government Operation Protocol version 1.1 or the latest public utilities inventory

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<sup>21</sup> FEIR p. 4-181.

<sup>22</sup> *Ibid.*

<sup>23</sup> [http://www.pge.com/includes/docs/pdfs/shared/environment/calculator/pge\\_ghg\\_emission\\_factor\\_info\\_sheet.pdf](http://www.pge.com/includes/docs/pdfs/shared/environment/calculator/pge_ghg_emission_factor_info_sheet.pdf)

<sup>24</sup> See CalEEMod User’s Guide, Appendix D, Default Data Tables, Table 1.2, *available at:* <http://www.caleemod.com/>

reports,” and “is consistent with recommendations in the California Air Pollution Control Officer Association (CAPCOA) Quantifying Greenhouse Gas Mitigation Measures document.”<sup>25</sup>

The BAAQMD has endorsed the use of a PG&E intensity factor of 641 pounds. PG&E’s unverified estimate of 290 pounds by 2020 is unlikely to be accurate given the extreme drought conditions that California has faced in recent years. For example, PG&E’s lowest verified GHG intensity factor was 393 pounds in 2011, due to extremely wet conditions that allowed for significant hydropower generation.<sup>26</sup> That intensity factor rose 12% in 2012, to 451, due to a drop in hydroelectric output and an increase in gas-fueled power generation.<sup>27</sup> This year, that number will undoubtedly rise again. The California Independent System Operator recently released a report stating that the “main impact from the drought during the 2014 summer will be an increase in natural gas generation, which could result in an increase in energy prices, and increased greenhouse gas emissions.”<sup>28</sup>

This shows that the estimates in PG&E’s guidance document are not accurate and should not be relied upon when performing a significance analysis under CEQA. Although the FEIR is correct that the GHG emissions calculator can be used to predict future GHG emissions factors for utility companies, there is nothing to suggest that the calculator predicted the current severe drought when it was released in 2010. There is no evidence to support the use of a GHG intensity factor of 290 for the Project, particularly because it is so much lower than PGE’s lowest verified intensity factor, which was 393 in 2011, and because drought conditions have become much more severe since that time. The City’s calculations of the GHG emissions that will be associated with the Project’s energy consumption are not supported by substantial evidence.

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<sup>25</sup> *Ibid.*, Appendix A, Calculation Details, p. 2.

<sup>26</sup> [http://op.bna.com/env.nsf/id/avio-9k2tuk/\\$File/PGE%20comment.pdf](http://op.bna.com/env.nsf/id/avio-9k2tuk/$File/PGE%20comment.pdf), p. 1, fn. 4 (“The GHG intensity of California’s electricity correlates strongly with the amount of hydropower used by the state .... The GHG intensity of California electricity peaked in 2001 and reached a low point in 2011, a particularly wet year.”)

<sup>27</sup> <http://www.pgecurrents.com/2014/02/06/new-numbers-confirm-pge%E2%80%99s-energy-among-the-cleanest-in-nation/>

<sup>28</sup> <http://www.naturalgasintel.com/articles/98351-with-less-hydro-california-to-lean-more-heavily-on-gas-fueled-power>

**D. The FEIR must require soil testing closer than four feet from the surface, to confirm the absence of soil contamination**

Pictures taken at the Project site several years ago depict dozens of barrels of fuel and unidentified chemicals, some tipped over, some without lids, and fuel storage tanks. This is in the area now proposed for an active park and ball field. The only soil samples in this area that were tested for contaminants such as lead were collected from four to six feet beneath the soil surface. At four feet, a lead concentration of 75 mg/kg was detected, which is very close to the human health threshold of 80 mg/kg. At six feet, the lead dissipated to only 15 mg/kg.

Despite numerous requests, the City has refused to test soil samples from this area at a depth of less than four feet from the surface. The FEIR's only response is that despite the lack of shallow soil testing in the vicinity of the former hazardous materials storage area, other samples collected "throughout the project site" show no evidence of shallow soil contamination.<sup>29</sup> This response is inadequate, as samples from other areas on the 39-acre Project site are not reflective of potential contamination in this particular area, which has a history of hazardous materials storage.

