

# SUPPLEMENTAL

COUNCIL AGENDA: 6-21-11

ITEM: 7.2



## Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Joseph Horwedel

**SUBJECT: ZERO WASTE ENERGY  
DEVELOPMENT COMPANY LEASE**

**DATE:** June 14, 2011

Approved

Date

6/17/11

**COUNCIL DISTRICT: 4**  
**SNI AREA: N/A**

### REASON FOR THE SUPPLEMENTAL

Per the original memorandum to the City Council on the Dry-Fermentation Anaerobic Digestion Facility Project ("Project"), staff is providing for Council consideration those comments received on the Initial Study / Mitigated Negative Declaration prepared for that Project, together with responses to those comments and a proposed, related Mitigation Monitoring and Reporting Program, which is required as part of considering a Mitigated Negative Declaration for a project. Adoption of the Initial Study / Mitigated Negative Declaration together with the related Mitigation Monitoring and Reporting Program will allow the City Council to consider the approval of the lease for the Dry-Fermentation Anaerobic Digestion Facility Project, for which the IS/MND was prepared.

### BACKGROUND

#### **Adoption of a Mitigated Negative Declaration**

Section 15074 of the Guidelines for Implementation of the California Environmental Quality Act (CEQA) requires a lead agency, prior to approving a project, to consider the proposed mitigated negative declaration together with any comments received during the public review process. The decision-making body also shall adopt the proposed mitigated negative declaration only if it finds, on the basis of the whole record before it (including the initial study and any comments received), that there is no substantial evidence that the project will have a significant effect on the environment and that the negative declaration or mitigated negative declaration reflects the lead agency's independent judgment and analysis.

#### **Recirculation of a Mitigated Negative Declaration**

Per the State CEQA Guidelines, a lead agency is required to recirculate a negative declaration when the document must be substantially revised after public notice of its availability has previously been given, but prior to its adoption. A "substantial revision" of the negative declaration is further defined

June 14, 2011

**Subject: Zero Waste Energy Development Company Lease**

Page 2

as when a new, avoidable significant effect is identified and mitigation measures or project revisions must be added in order to reduce the effect to insignificance, or if the lead agency determines that the proposed mitigation measures or project revisions will not reduce potential effects to less than significance and new measures or revisions must be required.

Recirculation is explicitly not required when mitigation measures are replaced with equal or more effective measures; or new project revisions are added in response to written or verbal comments on the project's effects identified in the proposed negative declaration which are not new avoidable significant effects; or measures or conditions of project approval are added after circulation of the negative declaration which are not required by CEQA, which do not create new significant environmental effects and are not necessary to mitigate an avoidable significant effect; or new information is added to the negative declaration which merely clarifies, amplifies, or makes insignificant modifications to the negative declaration.

### **Need to Prepare an Environmental Impact Report**

Per the CEQA Guidelines, if during the negative declaration process there is substantial evidence in light of the whole record, before the lead agency that the project, as revised, may have a significant effect on the environment which cannot be mitigated or avoided, the lead agency shall prepare a draft Environmental Impact Report (EIR) and certify a final EIR prior to approving the project.

### **ANALYSIS**

On April 8, 2011, the City of San Jose circulated an Initial Study and Mitigated Negative Declaration for the Dry-Fermentation Anaerobic Digestion Facility Project (File No. SP09-057) for public review and comment. The IS/MND was circulated for 30 days.

The Planning Division received a total of nine comment letters, which are attached to this document along with responses to those comments. Comments were received from the following entities:

- Citizens Committee to Complete the Refuge (CCCR);
- The Santa Clara Valley Audubon Society;
- San Francisco Baykeeper;
- The Sierra Club;
- CalRecycle Department of Resources Recycling and Recovery;
- The Regional Water Quality Control Board;
- The City of Milpitas;
- The US Department of Fish and Wildlife; and
- The California Department of Transportation.

The comments generally pertained to:

- Lack of adequate notice;

June 14, 2011

**Subject: Zero Waste Energy Development Company Lease**

Page 3

- Lack of availability of the environmental document and appendices;
- Piecemealing;
- The need to include the Project in the Water Pollution Control Plant Master Plan process; and
- Adequacy of the environmental analysis regarding:
  - Aesthetics,
  - Air quality (including odors),
  - Biological resources (including burrowing owl habitat and cumulative impacts to biology),
  - Geology and soils,
  - Greenhouse gas emissions,
  - Hazards and hazardous materials,
  - Hydrology and water quality,
  - Land use,
  - Noise, and
  - Transportation

After a review of the comments received, staff's assessment is that no significant environmental issues were raised that were not already adequately addressed in the Initial Study / Draft Mitigated Negative Declaration for the reasons set forth in staff's responses to those comments received. On June 14, 2011, the Director of Planning, Building and Code Enforcement provided responses to all comments received. The attached Response to Comments is organized with responses located immediately following each comment letter, respectively.

As a result of the comments, however, a mitigation measure relating to burrowing owls was revised to be more effective. The mitigation measure has been strengthened by (1) increasing the buffer zone area around occupied burrows during the non-breeding season from 150 feet to 160 feet; (2) adding a requirement that any land provided as a part of an off-site habitat and management plan must be of equal or greater habitat quality in terms of vegetation height and the density of potential nesting and roosting burrows, as compared to the impact site; and (3) reducing the survey interval to 14 days in advance of any ground-disturbing activity within 250 feet of suitable habitat that could disturb nesting owls.

The more effective mitigation measure has been incorporated into the Mitigation Monitoring and Reporting Program. The resolution proposed for adoption includes a finding that the revised mitigation measure is more effective than the one it replaces, and will in itself not have a significant effect on the environment. Per CEQA Guidelines Section 15074.1, recirculation of a Mitigated Negative Declaration is not required for the substitution of an equal or more effective mitigation measure.

In response to comments from the Regional Water Quality Control Board, staff has also added additional information to the Initial Study clarifying the jurisdiction of the Regional Water Quality Control Board. Per CEQA Guidelines Section 15073.5, recirculation is not required when new information is added to the negative declaration that merely clarifies, amplifies, or makes insignificant modifications to the Negative Declaration.

HONORABLE MAYOR AND CITY COUNCIL

June 14, 2011

**Subject: Zero Waste Energy Development Company Lease**

Page 4

### **CONCLUSION**

The Dry-fermentation Anaerobic Digestion Facility Project Initial Study / Mitigated Negative Declaration meets the requirements of CEQA by disclosing the environmental effects of the project and by proposing mitigation measures that, if incorporated, would reduce project impacts to a less than significant level. In addition, the comments received on the project raise no new significant environmental issues that require mitigation.

### **COORDINATION**

Preparation of this memorandum and the Responses to Comments were completed in coordination with the City Attorney's Office.

/s/

JOSEPH HORWEDEL, DIRECTOR  
Planning, Building and Code Enforcement

For more information contact John Davidson, Senior Planner, at 535-7895.

#### **Attachment:**

Response to Comments on the Initial Study / Mitigated Negative Declaration for SP09-057  
(contains original comment letters and responses to comments)



## CITIZENS COMMITTEE TO COMPLETE THE REFUGE

453 Tennessee Lane, Palo Alto, CA 94306 Tel 650 493-5540 Fax 650 494-7640 www.CCCRRefuge.org

May 9, 2011

Joseph Horwedel, Director  
Jodie Clark, Project Manager  
Planning, Building and Code Enforcement  
City of San Jose  
200 E. Santa Clara St.  
3rd Floor, Tower  
San Jose, CA 95113

**RE: SP09-057, Comments on Draft Mitigated Negative Declaration and Initial Study, Dry Fermentation Anaerobic Digestion Facility Project**

Dear Mr. Horwedel and Ms. Clark:

The Citizens Committee to Complete the Refuge (CCCR) appreciates the opportunity to comment on the findings and conclusions of the Draft Mitigated Negative Declaration (MND) and Initial Studies (IS) prepared for the Dry-Fermentation Anaerobic Digestion Facility Project (Project).

The Project's location on the San Francisco Bay shoreline and close, upslope relationship to the Don Edwards San Francisco Bay National Wildlife Refuge (Refuge) makes it particularly important that the Project fully incorporates the best of environmental practices in planning and implementation. Toward that end, the hope is that these comments will be given all due attention and process.

The comments will demonstrate that the documents' preparation and publication was inadequate for the purpose intended and for the CEQA process required. The comments will provide recommendations that can be used to remedy its CEQA deficiencies and address the environmental quality of the implementation of the project.

In general, CCCR supports the solid waste recapture and alternative energy roles proposed for this project and believe it is consistent with goals of the WPCP Master Plan (PMP) which includes the land proposed for this project. That support is accompanied with very important caveats of public process and environmental consideration.

### **NOTICE OF INTENT of April 8, 2011**

On multiple levels, this Notice of Intent (NOI) and associated access to project information was inadequate. The NOI, as a CEQA action, is not intended to be perfunctory fulfillment of a threshold minimum of state law but to be an action that successfully provides an effective public process. Indeed, ensuring a substantive public process is a central function of CEQA. The following excerpt from the CEQA Guidelines is pertinent:

#### **15201. PUBLIC PARTICIPATION**

Public participation is an essential part of the CEQA process. Each public agency should include

provisions in its CEQA procedures for wide public involvement, formal and informal, consistent with its existing activities and procedures, in order to receive and evaluate public reactions to environmental issues related to the agency's activities. Such procedures should include, whenever possible, making environmental information available in electronic format on the Internet, on a web site maintained or utilized by the public agency.

**Note:** Authority cited: Section 21083, Public Resources Code; Reference: Sections 21000, 21082, 21108, and 21152, Public Resources Code; *Environmental Defense Fund v. Coastside County Water District*, (1972) 27 Cal. App. 3d 695; *People v. County of Kern*, (1974) 39 Cal. App. 3d 830; *County of Inyo v. City of Los Angeles*, (1977) 71 Cal. App. 3d 185.

#### NOTICE PROCESS:

*Individuals and Community organizations.* A March 28, 2011 e-mail from San Jose Planning Department staff confirmed placement of my name on the notification list for this project. It is a message that was copied to Project Manager Jodie Clark. Although I am not date-certain, it was about 10 days after NOI release that I got a notification phone call from Ms. Clark. There should have been a notice sent on the day of NOI release.

*Potentially impacted parties.* It is evident that the NOI was not directly distributed to Project-impacted parties as identified in the MND and IS. The Refuge is such a party, mentioned repeatedly in the documents and as the reason for certain proposed mitigations. Its management (U.S. Fish and Wildlife Service (FWS)) was not directly notified about the release of this MND document. It is known too that the Project did not consult with the Refuge prior to the NOI release such that the findings might have been based on mutual assessment as to the impacts and the mitigations proposed. As the Refuge is a federal entity, a State Clearinghouse posting cannot substitute for direct notice.

*Regulatory Agencies.* The Project omitted direct notice to individual regulatory staff with whom it had consulted during IS preparations. Such notice is valuable as it ensures confirmation and/or clarification of findings and conclusions. The California Regional Water Quality Control Board (RWQCB) is such an agency where responsible staff was consulted but then did not know that the documents were released until informed by other parties. While it is true that the MND was posted on the California State Clearinghouse, that posting does not assure that the responsible and previously helpful regulatory individuals actually receive notice.

The lack of even an e-mail distribution to all document contributors, individual regulatory contacts and/or potentially impacted parties is an omission of best practice communications and of practices common in comparable planning processes today. Such notice omissions are counter to the CEQA-intended public process, impeding prescribed opportunities to both review and comment on the Project.

**Action:** In order to comply with CEQA for notification and public participation, the San Jose Planning Department (Department) needs to extend and/or reopen the comment period and directly ensure that the notice of that change reaches all impacted, referenced, interested and/or involved parties and the posting is such that general public service is ample and timely.

#### INFORMATION AVAILABILITY

The NOI description of document access was inaccurate and misleading. Paragraph five of the NOI states:

*Citizens Committee to Complete the Refuge*

[www.ccrRefuge.org](http://www.ccrRefuge.org)

“The draft Mitigated Negative Declaration, initial study, and reference documents are available for review under the above file number from 9:00 am to 5:00 pm, Monday through Friday at the City of San Jose Department of Planning, Building and Code Enforcement, City Hall, 200 East Santa Clara Street, San Jose CA 95113-1905. The documents are also available at the Dr. Martin Luther King, Jr. Main Library, 150 E. San Fernando St., San Jose, CA 95112, and online at <http://www.sanjoseca.gov/planning/eir/MND.asp>.”

*IS Appendices:* It is presumed that the IS appendices are the “reference documents” to which the NOI referred.

The IS Table of Contents (TOC) lists 10 source documents as its appendices. For most of the comment period, the IS document displayed on-line did not include e-links to appendices nor were there directions provided on-line on alternative access to those documents. This status changed during the final week of the comment period, confirmed with a file comparison of the PDF Document Property detail or attributes. A downloaded copy of the IS with a “Modified” date of April 21, 2011 has no e-links to appendices from its TOC. In a file copy downloaded on May 7, 2011 the Modification date is May 3, 2011 and includes TOC e-links to the appendices files. As such, for most of the comment period, the appendices’ public availability was limited to direct requests to the Department.

A visit to the Main Library on May 4, 2011, using the full assistance of reference librarians and the correct file number, found none of the documents (NOI, MND, IS, appendices) nor any library system record that the materials had been received. In short, none of documents, to that date, were available at a site listed in the NOI other than the Department offices.

The Department did not ensure that document access described in the NOI was readily available from the opening date of the comment period. Testing access on the Department website, easy to do, would have well served the need and, in fact, is exactly the type of provision recommended in the CEQA Guidelines.

**Action:** In order to comply with CEQA for information access, the Department needs to extend and/or reopen the comment period for a minimum of 30 additional days to fulfill public need for adequate time to access and review all related documents and to prepare resulting comments.

**Public Request Action:** Delayed access to substantive appendices was a reason I request for an extension to the comment period on May 3rd, 2011. That request was denied. A copy of my extension request with the denial letter is submitted with this comment letter. I now request that those documents become part of the public record of this Project.

## MITIGATED NEGATIVE DECLARATION and INITIAL STUDIES

The following discussions, except as noted, relate to both the MND and IS given that they are organized similarly and that one utilizes the findings of the other. Inclusive to the IS, *appendices may also be discussed but comments must be considered limited for reasons discussed above.*

It is necessary to begin by considering the CEQA definition of “Project” and demonstrating how the proposal discussed in these documents does not meet that standard. Consider the following excerpt from the CEQA Guidelines:

**15378. PROJECT**

(a) "Project" means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following:

(1) An activity directly undertaken by any public agency including but not limited to public works construction and related activities clearing or grading of land, improvements to existing public structures, enactment and amendment of zoning ordinances, and the adoption and amendment of local General Plans or elements thereof pursuant to Government Code Sections 65100–65700.

(2) An activity undertaken by a person which is supported in whole or in part through public agency contacts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

(3) An activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies....

The Project, from multiple perspectives, fails to meet the "whole of the action" standard. It instead variously segments or piece-meals proposed actions, violating CEQA.

Significantly, it ignores landscape perspectives in at least three ways.

**1. The selected site and operations propose to treat a portion of contiguous inactive landfill as a subset or segment of that landfill entity.**

Parcel 015-38-005 is 96 acres formerly owned as part the 160 acre Nine Par Landfill or disposal site. Archival records describe the operation's early years beginning in 1938 as:

"Trenches were dug, all metals were scavenged, the remaining trash was dumped into the trenches and then burned off and bay mud (the excavated soils) were used as cover over the residue in the trenches. This occurred over the entire site, trenches were dug as they were needed, not according to any predetermined plan, up until the 1950's." (Meeting notes, City of San Jose, 5/30/95.)

Subsequently, in operations to August 1977, the trench activity shifted to surface landfill formation, mostly northeasterly on the property. In the early 1980's 70 northeast acres were sold to establish the still-active operation now known as the Zanker Road Resource Recovery Operation and Landfill (ZRRROL). At that time and since, that operation has installed and maintained systems that meet regulatory requirements for environmental monitoring of hazards and of protection. Even though waste exists under its shared boundaries, the surrounding properties have the benefit of perimeter systems monitoring hazard and water-intrusion status.

During that same time the remaining 96 acres never underwent action to enact closure/post-closure as defined by the California Regional Water Quality Control Board (RWQCB). In recent months, notably prior to issuance and certification of a final MND, grading and fill actions were taken on the proposed Project footprint to satisfy "closure" requirements (personal communication, M. Young, City of San Jose (CSJ) Environmental Services Department (ESD)). No closure action was taken on the landfill beyond that footprint.

The RWQCB has stated that it expects the entire landfill to undergo the closure process (personal communication, K. Roberson, RWQCB). The recent surface action attempts to treat this portion of

the landfill as a separate entity when, in fact, it cannot. The action and the failure to include closure of the entire inactive landfill is piece-mealing under CEQA. The “whole of an action” must assess the entire 96 acres, define the locations of buried waste and both establish and enact a closure/post-closure plan that resolves the issue before any part of the land is subdivided, permitted or developed.

A number of specific concerns illustrate the importance of this action.

A significant quantity of TCE has been found in a boring site in the landfill (CSJ memo, N. Fukuda, 4/1/11) along the northern border of the proposed footprint and upslope of the wetlands. Actions must be completed to more completely identify the extent of presence and to assure permanent environmental protection.

The parcel includes protected wetlands, slopes to Artesian Slough and toward the Bay, borders Pond A18 (waters of the San Francisco Bay) with about half of the southwest boundary separated from the Refuge only by the slough. It is critical that development be preceded by actions that establish protection for these sensitive lands.

The easterly border of the parcel includes lowlands that are subject to flooding, high tides and sea level rise. As such it must be determined if and where waste deposits exist in this section of lands, how and if the deposits interconnect with other portions of the landfill and whether wastes found include potential hazards. At least one archival document reports waste in a portion of these lowlands. (Letter to WPCP L. Hirschhorn from Earth Systems Consultants D. Peluso, 11-9-93).

**Action:** The WPCP, as landowner, must include the entirety of the landfill closure/post-closure on APN: 015-38-005 to fulfill RWQCB requirements and establish protections for the included and surrounding wetlands and wildlife prior to proceeding to any development on this parcel.

**2. The proposed operations piece-meal the cumulative operations of one parent company across three, interdependent, sibling operations, adjoining or in close proximity along Los Esteros Road.**

The Project identifies the business proposed on the site as Zero Waste Energy Development Company (Zero Waste). The site is immediately bordered by ZRRROL and across the Artesian Slough from the Zanker Material Processing Facility (ZMPF). All three businesses are owned by GreenWaste.

The IS describes synergistic interdependencies of these GreenWaste-owned facilities:

“Municipal feedstock materials are to be trucked directly to the proposed facility or conveyed from the nearby ZRRROL and/or ZMPF facilities.” (p.5, Sec. 3.2)

“Entry to the proposed project site for feedstock deliveries will share the access driveway from the adjacent ZRRROL property, which is accessed via Los Esteros Road. Trucks will first enter vehicle-weighing scales located at the adjacent ZRRROL before entering the AD facility. An attendant at the scale house will inspect incoming trucks and direct them to the appropriate receiving location.”...”The project proposes a perimeter barrier to discourage unauthorized entry and will feature lockable gates at the entrance to the ZRRROL property...as well as a manned vehicle scale house located on the ZRRROL property.”(p.9, Sec. 3.4)

The Site Plan (p. 6, Figure 3.0-1) illustrates the direct integration of the ZRRROL in this project.

Given the planned interdependence, the “whole of the action” includes all GreenWaste operations on Los Esteros Road, existing or planned.

In 2008, the City approved a rezoning action to permit GreenWaste to expand a materials processing facility (the ZMPF) on a closed section of the landfill west of Artesian Slough. While that project has not yet been built-out, its plan identified impacts that need to be reconsidered for cumulative impact with those of the proposed project.

*Light and Noise:* Like the proposed project, the ZMPF will operate 24/7, each facility producing light, noise, aesthetic and possibly other impacts around the clock and virtually next door. Given proximity, it is necessary to assess those impacts cumulatively.

One example is the impacts on the Refuge.

There are two forms of light and noise impacts on the Refuge. One is wildlife disturbance that necessitates mitigations that remove or substantially reduce the impacts. Light and noise pollution is known to have serious adverse impacts for a wide range of wildlife ranging from invertebrates to mammals. It disrupts migratory patterns, foraging capabilities, predation, nesting, and breeding.

The other is impact on members of the public who visit the EEC to participate in programs, enjoy wildlife or simply spend time in relative isolation and quiet. On occasion, the EEC presents programs that take advantage of night skies.

To mitigate for those impacts, the 2008 ZMPF plan included multiple adjustments including a taller, shielding berm and an agreement to cooperate if evening Refuge programs needed facility lights dimmed. While the Zero Waste operation would need a specific set of similar mitigations, light and noise for the combined GreenWaste operations must be analyzed for cumulative and possibly enhanced impacts on wildlife and public use of the Refuge.

*Traffic:* For the ZMPF plan, Zanker/Los Esteros Road traffic became a contentious concern for local residents, Refuge visitors and road maintenance. The concern was sufficient for Mayor Reed and Councilman Chu to jointly produce a memo to the City Council recommending that GreenWaste “...assist the City in analyzing traffic counts and traffic impacts...” (Memorandum of 2-22-08, Council Agenda 02-26-08, Item 11.6).

The actual traffic impact of the still incomplete ZMPF is still unknown. However the proposed project with its interdependence with the ZMPF appears to be an impetus for both projects to proceed. Further, the traffic analysis provided for the current project’s IS utilizes data provided by GreenWaste, an approach used in the earlier project that produced the Reed/Chu 2008 Memo. All the same traffic issues of concern raised then exist now, unchanged.

As noted above, the IS states that “Municipal feedstock materials *are to be trucked directly to the proposed facility or conveyed from the nearby ZRRROL and/or ZMPF facilities* (emphasis added).

The project description does not discuss the cumulative traffic impacts at full build-out of both the ZMPF and Zero Waste facilities, additive to existing traffic already produced by the ZMPF

and ZRRROL. The IS includes no data suggesting the relative proportions of feedstock transferred from Los Esteros Road GreenWaste operations as compared to that which can reasonably be expected to arrive by direct transport from other, more distant sources. That comparative data is needed as a basis for assessing associated impacts proportionally.

The extent of potential traffic impact of all GreenWaste businesses on Los Esteros Road requires a cumulative impact analysis performed jointly with the City.

The MND Project Description states: "Special Use Permit for a 270,000 ton per year dry fermentation anaerobic digestion (AD) facility to process the organic portion of solid waste." (MND p. 1) That sentence is incomplete without the following: " ... *in order to produce and distribute biogas and compost products.*

Additionally, the IS limits discussion of the intended products, biogas/methane and compost, to the statement: "The project proponent and the City of San Jose are also exploring other possible options for use of biogas within the City." This statement ignores the fact that the proposed facility can develop service or end-product plans with any other entity, as may serve its for-profit motives. As capacity expands to build-out, those services may draw feedstock from multiple counties and distribute end-products as broadly as it may choose. These actions would all have associated impacts that must be considered as part of the entirety of the Project.

Missing too is discussion on what other facilities or operations may be needed on this site and/or adjoining GreenWaste site in order to take end-products to market. At build-out it is anticipated that methane volumes will exceed the facility's operations needs, a time when profitable distribution of excess methane will be necessary i.e. part of the "whole of an action."

Issues to be addressed include but are not limited to:

- When methane production exceeds Zero Waste operation rate of consumption, what facilities and operations will be needed at/near it to profitably deliver biogas in marketable form to other parties? What impacts might these actions produce?
- Will annual biogas production at build-out equal or exceed the cumulative greenhouse gas impact of operations, site and transport of materials (pre-digested, end-product) to/from the facility, allowing for distance transported?
- What will be the quality rating standard for the end-product compost and for what uses will it be suited?
- At build-out, will the production process impacts balance the impact of compost transport? As there is no significant agriculture local to the Project, who are the anticipated compost customers, how far away, how transported and with what traffic and greenhouse gas or other impacts?

*These examples demonstrate why the interdependent and long range operations of the three sibling businesses comprise the "whole of an action" and therefore, under CEQA, must all be included to be defined as Project.*

**Action:** The project description must be rewritten to include the entirety of the GreenWaste operations on Los Esteros Road such that the parts add up to the whole of the project. Doing so, the CEQA process must be restarted to cumulatively analyze impacts.

**3. The proposed project, on its own, does not qualify as a “project” under CEQA but, as part of the WPCP buffer lands, is a planning entity subject to the approved Plant Master Plan (PMP).**

From the earliest years of preparation of the PMP, the site of the proposed project was included with that plan’s boundaries. (Example: Figure 3, H.T. Harvey & Associates, Plant Opportunities and Constraints Assessment, 1/30/2007). From earliest public communications and media coverage, this parcel’s acreage was included in total acreage listed as part of the PMP. In every map presented in public meetings, on-line or in PMP development materials, the site was shown as within the Master Plan boundary.

ESD Director John Stufflebean stated (personal meeting, 5/6/11) that at no time did he include discussion of this facility in public presentations about the PMP. While that may be true, he repeatedly used presentation materials in those same situations that included the proposed project site in maps and acreage totals.

On April 19<sup>th</sup>, 2011, the City Councils of San Jose and Santa Clara approved the PMP inclusive of the subject lands of this Project. Also approved was the initiation of a CEQA process for a programmatic Environmental Impact Report (EIR) that will apply to all development on areas known as the WPCP buffer lands. Per his testimony to San Jose City Council on that date, Mr. Stufflebean estimated the EIR will be a planning guide applied to 200 projects.

The current project is one of those 200 projects. How else can its impact on the PMP landscape and its mixed land use be correctly assessed? How will its site hydrology, odor issues, traffic, emissions, building plans, and other attributes impact other elements of the PMP? How can a special use permit be appropriate if these impacts are not evaluated as part of the whole?

As the template for broad plans for the entirety of the buffer lands, the PMP EIR will need to *cumulatively* analyze factors that involve and impact the Project including but not limited to traffic and roadway infrastructure, air quality, greenhouse gases, hazards, hydrology, storm runoff, landscaping, biological resources, public use and the associated appropriate mitigations.

One example is the PMP pedestrian bridge and trail proposed to connect to the Refuge as part of an overall trail plan on buffer lands and connecting to other trail networks. This public use would cross the lower end of the current parcel, north of the Zero Waste facility. What requirements need to be met by the Project to assure that the quality of the trail’s public experience?

Development on these lands is part of the PMP and subject to it. Without the PMP’s Final programmatic EIR, this Project’s impacts cannot be adequately analyzed. To proceed with this Project prior to the findings of the parent PMP project violates CEQA by piece-mealing.