There is a risk of near-surface soil contamination that could affect workers, residents, and future users of the active park. The FEIR must be revised to properly analyze and mitigate this risk.

**E. The community boathouse would be located in an area with challenges to development**

To provide community benefits anticipated by the City's General Plan, the Applicant has designated a small parcel in the southeast corner of Project site ("Parcel D") for dedication to the City as the potential site for a future community boathouse. The DEIR stated that although the boathouse is not part of the Project, "the City has included it in this environmental analysis to help facilitate future development."<sup>30</sup> The FEIR, however, retreats from this position and now states that

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<sup>29</sup> FEIR p. 4-124.

<sup>30</sup> DEIR p. 3-8.

the boathouse is “not included as part of the proposed Riverfront project *or* evaluated in the DEIR.”<sup>31</sup>

A number of potential barriers to development of the boathouse parcel have arisen during the course of environmental review of the Project. First, new analysis in the FEIR shows that a portion of Parcel D will very likely be inundated by sea level rise.<sup>32</sup> Second, Parcel D is adjacent to a brackish marsh area that the California Department of Fish and Wildlife believes may support the protected salt marsh harvest mouse. The development of Parcel D may have significant impacts on this fully protected species.<sup>33</sup> Third, Parcel D is within the 100-foot buffer from the Petaluma River and its associated banks, which is susceptible to soil lurching. A future boathouse would therefore require a deep foundation that extends over 30 feet into the bay mud to reach the bedrock, which is a costly endeavor.<sup>34</sup>

The community benefits proposed by the Applicant included the dedication of a viable site for a potential community boathouse. It now appears that the designated site may be too close to the Petaluma River, and should be set back by a reasonable distance to accommodate for future sea level rise, soil instability, and potential habitat impacts. The City should require the Applicant to dedicate a site free from such substantial problems before it approves the Project.

**F. The FEIR introduces new biological mitigation measures in the form of “voluntary” measures, but does not make them mandatory, enforceable, and specific**

In response to the DEIR, the California Department of Fish and Wildlife (“CDFW”) submitted comments requesting that avoidance measures be required for those portions of the Project that are developed adjacent to salt marsh vegetation.<sup>35</sup> Salt marsh vegetation supports the salt marsh harvest mouse, which is a fully protected species under the California Endangered Species Act. CDFW believes that the mouse may occur in the marshland adjacent to the Project site, which is why CDFW requested mitigation.

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<sup>31</sup> FEIR p. 4-21 (emphasis added).

<sup>32</sup> FEIR p. 3-19, Figure 4.6-1; FEIR p. 4-163.

<sup>33</sup> See FEIR p. 4-27.

<sup>34</sup> FEIR pp. 4-138 to 4-139.

<sup>35</sup> FEIR p. 4-25.

The FEIR disagrees that there will be any impact on the mouse, even though some development will occur adjacent to marshland habitat. The FEIR states, however, that the measures suggested by CDFW “such as wildlife fencing and construction personnel training about sensitive wildlife will be implemented voluntarily by the applicant.”<sup>36</sup>

CEQA requires that mitigation measures be mandatory, enforceable, and specific, which the proposed “voluntary” measures are not. Also, the measures are clearly mitigation measures agreed to by the Applicant in response to concerns about potential impacts by CDFW. Courts will not hesitate to find that if something walks like a mitigation measure and talks like a mitigation measure, it is a mitigation measure.<sup>37</sup> The FEIR should be revised to include these measures as mandatory and enforceable mitigation.

### III. CONCLUSION

The Project presents significant environmental issues that must be addressed prior to Project approval. The FEIR fails to include an adequate analysis of and mitigation measures for the Project’s potentially significant impacts, and its conclusions lack substantial evidence as required by CEQA. The EIR for the Project must be revised and recirculated.

Sincerely,



Ellen L. Trescott

ELT:ljl

\* Internet links to all other references are provided herein. Paper copies of these documents will be promptly provided to the City upon request.

cc: Olivia Ervin (oervin@ci.petaluma.ca.us)

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<sup>36</sup> FEIR p. 4-28.

<sup>37</sup> *Lotus v. Dep't. of Transportation* (2014) 223 Cal.App.4th 645.