**Action:** The Project should be halted until there is a certified Final PMP programmatic EIR.  
~~~~~

The following comments address MND and IS content not discussed previously. In some cases, these comments are additive to comments above. *Again, appendices may be discussed but must be considered to be limited for reasons discussed above regarding the NOI.*

Finding (MND, p 1): The section concludes that a mitigated negative declaration is appropriate. This finding is highly inadequate due to the evident Project complexity involving landfill closure, landfill toxic findings, cumulative impacts of GreenWaste Los Esteros Road operations and its intended outcomes, potential impacts to sensitive lands and waters and concerns discussed below. As the land is subject to the PMP, the Project's CEQA process must be deferred until such time as the PMP programmatic EIR is certified.

### PROJECT OVERVIEW (IS 3.0)

General comment: Throughout this and subsequent sections, the text states that environmentally significant environmental actions "will" be taken when completion of those actions is a prerequisite for conclusions drawn within the CEQA process. An example is:

IS p. 12: The proposed project includes *development of* a vector management plan....The VMP *will be* reviewed and approved by the City.....prior to permit approval.

IS comments like this one preclude substantive comment by the public due to a lack of opportunity to review even draft versions of such plans. Comments that follow identify other instances when this inappropriate limit to the CEQA public process is applied.

### DESCRIPTION OF PROPOSED PROJECT (IS 3.2):

The phased development (p. 7) provides an impact management opportunity that needs to be added to the project plan. At completion of Phases 1 and 2 and before beginning the subsequent phase, milestone measurements should be taken on all identified impacts for review by appropriate regulators or other parties such that timely changes can be made to the next phase. These measurements will require baseline measures developed in conjunction with regulatory and impacted parties prior to the beginning of a phase. The milestone review should also investigate findings or complaints identified during construction or operation start-up of the prior phase and use the new information to adjust the plan of the subsequent phase as remedy.

Discussion on page 7 and illustrations in Figure 3.0.2 inadequately describe the site. The text needs to include the length and width of each building so that the total length of the row of buildings can be determined. That information is needed to assess how the addition and alignment of long, high walls may alter environmental dynamics such as odor, noise and distribution patterns of ground-level winds.

Figure 3.0.2 omits a view from the north which is the view for visitors to the Refuge and for users of a trail and bridge proposed in the PMP. A figure needs to be added to provide that view. Additionally, This figure or another needs to provide a more complete landscape view from both the north and south perspectives including the landfill formations to the east and west, the slough channel, the buildings and variations of land slope to provide perspectives of relative height and horizontal spacing within the existing landscape.

Action: Add information to Section IS 3.2 by establish baseline measures and milestone review process for the phased construction and to provide data that can be used to evaluate potential environmental impacts of the three large buildings.

Vector Management Plan (IS 3.9)

As mentioned, the final Vector Management Plan (VMP) must be available in order to draw appropriate conclusions.

Given that actions under the VMP will impact the Refuge, the FWS/Refuge must be consulted during preparation of the final plan. Further, and on a continuing basis for oversight, the FWS/Refuge, a federal entity, will need to be included for reporting purposes in addition to the Local Enforcement Agency (LEA) as that office's authority applies only to state regulation.

**Action:** In order to complete the CEQA process, develop a final VMP with consultation of the FWS/Refuge. Include the FWS/Refuge with the LEA for oversight of plan actions.

ENVIRONMENTAL SETTING, CHECKLIST, AND DISCUSSION OF IMPACTS (IS 4.0)

AESTHETICS (IS 4.1):

Discussed previously in these comments, noise and lighting of a 24/7 facility has a significant impact on wildlife and on the experiences of Refuge visitors for periodic nighttime public programs held outdoors. At minimum, it will require mitigation at this site.

**Action:** Reassess light and noise impacts in consultation with the FWS/Refuge and revise the impact status accordingly.

It is equally important the viewsapes from both Los Esteros Road and Refuge trails are reasonably attractive and complementary to the adjoining wetlands. Unfortunately photos included do not provide a view of the site from the Refuge. Combined with the need discussed under Project Description, there is insufficient information to assess these viewsapes in suitable detail. New information is needed to better assess visual impacts for planning purposes.

**Action:** Provide new visual information that can be used to assess the northerly and southerly viewsapes to more fully assess them and enable appropriate public comment.

AIR QUALITY (IS 4.3):

Pending improvements in the Project Description of north and south perspectives and dimensions of the planned large buildings (described above), an assessment needs to be made as to whether the Project may alter surface wind patterns in this location. With landfill formations to the east and west, the addition of a 40' tall, long wall composed of the new buildings may possibly create a semi-closed-ended canyon receiving the prevailing NW winds. It needs to be determined if wind effects of swirls or other patterns alter impacts involving distribution or concentration of odors, particulates or emissions. Further, it would need to be determined if these changes create new or increased impacts on the wetlands, wildlife or Refuge.

**Action:** Assess the effect of the AD buildings on wind patterns. Identify and address any resulting impacts or changes to impacts, as discussed.

As suggested in prior discussion, this site will carry the cumulative odor, particulate and emission effect of the three GreenWaste operations on Los Esteros Road. The air impacts must be cumulatively evaluated for the combined locations.

**Action:** Perform an air quality analyses that is cumulative for the landscape-level impacts of GreenWaste.

Biological Resources (IS 4.4):

This section needs to add to its jurisdiction discussion. The close-by Refuge has authority under the National Wildlife Refuge Administration Act of 1966 (and as amended) (NWRSA) to act to protect its resources such as may be needed and as based on the best available science.

**Action:** Amend the jurisdiction text of Sec. 4.4.1.1, p 44 to include the NWRSA.

Given the Project's high potential of impact on the Refuge, wetlands, and wildlife the FWS/Refuge must be given opportunity to review all of the findings and conclusions of the Biological Resources, to comment and to require changes, as may apply. As discussed, notice to the Refuge was inadequate. No further Project action can be taken without this consultation.

**Action:** Directly contact the Refuge to arrange for its review of Biological Resources and other impacts of the Project. The Refuge Manager is Eric Mruz. He can be contacted at 510-792-1475, ext. 125 or [eric\\_mruz@fws.gov](mailto:eric_mruz@fws.gov). Revise CEQA documents as subsequently agreed.

While Sec. 4.4.2.5, p. 53 addresses the impacts to trees, it fails to address the impacts of trees.

Historically trees were not found on the Bay's salt-water shoreline. As such, wildlife native to shoreline ecosystems thrived, in part, away from the sharp eyes of avian predators that use heights (possibly trees) to scan for prey. The Project site, as a former landfill, is a manmade artifact in this landscape. Its height and the presence of trees are part of the reason that the survival of multiple, native, shoreline species is so threatened.

Contrary to the Impact BIO-4 and MM BIO-4.1, removal of trees from this site may actually an advantage to wildlife. Further, any selection and placement of trees should occur only with the consultation and agreement of the FWS.

Additionally, as the lands will continue to be owned by the City as part of the PMP, all landscaping on site must be subject to the broad-based landscape planning of the PMP. In the preliminary PMP there are objectives to use native vegetation wherever and whenever possible, and certainly not to plant a barrier of New Zealand Christmas Trees facing Artesian Slough, as proposed by this Project. It is important to recognize that this location is not inland urban but coastal in nature.

Finally, this site is a landfill and any tree selected must be chosen by root depth i.e. by likelihood to enter the waste. Trees that penetrate waste are more likely to die and may open pockets that release landfill gases that may persist in pockets. Further, and in conjunction with planning for wildlife, trees should be chosen for lower canopy height such that they do not provide high perches for avian predators.

**Action:** Delete all of Sec. 4.4.2.5 and revise it to discuss "Trees." Consult with the FWS and the PMP landscape designers to redevelop the landscaping plan for the entire site consistent with precautions that protect wildlife, define selection criteria for all landscape vegetation and its maintenance, and avoid root penetration of landfill waste. Recirculate the revised proposal per CEQA guidelines.

The discussion of the Santa Clara Valley Habitat Conservation Plan (HCP) (Sec 4.4.2.6, p. 55) omits the fact that that document includes a Burrowing Owl Strategy that has a different boundary than does the main body of the HCP. That boundary includes the Project site i.e. that strategy must be considered for this species on this site.

**Action:** Revise the Sec 4.4.2.6 HCP discussion to include the Burrowing Owl Strategy and have a qualified biologist reassess the site per that strategy. Revise the proposal as and if needed and release for public comment under CEQA.

Section 4.4 omits mention of the FWS Tidal Marsh Recovery Plan that applies to the wetlands adjoining the Project site. The Plan is now undergoing final rewrites subsequent to comments received on its draft form. As such, standards that will apply to all wetlands along the Bay's edges are well understood and valuable now for planning wetland protection. It is a reference document that needs to be included for any shoreline planning.

**Action:** Add a description of the Tidal Marsh Recovery Plan to Section 4.4.

#### GEOLOGY AND SOILS (IS 4.6)

It is a of grave and serious concern that this Project proposes to go forward before final assessments are made to determine whether or not the construction will take place on floating grids or by driving piles. The two methods of construction have very different impacts during construction, impacts that require type-specific mitigation that must be defined within the CEQA process. The discussion (Sec. 4.6.2.1, p. 60) describes design-level geotechnical investigations that must be completed and publicly reviewed prior to conclusion of the CEQA process.

A particular concern is that extraordinary noise *and* vibrations of pile driving directly impact all forms of wildlife, impacts that will be significant and will require a very specific mitigation plan that must be developed within the CEQA process. To be sure, other forms of construction provide other types of impacts on wildlife and will also require a specific mitigation plan. But until there is a final plan, the appropriate mitigation cannot be identified.

**Action:** Complete the design-level geotechnical investigation and final recommendation of foundation type. Release those findings for adequate public comment and review per the CEQA Guidelines.

It is additionally a great concern that seismic borings were limited to the building locations and did not assess the stability of the northern half of the site, between the added weight of the buildings and the offsite, downslope wetlands. Might that area have different stability characteristics than the building locations? If it is less stable, might it be susceptible to movement induced by construction or pressure of the completed buildings? Might such movement force contaminants downslope into the wetlands?

At this location, it does not appear that building-only geotechnical studies are adequate given the serious threats that may be posed to sensitive adjoining lands.

**Action:** Order geotechnical investigations of the rest of the Project site to determine its stability characteristics. If findings indicate possible impacts, revise Section 4.6 to revise impacts and add appropriate mitigation, if available. Release the findings and revision per the CEQA Guidelines.

#### GREENHOUSE GAS EMISSIONS (IS 4.7)

The discussion of Local Policies (Sec 4.7.1.3) includes on P. 64 the City's Private Sector Green Building Policy (Policy 6.32). An important distinction for the Project is that it is private development on city-owned land that is also subject to the PMP. During the development of PMP's EIR, decisions may be made that vary from the cited policy, possibly improve on, because the WPCP, as landowner, has expanded responsibility for the property.

**Action:** The Project cannot determine what the applicable building standard will be until the PMP EIR is final. No building should occur in the interim.

Greenhouse gas (GHG) emissions from the Project are inadequately assessed in Sec. 4.7.2.1, pp 64, 65) because they do not analyze the GHG impact of trucks bringing feedstock to the site from distant locations, do not assess transport emissions produced by transport of compost away from the site, do not assess potential emissions of any type of action related to sale and distribution of produced biogas and do not assess the cumulative local GHG impact of the interdependent GreenWaste businesses on Los Esteros Road.

**Action:** Reassess GHG emissions to address the omissions described above to more accurately determine impact and appropriate mitigation. Revise Sec. 4.7.2.1 per the new findings and recirculate per CEQA Guidelines.

#### Hazards and Hazardous Materials (IS 4.8)

Little content of this section can be confirmed as accurate nor representative of the actual conditions, impacts and mitigation that actually apply. Multiple examples demonstrate that the extraordinary need to completely rewrite this section.

Critically, the final outcomes of the Draft Field Workplan (Golder Associates) were not ready before this section was written nor before the MND was released for public comment. Those findings can be the only basis for identification of hazards and their appropriate mitigations. It is completely unacceptable to release an MND that is based on assumptions.

A sampling of the final data is included in the CSJ Memo of Napp Fukuda, dated 4/1/11. That memo included data from Golder Associates test results that found a reportable level of TCE and deposits of petroleum hydrocarbons along the northwest boundary upslope of the sensitive wetlands. TCE is a carcinogen for both humans and animals. As the finding at one boring site does not determine the extent of the presence nor whether it originates at that location or has migrated from elsewhere nor what action must be taken to isolate it in-situ. No action can be taken at the site until the TCE and any other hazards are contained, all of which must occur after the final Field Workplan report is available.

**Action:** After the Final Field Workplan report is available, the City must review to design and implement remedies to the landfill. Subsequently, Sec. 4.8 can be fully revised per the final Workplan and completed landfill remedies such that remaining hazards can be defined for impacts and appropriate mitigation.

It is also very significant that the RWQCB requires that WPCP (the landowner) complete a landfill closure/post-closure plan involving the entire inactive landfill within the borders of APN: 015-38-005. The complete closure is necessary to establish protections for the sensitive adjoining wetlands and the Bay. Unfortunately the Department failed to inform the RWQCB of its recent, partial-closure actions, grading and filling the Project site. It then is unknown what agreement, if any, that the agency would have with the actions taken. It is also notable that the Project site included an appropriately enclosed asbestos stockpile. However that stockpile is also near Project borders upslope of wetlands, producing questions as to whether filling and grading actions better secured rather than disturbed it.

**Action:** The CSJ must complete the closure/post-closure of the entire inactive landfill on the current parcel before the CEQA process can be completed nor any construction action can occur.

#### HYDROLOGY AND WATER QUALITY (IS 4.9)

The discussions of this section appear to limit its considerations to water impacts within the site and ignore impacts that may arise from the nature of the lands surrounding the site, or at its lowest points such as entries. It assumes the accuracy and applicability of FEMA zoning despite landscape indicators of possible threats and known climate change indicators of more frequent major storm events. It omits any consideration of sea level rise (SLR). It bases runoff findings and conclusions on a *proposed* storm runoff plan, one that lacks RWQCB review particularly as may involve changes that may have been introduced by recent filling and grading. Finally, it ignores the broad hydrology planning of the PMP.

This Project proposes reducing the pervious surface by 68%, dramatically increases stormwater runoff that will impact the sensitive wetlands downslope from the Project. With that very significant impact no assessment mitigation can be considered appropriate without confirmation under a *final* stormwater runoff plan that has the agreement of the RWQCB. Further it must be assured that the plan includes consideration of more frequent major storm events.

**Action:** Develop the final stormwater runoff plan with review and agreement of the RWQCB. Use that plan as the basis for revision of Sec. 4.9.2.1 and associated impacts and mitigations. Recirculate the document per CEQA Guidelines.

In its discussion of flooding impacts, the impacts of local flooding and SLR are not discussed although Project low points are at just four feet msl, within 300' of a tidal slough and adjoining flood-prone Los Esteros Road. While the Project site forms a high point, it is edged by lands and a roadway generally susceptible to flooding and SLR. Potentially the site will be isolated under high water conditions locally and boundary stability maybe affected if soils become saturated by high water. The Project boundaries are on pervious soils.

**Action:** Assess the impact that high water on surrounding lowlands may have on the Project site. Revise Sec. 4.9.2.1 to reflect impacts and new mitigation. Recirculate the document per CEQA Guidelines.

#### LAND USE (IS 4.10)

The discussion of General Plan and Zoning (Sec. 4.10.1.3, p. 85) has several important omissions. It makes no mention of the PMP, approved April 19<sup>th</sup>, 2011, nor to the Draft final PMP that was published late in November, 2010. Each version includes the entire parcel in which the Project site is located, as discussed previously. The PMP cannot be omitted in this CEQA document.

The same section discusses the draft HCP but fails to mention its Burrowing Owl Strategy that does apply to the Project site.

**Action:** Amend Sec. 4.10.1.3 to include the PMP and the HCP's Burrowing Owl Strategy.

In Sec. 4.10.2.1, p. 87 the discussion of trails omits the trail proposals of the PMP including one that would border the northern edge of APN: 015-38-005.

In Sec. 4.10.2.2, p. 87, discussing consistency with the General Plan and Alviso Master Plan, the PMP is again omitted but clearly is a major factor in planning decisions for the Project site and the rest of the buffer lands.

**Action:** Amend Sections 4.10.2.1 and 4.10.2.2 to incorporate the PMP, its objectives and proposals for the Project site and other buffer lands.

#### NOISE (IS 4.12)

While this section correctly concludes that noise can be a significant impact on the Refuge, it omits assessment of certain potential impacts and it does not discuss vibration that may be associated with noise or noise events.

Disturbance by noise and vibration is not limited to human impact. It also impacts wildlife. Given the Project's location near wetlands, there is a need to assess the various sources of noise for impacts that are event-related, repeated or continuous. Under Regulatory Overview, it should be discussed that the FWS/Refuge has federal authority regarding noise and vibration impacts on the Refuge and wildlife, both on the Refuge and in surrounding wetlands.

**Action:** The FWS/Refuge shall be consulted to assess noise and vibration impacts on wildlife and create appropriate mitigation plans. Sec. 4.12 shall be revised wherever needed and recirculated per CEQA Guidelines.

Noise and vibration resulting from construction omitted the possible, most serious source of noise: *pile driving*. If this is the construction type required, this activity will be associated with extraordinary impacts. In previous comment, it has been stated that the final construction design plan must be complete before the CEQA process can complete in order to identify construction type. If that plan requires pile driving, Sec. 4.12.2.1 will have to be heavily revised per an assessment of the noise and vibration impacts and mitigations. Because it is of extraordinary impact, it will be necessary to include the FWS/Refuge in defining the impacts and mitigations. It is possible that pile driving may be limited to seasons of the year that do not disturb nesting and fledging species.

**Action:** If pile driving will be used in construction, a totally new noise/vibration impact and mitigation plan will need to be developed in conjunction with the FWS/Refuge. The revisions will need to be recirculated under CEQA Guidelines.

There is no evidence that the EEC at the Refuge was consulted in developing Impact NOI-1 or MM NOI-1.1. It is illogical to unilaterally assume the MND/IS conclusions are appropriate. As the Project did not notify the Refuge regarding this MND and public comment period, it is obliged to do so before any further action by soliciting comment from Refuge/EEC staff.

**Action:** Consult with the Refuge to review the Noise impacts upon the EEC and associated mitigation. Any resulting changes must be used to revise NOI-1 and MM NOI-1.1 and add anything additional that may be required. Recirculate revisions per CEQA Guidelines.

Section 4.12 does not consider the possible noise enhancement that may occur subsequent to construction of large buildings, which could introduce noise reverberation of generator motors and other operations noises either toward the Refuge or toward the WPCP, depending on construction designs. Such reverberation can be avoided through appropriate construction design.

**Action:** Reassess building design and materials to determine if the completed structures will enhance ambient noises. If noise enhancement is possible, redesign to mitigate and include discussion in Sec. 4.12,

#### TRANSPORTATION (IS 4.16)

Several factors are significant in regard to Zanker Road north of Highway 237 and its continuation as Los Esteros Road. It is the eastern access route to the community of Alviso. It is the route that the Refuge uses on all its materials to direct visitors to its Alviso location. It is a route frequently used or planned for improvement for bicycle use and pedestrian trails. It is the route central to traffic planning under the PMP. It is also the route used to reach the existing GreenWaste facilities (ZRRROL and ZMPF) and the planned Project.

In 2008, traffic impacts arising from an expanded ZMPF was a contentious issue. That expansion has not yet occurred but the issues of concern remain the same. The proposed Project will only exacerbate the impact.

This is a prime example of why this Project cannot be evaluated singly, segmented from the totality of the impact of the sum of the GreenWaste impacts. The traffic impacts discussed in the MND are incomplete and inadequate to the actual situation. They do not address the complete traffic impact nor the complete impact on the roadway itself.

In 2008, the Mayor and District Councilmember wanted CSJ and GreenWaste to jointly develop a traffic study. As it was in 2008, the study used for this MND is based solely on data provided by Zero Waste (GreenWaste). It simply does not fill the need.

**Action:** GreenWaste must work with CSJ and PMP managers to assess the cumulative impacts of all GreenWaste businesses on the traffic and roadway conditions and to develop appropriate mitigations, if any. The outcomes will be used to revise Sec. 4.16 which can then be recirculate per CEQA Guidelines.

MANDATORY FINDINGS OF SIGNIFICANCE (IS 4.18)

The issue of cumulative impacts has been discussed previously. With respect to definition of Project, it is clear that the Zero Waste proposal does not qualify as a project on its own but as a portion of what might be called the GreenWaste Los Esteros Road Project. It is possible that, individually, Zero Waste may not have significant impact while the whole project, including ZMPF and ZRRROL, may. As such the finding of "less than significant impact" to Question 2 (Sec 4.18 Checklist, p. 105) may indeed be incorrect, if fully assessed. Under Mandatory Findings, it may be a significant impact.

Question 4 of the Checklists asks whether the Project has the potential to achieve short-term environmental goals to the disadvantage of long-term goals. The CSJ has set aggressive goals to fulfill its Green Vision and the IS appears to align this Project with it. But the political impetus appears to be forcing this Project and its CEQA process forward at a pace that tramples on numerous significant environmental concerns, evident in an NOI, MND and IS working in concert to trample the CEQA process. It is a significant impact.

COMMENT SUMMARY

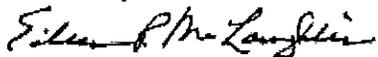
It is the conclusion of these comments that:

- (1) the MND and IS is inadequate for the purposes required under CEQA,
- (2) the Project does not qualify as a Project under CEQA,
- (3) the AD Project can only occur within a Project uniting all GreenWaste operations on Los Esteros Road
- (4) the environmental review of a GreenWaste Project must be subject to the requirements of a certified final PMP programmatic EIR and
- (5) the Mandatory Findings ought to report two significant impacts and conclude that the Project cannot proceed as a result.

Please send questions or responses to [wildlifestewards@aol.com](mailto:wildlifestewards@aol.com) or to 408-257-7599.

CCCR is a 501(c)(3) nonprofit organization that tracks its formation to the citizen-leadership that established the Don Edwards San Francisco Bay National Wildlife Refuge. In the decades since, while perpetually seeking to expand that Refuge, CCCR has acted persistently to protect the very special wildlife and habitats of and the Southern San Francisco Bay.

Yours truly,



Eileen P. McLaughlin  
Shoreline Watch for San Jose

CC: Florence LaRiviere, Chair, CCCR  
Carin High, Vice Chair, CCCR  
Eric Mruz, Manager, Don Edwards San Francisco Bay National Wildlife Refuge

Attach: 1. E. McLaughlin, CCCR 5/3/11 letter to J. Clark, CSJ Planning Department  
2. J. Clark, CSJ Planning E-mail letter to E. McLaughlin, CCCR



## CITIZENS COMMITTEE TO COMPLETE THE REFUGE

453 Tennessee Lane, Palo Alto, CA 94306 Tel 650 493-5540 Fax 650 494-7640 www.CCCRRefuge.org

May 3, 2011

Jodie Clark, Project Manager  
Department of Planning, Building and Code Enforcement  
City of San Jose  
200 E. Santa Clara Street, Tower 3<sup>rd</sup> Floor  
San Jose, CA 95113

**RE: Comment Period, SP09-057 Mitigated Negative Declaration**

Dear Jodie:

On behalf of our organization and others as may be interested, the Citizens Committee to Complete the Refuge (CCCR) requests that the Comment Period for the Mitigated Negative Declaration for the Dry-Fermentation Anaerobic Digestion Facility, #SP09-057, be extended 30 days.

An extension is required under CEQA because documents intended for public review have been unavailable. As of this morning, appendices of the Initial Study were not available as described in the April 8<sup>th</sup> Notice of Intent (NOI). These documents were not posted on-line nor available in the Dr. Martin Luther King, Jr. Main Library (confirmed by Reference Librarians).

As the Appendices are primarily technical in content and some are of substantial length, once these documents are confirmed as available, 30 days should be allowed for adequate review.

Additionally, it is evident that distribution of the NOI was inadequate. For CCCR and me personally, a request to be noticed, confirmed on March 28<sup>th</sup> by staff e-mail, produced delayed notice about 10 days following the NOI release. In addition, it was learned that the Don Edwards San Francisco Bay National Wildlife Refuge, referenced and described in released documents as impacted, was not notified by the City. It should have been and needs time to respond.

The consideration given to the public process by providing this extension will be greatly appreciated. For any additional information that you may need, feel free to contact me at 408-257-7599 or by e-mail to [wildlifestewards@aol.com](mailto:wildlifestewards@aol.com).

Yours truly,

Eileen P. McLaughlin  
Shoreline Watch for San Jose

CC: Florence LaRiviere, Chair, CCCR  
Carin High, Vice-Chair, CCCR

**From:** Clark, Jodie <jodie.clark@sanjoseca.gov>  
**To:** Eileen McLaughlin <wildlifestewards@aol.com>  
**Cc:** Davidson, John <John.Davidson@sanjoseca.gov>  
**Subject:** RE: comment extension SP09-057  
**Date:** Thu, May 5, 2011 5:41 pm

---

Eileen,

As required by the CEQA Guidelines and Public Resources Code, the Initial Study, technical reports, and associated notices for SP09-057 have been available for review at City Hall since April 8, 2011. While the City does its best to provide all CEQA documents online it is not a State Requirement. Therefore, the City of San Jose is not able to extend the comment period beyond the current 30 days.

As requested you will be added to the mailing list for all future notices regarding this project.

**Jodie Clark, AICP**  
**Project Manager**  
*Department of Planning, Building and Code Enforcement*  
*City of San Jose*  
*City Hall Tower - Third Floor*  
*(408) 535-7818*  
*fax (408) 292-6055*  
*jodie.clark@sanjoseca.gov*

Interested in being informed on Planning, Development and Land Use Issues? You can subscribe to e-mail notifications on issues that interest you. Please go to  
[http://www.sanjoseca.gov/development/subscription/email\\_updates.asp](http://www.sanjoseca.gov/development/subscription/email_updates.asp)

---

**From:** Eileen McLaughlin [<mailto:wildlifestewards@aol.com>]  
**Sent:** Tuesday, May 03, 2011 4:29 PM  
**To:** Clark, Jodie  
**Subject:** comment extension SP09-057

Hi Jodie,

The attached letter is a request that the public comment period for SP09-057 be extended. Largely, the request is based on reasons that I know are familiar to you.

Please make sure that I am on any distribution lists for notice of this change or any other public notice involving this project.

Thank you.

Eileen McLaughlin  
Shoreline Watch for San Jose  
Citizens Committee to Complete the Refuge  
408-257-7599  
408-230-0054 cell  
[wildlifestewards@aol.com](mailto:wildlifestewards@aol.com)  
[www.cccrRefuge.org](http://www.cccrRefuge.org)

## **Citizens Committee to Complete the Refuge**

**Response 1:** (p. 1, Notice of Intent). - The City made all relevant documents available to the public in the Planning office, for the entire review period (from April 8, 2011 to May 9, 2011), as stated in all public notices. As soon as someone notified staff that there was a problem with the on-line copy, which occurred on April 29, 2011, the problem was corrected within 2-3 business days.

**Response 2:** (p. 2, Information Availability). – Please see response #1.

**Response 3:** (p. 4, #1). As described in the Initial Study, the Nine Par property is subject to applicable state regulations contained in California Code of Regulations (CCR) Title 27. This proposed project causes this site to become subject to CCR, Title 27, Post-Closure Regulations, which in part specify the need for project review, approval, and compliance with state environmental monitoring and controls. The landfill will be required to file a plan for Post-Closure maintenance and monitoring in addition to a post-closure project application that addresses all applicable requirements of CCR, Title 27, Section 20190, including the approval of the City of San Jose Local Enforcement Agency, and the 'concurrence' of the Natural Resources Agency - CalRecycle Program.

Development and activities on the site may also be regulated by the San Francisco Bay Regional Water Quality Control Board through the issuance of Waste Discharge Requirements (WDR). Permits from the Bay Area Air Quality Management District (BAAQMD) will also be required for facility operation. As a former landfill, special consideration is required in dealing with existing and future soil conditions.

The existing landfill cover is being evaluated for acceptability as an engineered alternative cap under current regulations (CCR Title 27). As required for all landfill post closure operations, continuous monitoring of combustible gas and protection measures will be required for all enclosed structures and installation of groundwater, and perimeter gas monitoring wells will also be required in accordance with CCR Title 27.

All landfill closure requirements will be met in conformance with Title 27 and the RWQCB. At this time the RWQCB is reviewing final details for the design options for the landfill. The City of San Jose is committed to the closure of the entire landfill in accordance with the regulatory requirements for the post-end use.

**Response 4:** (p.5 #2). The two sites adjoining and across the Artesian Slough from the Nine Par site designated as Zanker Road Resource Recovery Operation and Landfill (ZRRROL) and the Zanker Material Processing Facility (ZMPF) are both owned in their entirety by Zanker Road Resource Management, Ltd. (Zanker). Zanker does not own GreenWaste Recovery, Inc. (GreenWaste). Zanker is a California Limited Partnership and GreenWaste is a California Corporation. Zero Waste Energy Development Company, LLC is a partnership of GreenWaste and Zanker. The proposed AD Facility project will have separate utilities and will be owned, managed and operated by Zero Waste Energy Development Company (ZWED). While the adjacent ZMPF and ZRRROL facilities may transfer materials between facilities, they are transacted through independent business relationships. Each company is separate and distinct, while they share some common ownership at the present time, the companies and their facilities are operated independently and have separate and distinct functions. In other words, none of the businesses require the other business in order to operate. Regardless of ownership, these properties have separate utilities and functions and are not part of the

proposed project. The two adjacent facilities are either existing or have their entitlements. The Initial Study fully describes their proposed interactions with the proposed project.

The shared scales will be a convenience to the adjacent ZRRROL and the project, similar to the sharing the access driveway. The shared scale does not exacerbate any environmental impacts. The proposed project could purchase their own scale and provide their own driveway, if needed.

**Response 5:** (p. 6; Light and Noise). Noise impacts to wildlife were evaluated in the *Noise Impacts during Operation* section of the Initial Study. As described on page 95 of the Initial Study, noise impacts from the project will be mitigated to a less than significant level. The project's operation noise levels would be 59 dBA DNL at the Environmental Education Center, where existing daily average noise levels are 57 dBA DNL. According to the City's project biologist, *H.T. Harvey & Associates*, the combined noise levels from the approved ZMRF and the proposed project will not significantly impact wildlife, as the increase in activity will not result in a substantial increase in noise levels.

According to the City's project biologist, the combined lighting from the approved ZMRF and the proposed project will not significantly impact any species or activities at the Refuge. The area between the two project sites (where combined increases in lighting would be greatest) is marginal habitat, at best, for the salt marsh harvest mouse, and no other species would occur in such abundance in that area to be significantly impacted even if the combined lighting were to substantially increase light levels. As one gets farther from the area immediately between the two sites, the combined increase in lighting would diminish, and it is expected to diminish rapidly (as compared to the increase from just one project or the other) based both on the measures incorporated into each project including conformance to the City Council Policy 4.31, Outdoor Lighting on Private Development and based on the lighting plan for ZMRF that indicated that light levels fell off very rapidly outside the site.

The comments are conclusory in nature and provide no basis or evidence to support scientific evidence.

**Response 6:** (p. 6; Traffic). As described in the Initial Study, a Trip Generation Study was done which identified the number of vehicle trips that would be generated by the project (p. 101). The City of San José then compared the anticipated traffic to the existing conditions and the conditions that will exist when the approved Zanker MRF is built on adjacent property. The City of San Jose defines traffic impacts in terms of level of service of roadway intersections. Adopted Council Policy 5-3 states that cause an intersection to degrade to Level of Service E or greater is inconsistent with General Plan policies to maintain acceptable traffic levels in the City and would therefore, create a significant adverse impact. City staff also maintains an approved methodology for estimating traffic increases and calculating impacts. A trip generation study was prepared for this project and is included in Appendix G. Results of this analysis found that the intersections in the area currently operate and are projected to continue to operate at an acceptable level of service under existing, background, and project conditions because the project will not add sufficient traffic to cause the intersections in the area to deteriorate below acceptable levels of service. The project traffic will not exceed the capacity of the existing circulation system or conflict with relevant standards on regional roadways as established by adopted City and Congestion Management Program policies. Therefore, traffic impacts were fully and adequately evaluated in the Initial Study.

The proposed project does not depend on the approved ZMRF Planned Development Rezoning project to be completed in order to proceed with full operation. The approved ZMRF development will still be required to complete their conditions of approval, regardless of the proposed project's approval. Although not relevant to the proposed project, a transportation impact assessment for the approved ZMRF development project, was completed in accordance with the City of San Jose standards and it was determined that the project was in conformance with the City of San José Transportation Level of Service Policy and no significant unavoidable impacts were identified. As a condition of that project, City staff recommended validating the EIR transportation conclusions regarding safety concerns to truck drivers who serve the site or to residents and visitors in the vicinity of the proposed project. This condition will be required at or immediately after commencement of operations of the approved ZMRF development.

As described in the project description for the proposed project, at full buildout 45,000 tons per year of bulking material and compost amendments will be transferred to the project site from the adjacent ZRRROL facility and 225,000 ton per year of organic feedstock will be transferred from other off-site locations. This was all evaluated in the Initial Study and Trip Generation Study.

The statement that a study needs to be done “jointly with the City” is based on a misunderstanding. The study done for this project was scoped by the City Staff, included information provided by the City, and was approved by the City Staff in the Department of Public Works.

**Response 7:** (p. 7; “The MND...”). The project does not propose to distribute biogas. The biogas will be used to power the on-site digester engines and a flare is included in each of the three phases as back-up to combust the biogas when insufficient engine capacity is available. The compost byproduct material will be sold as soil amendment primarily on the specialty markets of the commercial landscape and horticulture industry. The commercial market sector includes landscapers, land developers, contractors, golf courses, and private recreational facilities and are typically high volume compost users. The soil amendment can be used for erosion control, compost filter socks, compost blankets, and general soil amendment for plantings. Mainstream agricultural markets will not be able to utilize the compost produced from the proposed project because of the non-OMRI certification and contamination with non-organic materials; however, alternative agricultural markets including crops that are not intended for fresh consumption (i.e. fresh vegetables and berries), can utilize compost products produced by the proposed project. This can include nursery stock, flowering potted plants, ornamental nursery stock, cut flowers, potted foliage plants, indoor cut flowers, and landscape plants.

CEQA requires that an Initial Study address the whole of an action, to the extent of what is known at the time of project approval. The complete project as it is known to the City of San Jose is described in this Initial Study. Changes, additions or future expansion of the scope or design of the project requiring City reviews and approvals would be subject to subsequent CEQA analysis.

The comments keep referring to adjacent developments as part of the “whole of an action”, but since the ZMRF is already approved and the ZMPF and ZRRROL are already existing and independently operating without the project, they do not really need any “action”. The City of San Jose has working knowledge of the need for constant innovation and improvements in the waste management and recycling industry and does not preclude future improvements and refinements in processes at all the facilities. Those refinements are currently unknown and will, however, require CEQA review once they are identified.

The greenhouse gas emissions and transport of materials to and from the site was completely evaluated in the Initial Study and additional details can be found in the Air Quality Impact Assessment that included greenhouse gas emissions and the projected vehicle trips. The evaluations did not identify any significant impacts.

Organic materials to be processed are anticipated to be delivered from within a 150-mile radius but on the average of less than 50 miles away, based upon the business plan provided by the project applicant. At a distance of 150 miles, that would include areas such as Ukiah, Yuba City, Folsom, Groveland, Merced, Madera, and King City, California. At a distance of 50 miles that would include areas within Daly City, Santa Cruz, Gilroy, Tracy, Walnut Creek, and Richmond, California. The finished product is anticipated to be delivered within a 200-mile radius (areas could include Mendocino, Chico, and San Luis Obispo, California), based upon the marketing plan provided by the project applicant, but on average to a distance less than 50 miles away.

**Response 8:** (p.8 #3). The proposed ZWED project is a separate and independent project from the Water Pollution Control Plant (Plant) Master Plan, which is not completed and has only a preferred alternative plan for analysis purposes. The scoping process for the Plant Master Plan EIR recently started with the public noticing of the Notice of Preparation (NOP) for the EIR, dated May 23, 2011.

While the proposed project is located on Plant lands, it is physically separated by Los Esteros Road from the Plant itself, it will have separate utilities, and neither the proposed project nor the envisioned Plant Master Plan depend on each other to be approved or operate. In other words, the proposed project, if approved, can operate with or without approval of the possible future Plant Master Plan project because each project has a separate and independent utility. Further, the Plant Master Plan NOP states no changes are proposed to the Nine Par landfill site under the proposed Plant Master Plan.

In addition, each project has separate goals and objectives. One of the main objectives of the proposed project is to meet the City's Green Vision by diverting organic waste from landfills and converting waste to energy. At full buildout, the project will divert approximately 225,000 tons of organic waste from landfills. This is also consistent with the City's General Plan Solid Waste Goals 1 and 5 that promote extending the life span of landfills by composting and transforming solid wastes and encourage alternatives to landfilling.

The main purpose of the Plant Master Plan will be to improve and replace the aging infrastructure at the Plant in order to meet new regulations and to meet the projected population growth anticipated by Association of Bay Area Governments. Other uses of the Plant lands will be secondary to that primary objective. Adopted Council policy specifies that the highest priority for use of Plant lands is the Plant itself and defines the future expansion area as 200 acres directly south of the Plant itself (it should be noted that the project site is northwest of the Plant and across Los Esteros Road and not within this Plant expansion.)

In summary, the Initial Study evaluated the entire proposed project and did not 'piecemeal' any analysis of the environmental impact of the project. This facility is separate from and independent of the possible future Plant Master Plan and has no connection other than being on land owned by the Plant. The Plant Master Plan EIR when it is prepared will be required to evaluate the cumulative environmental impacts of that project and others that are pending at that time.

**Response 9:** (p.9; Project Overview). The comment is incorrect, the Vector Management Plan was provided to the public for review and comment during the public review period for the Initial Study in the project description. The Vector Management Plan (VMP) is an impact minimization measure that is incorporated into the project; it is not a mitigation measure for a specifically identified impact. CEQA does not prohibit project applicants from incorporating measures to avoid and minimize environmental impacts into their projects, and the VMP does just that.

The IS/MND does not inappropriately defer details of the VMP. Although the VMP itself is not described in its entirety in the IS/MND, Section 3.9 of the Initial Study contains a great deal of detail on the components of the VMP, including specific measures to minimize the abundance of nuisance species at the site, minimize these species' access to food resources, and remove nuisance mammals from the site. The Initial Study describes the monitoring and adaptive management process, lists a number of adaptive measures that could be employed if necessary, and describes the process by which the City would review and approve the VMP and oversee the implementation of the VMP.

The Initial Study notes that, in addition to measures specifically described in Section 3.9, additional measures that are not described in that section whose goals are to limit accessibility of waste to wildlife as described on p. 12 of the Initial Study, may be implemented in the future. This is not inappropriately deferring details of the project description; rather, it acknowledges that as the state of the art in nuisance species abatement and control advances and site-specific experience is gained, the applicant may employ additional measures that will improve the effectiveness of abatement. The IS/MND does not rely on these future improvements to ensure that impacts associated with nuisance species are less than significant, but rather provides an opportunity to use improved techniques if they become available, and are accepted by the City of San Jose Director of Planning, Building and Code Enforcement.

The IS/MND does not defer formulation of mitigation to a later date. The statement quoted in this comment refers very clearly to additional measures that may be implemented. The VMP is identified, discussed at length and is proposed by the project. CEQA does not preclude identification and utilization of different, additional, better, newer, or other elements by an approved program that stipulates the purpose, goal and measures of success. Although not required by CEQA because it is a part of the proposed project, the Vector Management Plan will include a baseline, performance standards, and monitoring requirements to ensure ongoing effectiveness.

**Responses 10 and 11:** (p.9; Description of the Proposed Project). The Initial Study evaluated the full buildout of project. There are three phases planned for the development of the project, but the Initial Study evaluated the worst case condition, that included operation of all three phases (full buildout) and based on this evaluation the project would not result in any significant unavoidable environmental impacts.

The full scale and dimensions of the proposed buildings and their proposed location were taken into account for the odor, noise, and wind patterns analyses and conclusions that were described in the Initial Study. Figure 3.0-2 identifies building heights and lengths and shows the proposed building elevations and line-of-sight from the nearest public receptors traveling along Los Esteros Road.

CEQA requires evaluation of the change compared to existing conditions. While possible options for the Plant Master Plan have been developed, a final Plant Master Plan has not been adopted and no

environmental review for the Plant Master Plan has been completed at this time; therefore, identification and evaluation of future trails for the Plant Master Plan are speculative. Any trails apart of the Plant Master Plan will be fully evaluated in the Plant Master Plan EIR.

The view of the project site from the USFWS NWR is described in Section 4.1.2.1 of the Initial Study. The viewshed in this area is not a pristine environment. There are two active landfills, the Water Pollution Control Plant, two resource recovery operations, a group of industrial buildings on the north side of Alviso, and a major power plant, plus a great many overhead electrical transmission lines. As described in the Initial Study, portions of the buildings and operations may be visible from the NWR Environmental Education Center, although these views would be difficult to distinguish from the existing viewshed that includes the ZMPF and ZRRROL. These adjacent uses are much higher in elevation than the proposed AD facility. In addition, the current height of the surrounding landfills already alters the existing views of hillside areas from the Don Edwards San Francisco Bay NWR.

**Response 12:** (p.10; Vector Management Plan). Please refer to Response 9.

**Response 13:** (p.10; Aesthetics). Please refer to Responses 5 and 11.

**Response 14:** (p.10; Air Quality). As stated in Response 11, the full scale and dimensions of the proposed buildings and their proposed location were taken into account for wind patterns analyses and conclusions that were described in the Initial Study. This was evaluated in what is referred to as a downwash analysis, and is part of the air dispersion modeling with the USEPA-approved model AERMOD. Emissions of criteria air pollutants, toxic air contaminants, and odorous compounds were all subjected to detailed air dispersion modeling using AERMOD, which includes a complete downwash analysis with a program called Building Profile Input Program (BPIP)-Prime. Detailed dimensions of the project's structures are used to determine the potential wake effects on the emission plumes from project sources, and any resulting downwash that might occur. Based on "Reference Guide to Odor Thresholds For Hazardous Air Pollutants Listed in the Clean Air Act Amendments of 1990, EPA 600/R-92/047", AERMOD was used to evaluate the impacts of 20 emitted compounds that could potentially cause odor problems from the project. The modeled maximum impacts from all of the 20 odorous compounds are between two and nine orders of magnitude lower than their published odor thresholds. Such detailed air dispersion modeling of odorous compounds went beyond the minimum analytical requirements of the BAAQMD CEQA Guidelines. The commenter is correct in stating that wind effects of swirls or other patterns alter impacts involving distribution of concentration of odors, particulate or emissions and this was evaluated in the above described modeling.

This comment does not raise any new evidence of new environmental impacts.

**Response 15:** (p.11; Biological Resources). The City does not dispute that the project site is located near the US Fish and Wildlife (USFWS) National Wildlife Refuge (NWR) and the project is required to evaluate the possible impacts to listed species under the Endangered Species Act and any other resources that could be impacted by the project site. A complete biological assessment was completed as part of the environmental review for the proposed project and all possible impacts to biological resources was mitigated to a less than significant level by mitigation and avoidance measures proposed by the project. In the event any official consultation or permit approval is required from the USFWS the appropriate coordination will be completed.

The City did receive comments from the USFWS NWR on the proposed project's environmental review and the City provided responses to their concerns.

**Response 16:** (p.11; Trees). CEQA is required to evaluate the proposed changes to existing conditions. The current condition of trees on the project site compared to past historical conditions is not required of CEQA evaluations because historical conditions are not a result of a newly proposed project. It is required that consistency with a local tree ordinance and policies be addressed, which is Section 4.4.2.5.

According to the landscaping plan most trees would be planted along the southern and western project site boundaries, as well as around the administration building and digester buildings as opposed to along the northern boundary closest to the wetlands. Trees along the southwestern boundary will grow to 20-35 feet tall, which is a relatively low canopy. Other unpaved areas, including the northern boundary, will be planted with a native restoration/erosion hydroseed mix. In conformance with the General Plan and City policies, City staff will continue to work with the applicant to incorporate appropriate native trees and vegetation into the planning plan. It is assumed the tree roots may come into contact with waste, and therefore, all vegetation used on the site will be species that can live on closed landfills.

Fencing and trees associated with the ZMRF to the west, large metal electrical transmission towers to the west and north, wooden powerline poles on and adjacent to the site, and fencing around the ZRRROL site to the north/northeast already provide numerous taller perches for raptors in close proximity to sensitive wetland habitats (such as those north of the project site that could support salt marsh harvest mice) and potential burrowing owl habitat. Given that raptors are territorial, planting new trees will not result in a substantial increase in the number of raptors that could prey on sensitive species in the vicinity. Trees are only to be planted adjacent to existing street, proposed parking lot and along the southwestern site boundary and no trees are proposed adjacent to the Refuge. Species proposed along the southwestern site boundary which would be the trees closest to the Refuge, will only grow approximately 20 to 35 feet tall. According to the City's consulting biologist, these trees could be used as raptor perches, but they would not provide substantially better or more perches than are currently out there. Raptors may congregate in areas of high prey abundance, but as mentioned above, they are also territorial enough that each tree, pole, tower, or fencepost would not to equate to another raptor. Planting trees will just provide more perches for the raptors that are out there foraging already, but would not substantially increase predation rates. As a result, such tree planting would not result in a significant impact to sensitive species due to the provision of perches for raptors.

(p.12; HCP)

This comment does not raise any new evidence of new environmental impacts. The not yet adopted draft HCP has developed an *expanded* study area for burrowing owl conservation, that includes the northern edge of the County and portions of Alameda County and San Mateo County. The purpose of this expanded study area is provide additional conservation areas for the burrowing owl since there are limited conservation areas within the draft HCP study area. In the expanded study area allowable covered activities are limited to conservation actions for the burrowing owl for areas within the draft HCP study area. Any projects or activities of jurisdictions which are not permittees of the draft Santa Clara HCP study area are not covered under the HCP. The presence of burrowing owls was evaluated as part of the biological resources evaluation. The impacted areas of this project site are currently of limited value to roosting or nesting burrowing owls because of the small number of ground squirrel burrows, and the dense and high herbaceous vegetation characterizing much of the

site. These conditions and that the site is landfill do not provide high value habitat for burrowing owls. The project will, therefore, not result in a substantial loss of burrowing owl habitat under existing conditions if owls use the site only for foraging but not for roosting or nesting. Standard pre-construction surveys for burrowing owls will be completed on the site in conformance with CDFG protocols.

No evidence of an environmental impact is raised by this comment. The main goal of the draft Recovery Plan is the comprehensive restoration and management of tidal marsh ecosystems. As described in the biological resources section of the Initial Study, the project will not result in any significant impacts to any wetland or special-status species.

**Response 17:** (p.12; Geology and Soils). As mentioned in the Initial Study, all final foundations will be subject to review and approval by the City Geologist prior to issuance of grading permits. As the project design has progressed, the project applicant has determined that they will use grade beam foundations that are designed to avoid the use of piles into landfill waste. The construction noise impacts have been fully evaluated in the Initial Study including pile driving (although pile driving is no longer required) and appropriate mitigation measures have been included in the Initial Study to reduce these impacts to a less than significant level. This was part of the project evaluated by the consulting biologists.

The Geotechnical Investigation addressed the slope stability including an analysis of the north slope adjacent to the wetlands and considered loads from the proposed buildings and other improvements (refer to Appendix C of the Initial Study). Historic borings located in the northern portion of the site were used to confirm that the conditions there are similar to the conditions the borings encountered in the southern portion.

**Response 18:** (p.13; Greenhouse Gas Emissions). The proposed project is not subject to the possible future Plant Master Plan because there is no adopted plan at this time. The proposed project will be subject to the policies and plans that are applicable to the project at the time of approval and issuance of permits.

The comment on this subject is incorrect. The GHG emissions generated by the transport of finished compost product from the site to unspecified places located a conservative average of 50 miles away from the project site were disclosed in the Initial Study. The BAAQMD CEQA Guidelines clearly indicate that impacts must, and did, include analysis of all sources within 1,000 feet from the project fence line of the criteria pollutant PM<sub>2.5</sub> and toxic air contaminants that are carcinogenic or have chronic non-cancer health effects. There is no requirement in the BAAQMD CEQA Guidelines to evaluate cumulative GHG impacts because the BAAQMD uses a project-based GHG significance threshold which is set at a de minimus level below which GHG emissions are considered less-than-significant both individually and cumulatively. Nonetheless, Table 4-4 in the Air Quality Report and the associated text includes a comparison of the GHG emissions from all sources in Santa Clara County, California, the US, and the globe.

**Response 19:** (p. 13; Hazards and Hazardous Materials). The Final Workplan was completed during the public review and no changes were made between the Draft and Final versions, so the Draft Workplan is essentially the Final Workplan. Based on the Workplan, the Final Site Investigation was completed. Based on the results of Final Site Investigation no additional mitigation is required. The draft and final versions of both the Workplan and Site Investigation were reviewed by the City of San Jose, CalRecycle, and Regional Water Quality Control Board and these

agencies will continue to be involved in the review process in accordance with Title 27. For additional information, please contact the Napp Fukuda, Sustainability & Compliance Manager, City of San Jose, Environmental Services Department, (408) 975-2594 or [Napp.Fukuda@sanjoseca.gov](mailto:Napp.Fukuda@sanjoseca.gov). As stated previously in Response 3, all landfill closure and post closure requirements will be completed in accordance with Title 27. The CEQA process does not require all permits and approvals to be obtained prior to CEQA approval, in fact, the CEQA process provides environmental clearance in order for discretionary permits to be issued.

According to the project geologist for the project (Tom Vercoetere, Professional Geologist, Senior Consultant, Golder Associates Inc.), the proposed project development will have no effect on the existing TCE impact zone (plume) that is located approximately 15 feet below ground surface in a sand layer that is overlain by low permeable bay mud or refuse within that landfill. Additionally, the existing TCE, which is in the landfill waste and in groundwater, will have no adverse effects on future workers or visitors to the site. Due to the depth and location of TCE, no surface runoff from the site will contain TCE, and therefore, surface runoff of TCE into the wetlands will not occur. The reduction of pervious surfaces (paving portions of the site and constructing buildings) on the project site and implementation of the proposed stormwater pollution prevention plan will improve the water quality of surface runoff and reduce stormwater infiltration into the waste that contains TCE. This will reduce the potential for TCE migration because by decreasing the permeable surface area, infiltration into the landfill refuse will be reduced. In addition, the development of the project will have no effect on the current groundwater flow below or nearby the project site because groundwater flow occurs in the sand layers that are 15 to 20 feet or more below ground surface.

The City of San Jose does its best to inform all responsible and interested agencies, to that end the document was sent to the State Clearinghouse and has been circulating since April 8th. According to the Clearinghouse database the document was sent to the Region 2 office during the public review period ([www.ceqanet.ca.gov/DocDescription.asp?DocPK=650849](http://www.ceqanet.ca.gov/DocDescription.asp?DocPK=650849)).

**Response 20:** (p.14; Hydrology and Water Quality). The current stormwater control plan (Worley Parsons Group, Inc. 2010) includes six vegetated swales, four forebays, and a series of storm drains designed to avoid and reduce impacts from stormwater run-off from the project site to a less than significant level. The stormwater runoff collected in storm drains and discharged from drainage collection areas (basins) will first be channeled into open forebays, where all large sediment particles will settle out and can be removed as needed. The second water quality treatment will occur as each forebay continues to drain into one of six vegetated swales. This system will therefore provide two levels of water treatment before the stormwater is released at a controlled flow rate into the existing catch basin and wetlands to the west of the project site. The rate of outflow being discharged to the existing water and wetlands will be limited so as to avoid exceeding the prevailing pre-developed flow.

The forebay and vegetated swale containment system is designed to handle 100-year flood conditions, and therefore will not be overwhelmed and released untreated water into the adjacent wetlands. In addition, the volume of runoff released from the site in any particular area is not expected to be substantially greater than existing conditions, as the outfall areas will distribute runoff to four release locations. As a result, release of runoff from the site is not expected to result in substantial changes in the character of receiving areas off-site (e.g., by converting saltmarsh habitat to brackish or freshwater marsh). Thus, project impacts to adjacent salt marsh and aquatic habitats resulting from stormwater runoff, including both quality and quantity-related impacts, will be less than significant. In addition, mitigation measures in the Initial Study list Best Management Practices

(BMPs) and Treatment Control Measures (TMCs) to be incorporated into the project's Stormwater Pollution Prevention Plan (SWPPP). The City will require the proposed project to implement a stormwater control plan to address Provision C.3 of the National Pollutant Discharge Elimination System (NPDES) permit and City Policy 6-29 prior to issuance of the Special Use Permit and to the satisfaction of the Director of Planning, Building and Code Enforcement.

In May 2009, BCDC submitted preliminary recommendations for amendments to the Bay Plan to incorporate climate change. This proposal adopts sea level rise estimates of 16 inches (1.3 feet) by 2050 and 55 inches (4.6 feet) by 2100. Based on the projected sea level rise and coastal flooding maps for the South Bay, the project site itself would be elevated above the area subject to predicted sea level rise, but areas surrounding the site (Los Esteros Road and most of Alviso) would be affected by the predicted sea level rise due to global climate change.<sup>1</sup> The project site including proposed buildings and facilities are above the 55-inch projected sea level rise area. Due to the lower elevations of Los Esteros Road, access to the site may become affected by the predicted sea level rise. Because the access roads to the project site and most of the project area would likely be affected by predicted sea level rise, the proposed project may cease operations at some point in the future. The sea level rise will be a regional issue for the appropriate agencies, including the City of San Jose, to address.

**Response 20:** (p. 15; Land Use). While possible options for the Plant Master Plan have been developed, a final Plant Master Plan has not been adopted and no environmental review for the Plant Master Plan has been completed at this time. The Initial Study cannot discuss a document that does not exist.

Please refer to Response 16, for comments regarding the HCP.

**Response 21:** (p.15; Noise). The IS/MND analyzed effects of the operation of the facility on wildlife (*Impacts of Project Operation on Wildlife*). This impact statement considered all the potentially occurring wildlife species, including common species and special-status species such as those listed in the comment, and specifically noted the increase in noise and site activity, which would include vibrations. However, due to the absence of the California clapper rail and western snowy plover (biological report pp. 15,21-23) and the scarcity of burrowing owl, salt marsh harvest mouse, and salt marsh wandering shrew (biological report pp. 15,23-26, 36) on or near the site and its immediate vicinity, the existing levels of disturbance from adjacent facilities (ZRRROL, ZMPF, and Plant facilities) (to which any individuals in the project vicinity must already be habituated), and screening vegetative cover incorporated into the project, such indirect impacts were considered less-than-significant for most species. These impacts were specifically characterized as identified by the consulting biologists as less than significant due to a combination of the low level of potential effect (e.g., the indirect effects of lighting, noise, or vibration, when viewed in the context of existing levels of lighting and disturbance in the vicinity (including ZRRROL, ZMPF, and Plant facilities) would not be sufficient to cause these special-status birds to abandon nests) and the low number of individuals or pairs (few or none) that could possibly be affected by the project, relative to regional populations.

---

<sup>1</sup> Sources: 1) San Francisco Bay Conservation and Development Commission. *Shoreline Areas Vulnerable to Sea Level Rise: South Bay*. Map. 2008. Available at: [http://www.bcdc.ca.gov/planning/climate\\_change/index\\_map.shtml](http://www.bcdc.ca.gov/planning/climate_change/index_map.shtml). 2) California Climate Change Center. *Impacts of Sea-Level Rise on the California Coast*, March 2009.

Pile driving was evaluated for both noise and vibration for the project site, refer to Table 7 of Appendix F Noise Study. The table identifies the maximum noise level ranges for different types of construction equipment to be used for the AD Facility. The noise report (which includes impacts of construction noise including pile driving) was evaluated by the consulting biologists, who determined that no significant impact would occur (see p. 46-53 of IS).

The full scale and dimensions of the building plans and the proposed topography were studied in order to determine the projected noise levels during project operation at the property line.

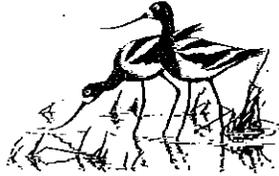
**Response 22:** (p.16; Transportation). Please refer to Response 6.

**Response 23:** (p.17; Mandatory Findings of Significance). The two sites adjoining and across the Artesian Slough from the Nine Par site designated as ZRRROL and ZMPF are both owned in their entirety by Zanker Road Resource Management, Ltd. (Zanker). Zanker does not own GreenWaste Recovery, Inc. (GreenWaste). Zanker is a California Limited Partnership and GreenWaste is a California Corporation. Zero Waste Energy Development Company, LLC is a partnership of GreenWaste and Zanker. The proposed AD Facility project will have separate utilities and will be owned, managed and operated by Zero Waste Energy Development Company (ZWED).

While the companies may transfer materials between facilities they are transacted through independent business relationships. Each company is separate and distinct and while they share some common ownership, the companies and their facilities are operated independently and have separate and distinct functions. Regardless of ownership these properties have separate utilities and are not part of the proposed project.

The two sites nearby are either existing or have their entitlements. They are not proposed for anything at this time. The Initial Study fully describes the proposed interactions with the proposed project. The traffic numbers assumed all existing and approved trips, in addition to the proposed project trips evaluated by City Staff.

**Response 24:** (p. 17; comment summary). Please refer to Responses 8 and 23. The commenter's concerns are hereby included in the environmental record and will be before the City's decision-makers, the City Council, for their consideration.



Santa Clara Valley Audubon Society  
Founded 1926

May 9<sup>th</sup>, 2011

*Via Email*

Jodie Clark, Project Manager  
Department of Planning, Building and Code Enforcement  
City of San Jose

Re: **City File No. SP09-057, Dry Fermentation Anaerobic Digestion facility**

Dear Ms. Clark,

The Santa Clara Valley Audubon Society (SCVAS) has reviewed the Mitigated Negative Declaration (MND) for the Special Use Permit for a Dry Fermentation Anaerobic Digestion facility (AD) to process the organic portion of solid waste. Strong supporters of renewable energy development and responsible waste management, SCVAS believes that the transition to renewable energy and the use of green waste must be done right, with attention to proper siting and sufficient mitigation so that biological resources are not irreversibly harmed. After review of the Mitigated Negative Declaration (MND) for this project and the associated documents, SCVAS concluded that the documents, as currently presented, are inadequate and do not describe nor mitigate the full environmental effects that this project may impose on aesthetic, biological and water resources.

CEQA Guidelines section 15378 require and EIR to study “the whole of an action” which has the potential to result in a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. A public agency is not permitted to subdivide a single project into smaller individual sub-projects in order to avoid the responsibility of considering the environmental impact of the project as a whole. “The requirements of CEQA, ‘cannot be avoided by chopping up proposed projects into bite-size pieces which, individually considered, might be found to have no significant effect on the environment or to be only ministerial. The term ‘project,’ ... means the whole of an action which has a potential for physical impact on the environment, and ... [t]he term “project” refers to the underlying activity and not the governmental approval process.’ *Orinda Assn. v. Board of Supervisors* (1986) 182 Calliope.3d 1145, 1171-1172.

We believe that the MND, as proposed, constitutes “piecemealing” of environmental review, a

*p. 1 of 10*

practice prohibited by CEQA. We argue that this project be evaluated as a part of the Environmental Impact Report for the Plant Master Plan, and not be segregated. At the very least, a comprehensive EIR should be prepared for this project, so that Government Agencies and the public can provide comments, and so that San Jose City Council can accept public comments, evaluate alternatives, consider project-specific and cumulative impacts, and make an informed decision that includes a determination of overriding consideration as needed. Our comments also identify a missing Monitoring, Mitigation and Reporting Plan and resources for the implementation of such plan. Furthermore, the City failed to prepare a Water Supply Assessment ("WSA"), as required by the Water Code.

We would like to point out that Appendices of the Initial Study were not readily available until May 3rd when the City fixed its web posting. CEQA Guidelines (15201) state, "Public participation is an essential part of the CEQA process. Each public agency should include provisions in its CEQA procedures for wide public involvement, formal and informal, consistent with its existing activities and procedures, in order to receive and evaluate public reactions to environmental issues related to the agency's activities. Such procedures should include, whenever possible, making environmental information available in electronic format on the Internet, on a web site maintained or utilized by the public agency." Yet the Biological Resources Study was available online for less than one week.

We expect a comprehensive environmental review for a project of the magnitude proposed (three 60,000 square foot buildings, incidental office space, biofilters, outdoor space for aerated curing piles, screening and stockpiling finished materials, 6 power generators and 3 emergency generators on an approximately 41 gross acre site), especially as the proposed project site is adjacent to National Wildlife Refuge, the San Francisco Bay, and the village of Alviso. We ask that the MND be set aside and replaced by a comprehensive review and disclosure, to inform the public and decision makers of the full impacts on natural resources, listed species and their habitat, public health, and San Francisco's Bay ecosystem. CEQA requires a leading agency to prepare an Environmental Impact Report (EIR) whenever substantial evidence in light of the entire record supports a "fair argument" that the project may have a significant adverse impact on the environment. **We believe that we can fairly argue, based on substantial evidence, and in light of the whole record, that this project may have a significant environmental effect and that an EIR must be prepared.**

## **I. ENVIRONMENTAL IMPACTS**

### **I.1. Aesthetics**

- The analysis provided (IS, Page 15) is deficient in that it did not include views from the trails along the wetlands of Don Edwards Wildlife Refuge. These trails are used by the public for recreation, thus viewsheds from Don Edwards Wildlife Refuge and the Refuge trails should be included in the analysis.

## I.2. Biological Resources

### **I.2.1. Contamination of Aquatic and Wetland Habitat (Impact Bio-1, MND page 2)**

- The IS identifies construction and grading activities as a potentially significant impact since these activities can contaminate adjacent aquatic and wetland habitat. The minimal discovery and analysis of impacts and risks associated with contamination of aquatic and wetland habitat is especially worrisome, since the project site is an inactive landfill that never underwent RWQCB closure/post-closure. Reportable levels of trichloroethylene (TCE) have been detected on the corner upslope from the wetlands. TCE is carcinogenic in animals, and the project should specifically analyze TCE potential contamination and properly mitigate this potential impact to wildlife species that utilize the wetlands.

### **I.2.2. Impacts to burrowing owls and their habitat**

The IS acknowledges that Burrowing Owl, a California Species of Special Concern, is known to occur in the grasslands and ruderal habitats on Water Pollution Control Plant lands south of the site and in New Chicago Marsh to the west. The IS explains that Burrowing owls are expected to occur and forage on the site. California ground squirrel burrows on the project footprint provide potential roosting and nesting sites for the species, and burrowing owls could potentially nest or roost on the site. **Thus the project site contains nesting and foraging habitat for an existing population of burrowing owls.**

#### **I.2.2.1. Evaluation of Significant Impact**

The IS states, “Due to recent declines in burrowing owl populations, **the loss of any individuals or active nests would be considered a significant impact under CEQA.** In addition, burrowing owls along with all other native birds are protected by the federal Migratory Bird Treaty Act and the California Fish and Game Code.” However, the documents propose, “The impact areas of this project are currently of limited value to roosting or nesting burrowing owls because of the small number of ground squirrel burrows, and the dense and high herbaceous vegetation characterizing much of the site”. The MND proposes that **the project will not result in a substantial loss of burrowing owl habitat under existing conditions IF** (SCVAS emphasis) **owls use the site only for foraging but not for roosting or nesting.** This conditional and vague conclusion is controversial and it reveals major flaws in the MND in that:

- 1) baseline information is unavailable due to inadequate survey efforts;
- 2) the importance of habitat for foraging owls is disregarded.

We will now elaborate on these flaws:

#### **1) Lack of baseline information due to inadequate survey efforts**

- The MND/IS rely on reconnaissance-level surveys for burrowing owls. There is no information on the calendar year and/or time of year when these surveys were conducted, and thus the public cannot comment on the adequacy of the methodology used. This is inappropriate and does not abide by CEQA.
- The MND defers protocol-level surveys to a pre-construction phase. This is inappropriate by CEQA. Burrowing owls are site tenacious and demonstrate burrow fidelity, and a

protocol-level survey should be used for determination baseline site-specific information. An EIR should be produced and illustrate whether or not burrowing owls utilize the site for nesting, roosting or foraging. Surveys should determine exactly how close the site is to any existing burrowing owl burrows and colonies, and provide a map to show the site and its proximity to burrowing owls.

- CEQA requires that the Lead Agency evaluate potential environmental effects based to the fullest extent possible on scientific and factual data. In the absence of defined thresholds, significance conclusions must be based on substantial evidence, which includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts (CEQA Guidelines §15064). Since protocol-level surveys were not conducted as a part of the IS, there is no baseline to determine whether the site is, or is not, occupied by burrowing owls and whether or not it is used by foraging owls. **The IS offers no data on burrowing owl use of the project site. Thus, the analysis provided in the MND is speculative and is not supported by fact.**

## **2) Disregard for the importance of foraging habitat**

In a recent letter from Carl Wilcox, Regional Manager with the California Department of Fish and Game (CDFG) to Matt Krupp, planner of Water Pollution Control Plant Master Plan (dated March 16, 2011), CDFG cautions that all non-native grasslands and ruderal habitats in the Water Pollution Control Plant area could provide suitable habitat for burrowing owls. DFG recognizes habitat loss as the primary reason for the decline of the local burrowing owl population, and states, "Any loss of burrowing owl habitat should be considered a significant impact and adequately mitigated". Furthermore, the CDFG **"current recommendation for projects not covered by the SCVHP is that mitigation lands consist of occupied burrowing owl habitat of greater quantity and quality than that impacted"**.

- The controversy regarding the value of the project site as burrowing owl habitat, in itself, justifies the preparation of an EIR that would fully examine that quality of the heterogeneous vegetation patterns on the project site for foraging burrowing owls. While the owls prefer to nest in short vegetation or bare ground, this is not a requirement for foraging habitat. In fact, heterogeneous habitat may be of high quality for foraging, as these habitats often provide food and refugia that allow a rich prey base to thrive. Surveys of utilization by burrowing owls and of prey base are the correct methodology to assess foraging habitat quality. Thus, the conclusion that the site is less than optimal for owls is not supported, especially since owls are known to use what humans often view as sub-optimal, ruderal or heterogeneous habitat for foraging.
- The conclusion that the project would not result in substantial loss of burrowing owl habitat is not supported by fact, or by scientific evidence, and is not acceptable to the CA Department of Fish and Game that considers any impact on burrowing owl habitat to be a significant impact. A new, fact based IS should be prepared to establish the baseline for analysis by an EIR. The EIR should also provide an in-depth description of the site, including description of all sparse vegetation or bare ground that could be used by nesting burrowing owls.

- The California Supreme Court has stated that an EIR is required to resolve, “uncertainty created by conflicting assertions” and to “substitute some degree of factual uncertainty for tentative opinion and speculation” [No Oil, Inc. V. City of Los Angeles (1975) 13 Cal.3d 68, 85.]. Thus an EIR is required to resolve the controversy regarding the value of the project site for foraging burrowing owls and to evaluate mitigations.

To conclude, we argue that the MND’s proposition that “**the project will not result in a substantial loss of burrowing owl habitat under existing conditions if owls use the site only for foraging but not for roosting or nesting**” is vague and not supported by evidence or fact, and thus violates CEQA guidelines.

### **I.2.2.2. Inadequate Mitigation**

In the abovementioned March 2011 letter, CDFG recommends that mitigation measures utilize the approaches in the burrowing owl conservation strategy in the Santa Clara Valley Habitat (SCVHP) Plan.

- The mitigations proposed in the MND are vague, incomplete and inconsistent, and fail to follow the SCVHP guidelines.
- **The MND fails to mitigate for the loss of foraging habitat and to preserve burrowing owl habitat land of the same or better quality as will be affected by the Project.**
- The MND proposes off-site mitigation should an owl be found. It is not clear whether off-site mitigation would be provided locally, or alternatively by buying credits in a conservation bank (which causes owl declines locally). Offsite mitigation by buying credits in a mitigation bank in remote locations should not be considered, as it results in mortality of evicted owls and threatens the existence and recovery of the remnant population of burrowing owls in the South Bay area.
- SCVAS supports off-site mitigation nearby, in the Water Pollution Control Plant or Alviso area.
- The MND provides no criteria for the maintenance of mitigation land. An EIR should provide information of the type of long term security and management that would be provided and specify management tools (mowing or grazing schedules, artificial burrows etc.)
- The MND proposes a 150' buffer zone from occupied burrows outside of the breeding season. The burrowing owl consortium guidelines indicate a 160' buffer.
- 30-day pre-construction surveys for nesting burrowing owls are inadequate as mitigation, since burrowing owls may occupy a burrow and start nesting anytime. No more than 2 days should pass between a nesting owl survey and start of construction (David Johnston,

Senior Biologist, Department of Fish and Game, in an email to San Jose Planners John Davidson and Janis Moore, August 30, 2010).

**To conclude, SCVAS argues that the MND/IS fail to adequately protect burrowing owls and their burrows during project development and beyond, and provide inadequate mitigation for loss of habitat. The MND cannot support the findings of “no significant impact” based on the proposed, inadequate and/or deferred surveys, analysis and mitigations.**

**I.2.3. Impacts to Salt Marsh Harvest Mouse, Salt Marsh Wandering Shrew, Clapper Rail, snowy plover and other shorebirds, nesting special status birds, and bird and wildlife habitat**

- The MND/IS neglected to analyze or propose mitigation for the potential impacts of noise and vibrations due to construction (including pile driving) and operations on bird and mammal species in the adjacent wetlands and in the Don Edwards Wildlife Refuge (Clapper Rail, Salt Marsh Harvest Mouse, Salt Marsh Wandering Shrew) as well as on burrowing owls on the project footprint and the surrounding habitat.
- Please analyze all project-generated-impacts on special-status bird species including the California clapper rail, western snowy plover, loggerhead shrike, San Francisco common yellowthroat, Alameda song sparrow, and Bryant’s savannah sparrow, that could nest in vegetation near the project site. Since all native birds are protected by the federal Migratory Bird Treaty Act and the California Fish and Game Code, noise, light or other project related impacts should be evaluated in depth.
- The proposed development will result in the removal of 34 trees, all of which are ordinance-sized trees. Nesting bird and bat colony surveys have not been performed, and thus the biological resource value of these Eucalyptus and other trees has not been evaluated.
- Environmental analysis should identify and mitigate impacts associated with timing of tree removal to avoid impacting nesting birds
- Please describe success criteria and monitoring methods for mitigating impacts to all listed species.

**I.2.4. Trees**

- The MND proposes that 34 ordinance-sized trees will be removed, and up to 136 trees will be planted. The MND defers the selection of species and any decision regarding the number of trees to be planted (MM Bio 4-1, MND Page 5). Trees provide perches for raptors, and so the number of trees and the configuration of tree planting can impact endangered wetland species as well as burrowing owls. Thus, a tree-planting/landscape plan should be submitted as an integral part of an EIR, and potential impacts on wildlife should be evaluated.

**I.2.5. Vector Management Plan (VMP)**

The project description does not provide a full description of how food is handled at the facility, and the frequency and quantity of food that may become available to nuisance species. The

*p. 6 of 10*

Initial Study indicates that, "... completely eliminating access to food waste and refugia for nuisance species may not be feasible". The IS lists gulls, corvids such as common ravens and American crows, and nuisance mammals such as rats, opossums, raccoons, skunks, red foxes, and feral cats, all of which "... could then adversely affect sensitive wildlife species elsewhere in the South Bay through predation or competition." To mitigate this impact, the Initial study proposes the development of a Vector Management Plan (VMP) (IS, Page 12).

- The VMP cannot be defined as a component of the project since it is clearly a mitigation measure aimed to reduce environmental impacts of nuisance species on biological and other resources, as proposed in the IS, "The purpose of the VMP will be to minimize the degree to which nuisance species increase in the vicinity of the site as a result of processing activities". The IS continues to describe various aspects of the VMP, and potential environmental impacts that could originate from mitigation measures that are proposed within the Vector Management Plan (hazing techniques, trapping, poisoning etc.), proposing, "The VMP will be designed to be adaptive. It will include some monitoring of the presence and/or abundance of individual nuisance animals and increasingly more stringent measures to limit accessibility of wastes to these animals." The preparation of a Mitigation Monitoring and Reporting Plan cannot be delegated to good faith and trust in "some monitoring" that provides no detail for public review.
- The VMP should not defer discussion of potential mitigation measures, as proposed (IS, Page 12), "specific measures.... may be implemented in the future that are not described below". This violates CEQA since it is based on the presumed success of future mitigation measures that have not been formulated at the time of project approval and have not been presented for public review.

We ask that the VMP be fully developed and presented for public review as a part of an EIR for the project. Success criteria should also be provided, as well as action thresholds that trigger a change in policy, such as, "If measures do not properly control nuisance species, the acceptance of organic waste and or MSW may be restricted ...and possibly even eliminated, as necessary" (IS, Page 14). Guidelines for the proposed adaptive management plan should also be provided.

#### **I.2.5. Noise and vibrations**

Impact Geo-1 alerts us to impacts due to settlement of underlying refuse below the project footprint. And proposes two types of foundations: Grid Foundations OR Pile Foundations.

- The analysis must be complete so that the type of foundation to be used is selected and properly mitigated. This is especially important in the case of pile foundations that are likely to generate potential biological impacts due to noise and vibrations associated with the driving of piles 100-ft into the landfill/ground.
- The MND proposes that if Pile Driving is selected, RWQCB oversight and approval will be necessary. This, constitutes deferred potential mitigation, and does not meet CEQA requirements for either an MND or an EIR, since the effectiveness of the measures that WQCB may impose cannot be determined prior to project approval. Mitigation measures may not be deferred to a later time.

*p. 7 of 10*

#### I.4. Hydrology and Water Quality

- The MND provides no finding related to the Technical Appendix E Storm Water Report of May 3<sup>rd</sup>, 2011. Findings of no significant effects of storm water runoff and water quality that were made prior to the publication of Storm Water Analysis cannot be made.

#### I.5. Traffic

- The MND does not address the basic CEQA requirement of comparing a project's impact against current traffic conditions. Since trucks are expected to deliver 270,000 ton/year to the project, a traffic analysis is required to evaluate the traffic generation impacts of the proposed project.

### II. CUMULATIVE IMPACTS

- The project is adding an interdependent business to Los Esteros Road. The MND/IS did not properly analyze the context of the site and cumulative impacts on all environmental resources on the project's footprint and the surrounding ecosystems and residential areas. Environmental review should examine the project in the context of the Water Pollution Control Plant Master Plan, and take into consideration cumulative impacts of all proposed and impending development along Zanker Road (Zanker Road Resource Operation and Landfill (ZRRROL) and Zanker Materials Processing Facility (ZMPF)) and Newby Island.
- Any impact on burrowing owls in the South Bay can impact the entire population and its potential for survival and recovery. Thus, cumulative impacts on burrowing owls should be considered on a regional scale and properly analyzed in an EIR.

### III. THE CITY HAS NOT COMPLIED WITH REQUIREMENTS SET FORTH IN THE CALIFORNIA WATER CODE

Pursuant to Section 10912 of the California Water Code, a Water Supply Assessment (WSA) is required for the Project and must be included in an EIR that is circulated for public review and comment. If the City approves the Project without requiring the preparation of a WSA and including that WSA in an EIR, the City's decision will violate CEQA and the Water Code.

#### **A. The Anaerobic Digester meets the definition of a "project" under the Water Code**

The Water Code requires a WSA for any project that meets the definition in Section 10912(a). The term "project" is defined in section 100912 as follows:

##### **(a) "Project" means any of the following:**

- (1) A proposed residential development of more than 500 dwelling units.
- (2) A proposed shopping center or business establishment employing more than 1,000 persons or having more than 500,000 square feet of floor space.

*p. 8 of 10*

- (3) A proposed commercial office building employing more than 1,000 persons or having more than 250,000 square feet of floor space.
- (4) A proposed hotel or motel, or both, having more than 500 rooms.
- (5) A proposed industrial, manufacturing, or processing plant, or industrial park planned to house more than 1,000 persons, occupying more than 40 acres of land, or having more than 650,000 square feet of floor area.**
- (6) A mixed-use project that includes one or more of the projects specified in this subdivision.
- (7) A project that would demand an amount of water equivalent to, or greater than, the amount of water required by a 500 dwelling unit project.

Under the plain language of the statute, a WSA is required for the Project because it is an industrial facility occupying more than 40 acres of land. This conclusion is further supported by the court's interpretation of the plain language of the Code in *Center for Biological Diversity v. County of San Bernardino*. In that case the court stated that:

Under the plain language of section 10912, subdivision (a)(5), the proposed Hawes Project qualifies as a "project" because it is a "processing plant" conducted on more than 40 acres of land. We reject Nursery Products's assertion that subdivision (a)(5) of section 10912 applies only to "large scale buildings located on large square footage or plots of land." The Water Code does not define the term "processing plant," but the term "plant" is commonly defined as including the *land*, as well as buildings, machinery and fixtures, used in carrying out a trade or industrial business. "When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word." Had the Legislature intended the statute to apply only to processing operations conducted in large buildings, we presume it would not have included acreage as a separate factor in addition to square footage of a physical structure. An open-air composting facility is a "project" within the meaning of subdivision (a)(5) of section 10912 if it meets the acreage threshold, even if the only structures on site are small ones.

Like the composting facility at issue in *Center for Biological Diversity*, the Dry-Fermentation Anaerobic Digestion is a "project" under Section 10912 because it is a proposed "Industrial Facility" occupying more than 40 acres of land. *A WSA is, therefore, required.*

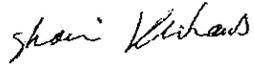
## **CONCLUSION**

Based on our review of the MND and supporting documents, we have concluded that the MND does not comply with the basic requirements of CEQA. In sum, the MND fails to identify a proper baseline and disclose, analyze and mitigate the Project's impacts on aesthetics, biological resources, Hydrology and Water Quality, Traffic, and Cumulative Impacts. Thus, the MND does not fulfill its function as an informational and decision-making document. Furthermore, the MND relies on deferred mitigations, a practice prohibited for this type of environmental document since it is based on the presumed success of future mitigation measures that have not been formulated at the time of project approval and have not been presented for public review.

The findings that the project as described in the MND/IS that the project would not have a significant effect on the environment cannot be made, a Water Supply Assessment and a Mitigation Monitoring and Reporting Plan are needed.

Thank you for the opportunity to comment on the proposed project. Please keep SCVAS on the notification list for the proposed project site.

Sincerely,



Shani Kleinhaus, PhD.  
Environmental Advocate, Santa Clara Valley Audubon Society  
22221 McClellan Rd.  
Cupertino, CA 95014  
[shani@scvas.org](mailto:shani@scvas.org)

## **Santa Clara Valley Audubon Society**

**Response 1:** (p.1; CEQA Guidelines...). The proposed ZWED project is a separate and independent project from the Water Pollution Control Plant (Plant) Master Plan, which is not completed and has only a preferred alternative plan for analysis purposes. The scoping process for the Plant Master Plan EIR recently started with the public noticing of the Notice of Preparation (NOP) for the EIR, dated May 23, 2011.

While the proposed project is located on Plant lands, it is physically separated by Los Esteros Road from the Plant itself, it will have separate utilities, and neither the proposed project nor the Plant Master Plan depend on each other to be approved or operate. In other words, the proposed project, if approved, can operate with or without approval of the Plant Master Plan project because each project has a separate and independent utility. Further, the Plant Master Plan NOP states no changes are proposed to the Nine Par landfill site under the proposed Plant Master Plan.

In addition, each project has separate goals and objectives. One of the main objectives of the proposed project is to meet the City's Green Vision by diverting organic waste from landfills and converting waste to energy. At full buildout, the project will divert approximately 225,000 tons of organic waste from landfills. This is also consistent with the City's General Plan Solid Waste Goals 1 and 5 that promote extending the life span of landfills by composting and transforming solid wastes and encourage alternatives to landfilling.

The main purpose of the Plant Master Plan will be to improve and replace the aging infrastructure at the Plant in order to meet new regulations and to meet the projected population growth anticipated by Association of Bay Area Governments. Other uses of the Plant lands will be secondary to that primary objective. Adopted Council policy specifies that the highest priority for use of Plant lands is the Plant itself and defines the future expansion area as 200 acres directly south of the Plant itself (it should be noted that the project site is northwest of the Plant and across Los Esteros Road and not within this Plant expansion.)

In summary, the Initial Study evaluated the entire proposed project and did not 'piecemeal' any analysis of the environmental impact of the project. This facility is separate from and independent of the Plant Master Plan and has no connection other than being on land owned by the Plant. The Plant Master Plan EIR when it is prepared will be required to evaluate the cumulative environmental impacts of that project and others that are pending at that time.

**Response 2:** (p. 2; MMRP). Consistent with Section 15097 of the CEQA Guidelines, a Mitigation Monitoring and Reporting Program (MMRP) will be adopted when the mitigated negative declaration is adopted and approved by the decision makers. All of the mitigation measures identified in the Initial Study and MND that require monitoring will be in the MMRP and those measures were all available to review during the public review period.

**Response 3:** (p. 2; WSA). The physical area evaluated in the Initial Study was stated to be approximately 41 acres, however, this acreage was assumed for the environmental review in order to ensure that all of land that could be incorporated into the operation was analyzed. Because the property is a much larger piece of City land, the precise boundary is based on the

site plan and is not an existing parcel. The actual size of the facility is 37.91 acres. The 37.91 acres includes all facility buildings, windrows, landscaping, roadways, fencing, construction staging areas, etc. Because the project will not occupy more than 40 acres of land it does not require a Water Supply Assessment. Current water usage for the project is estimated at 9,300,000 gallons of water per year of which at least 5,700,000 gallons per year is anticipated to be reclaimed water (60%). Further, reclaimed water usage may increase to 90 percent of total water used, in the future.

**Response 4:** (p. 2; Process). The City made all relevant documents available to the public in the Planning office, for the entire review period (from April 8, 2011 to May 9, 2011), as stated in all public notices. As soon as someone notified staff that there was a problem with the on-line copy, which occurred on April 29, 2011, the problem was corrected within 2-3 business days.

The City has prepared a thorough analysis of all environmental factors associated with this project (95 pages). As stated in this comment, an EIR is required when there is a potentially significant adverse environmental impact, not when a project of a particular type or size is proposed. No evidence is provided in this letter that a significant impact would result from the proposed project.

**Response 5:** (p. 2; Aesthetics). The view of the project site from the USFWS Don Edwards National Wildlife Refuge is described in Section 4.1.2.1 of the Initial Study. The viewshed in this area is not a pristine environment. The project site is surrounded by two active landfills, the Water Pollution Control Plant, acres of biosolid lagoons, two resource recovery (recycling) operations, a group of industrial buildings on the north side of Alviso, a large power plant, plus a great many large overhead electrical transmission lines. As described in the Initial Study, portions of the buildings and operations may be visible from the NWR Environmental Education Center, although all south facing views of the project would be difficult to distinguish from the existing viewshed that includes the Zanker Material Processing Facility (ZMPF) and Zanker Road Resource Recovery Operation and Landfill (ZRRROL) and the Plant in the background with large electrical transmission towers interspersed. These adjacent uses are much taller in elevation than the proposed AD facility. In addition, the current height of the surrounding landfills already alters the existing views of hillside areas from the Don Edwards San Francisco Bay NWR. Although aesthetics requires subjective judgment, there is no basis for identifying a significant adverse change in the existing highly cluttered visual landscape south of the Refuge.

**Response 6:** (p. 3; Contamination of Aquatic). The Initial Study does not identify potentially significant impact from construction and grading. The project will incorporate all measures to avoid and minimize any impact (see IS pp. 49-50). The proposed project will not disturb or expose the former landfill as part of the development of the facility and all improvements will be done with review and oversight by the appropriate regulatory agencies including LEA, CalRecycle, and RWQCB.

According to the project geologist for the project (Tom Vercoutere, Professional Geologist, Senior Consultant, Golder Associates Inc.), the proposed project development will have no effect on the existing TCE impact zone (plume) that is located approximately 15 feet below ground surface in a sand layer that is overlain by low permeable bay mud or refuse within that landfill.

Additionally, the existing TCE, which is in the landfill waste and in groundwater, will have no adverse effects on future workers or visitors to the site. Due to the depth and location of TCE, no surface runoff from the site will contain TCE, and therefore, surface runoff of TCE into the wetlands will not occur. The reduction of pervious surfaces (paving portions of the site and constructing buildings) on the project site and implementation of the proposed stormwater pollution prevention plan will improve the water quality of surface runoff and reduce stormwater infiltration into the waste that contains TCE. This will reduce the potential for TCE migration because by decreasing the permeable surface area, infiltration into the landfill refuse will be reduced. In addition, the development of the project will have no effect on the current groundwater flow below or nearby the project site because groundwater flow occurs in the sand layers that are 15 to 20 feet or more below ground surface.

Based on the results of preliminary investigations discussed in the Initial Study and further confirmed by additional testing (draft and final versions of Site Investigation) completed subsequent to the earlier reports, no additional mitigation is required to reduce or avoid any and all adverse impacts associated with the former landfill. For additional information on this report, please contact the Napp Fukuda, Sustainability & Compliance Manager, City of San Jose, Environmental Services Department, (408) 975-2594 or [Napp.Fukuda@sanjoseca.gov](mailto:Napp.Fukuda@sanjoseca.gov).

**Response 7:** (p. 3; Impacts to Burrowing Owls). Burrowing owl survey efforts have not been inadequate for CEQA purposes. The original reconnaissance-level survey of the site took place on December 3, 2009 by the project biologist, at H. T. Harvey & Associates. No burrowing owls were observed on the site during that survey. A subsequent survey for burrowing owls was conducted by City staff in February 2011 and another by an H. T. Harvey & Associates wildlife ecologist on February 23, 2011, prior to geotechnical borings on the site. None of these surveys found evidence of roosting or nesting burrowing owls. However, because the possibility that owls may occupy the site in the future cannot be eliminated, the mitigation measures included pre-construction surveys and a compensatory mitigation requirement in the event that owls need to be relocated from the site.

The IS/MND did not disregard the importance of habitat for foraging owls. Rather, in preparing the biological resources report for the IS/MND, the project biologist took the existing condition of the project site and its contextual surroundings into account in determining whether lost foraging habitat would adversely affect burrowing owls known to occur in the North San Jose area, and therefore, result in a significant impact. The project biologist determined that due to the relatively low quality of foraging habitat on the site resulting from the tall, dense coyote brush and other vegetation present on most of the site; the abundance of higher-quality foraging habitat (e.g., with much shorter and/or sparser herbaceous vegetation) on WPCP lands and in other surrounding areas; and the absence of any known burrowing owl nesting or roosting sites on or immediately adjacent to the site (the nearest being on Plant lands 0.4 mile away and in New Chicago Marsh nearly 0.5 mile away), burrowing owls are not expected to use the site heavily for foraging, if in fact they use the site at all. Therefore, the loss of habitat on the site would not represent a significant impact to owls that may only occasionally forage on the site and that do not nest or roost there. Even though all available information found no evidence of basis of impact, the City included additional mitigation if conditions should change.

**Response 8:** (p. 3; 1. Lack of baseline, bullet 1). The date of the reconnaissance-level survey (December 3, 2009) conducted on the site was provided in the biological resources report prepared for the MND located in Appendix B of the Initial Study. In addition, a subsequent survey for burrowing owls was conducted by City staff in February 2011 and another by an H. T. Harvey & Associates wildlife ecologist on February 23, 2011, prior to geotechnical borings on the site. None of these surveys found evidence of roosting or nesting burrowing owls.

**Response 9:** (p. 3; 1. Lack of baseline, bullet 2). As indicated in Response 6, the site has now been surveyed on three occasions (3 December 2009 and 23 February 2011 by H. T. Harvey & Associates wildlife ecologists and February 2011 by City staff), and no evidence of burrowing owls has been detected. If burrowing owls were present on the site and “site tenacious”, some evidence of their presence would have been detected during one or more of these surveys. Since none were detected, it is unlikely that owls use the site for any purpose under existing conditions (which is the basis of a CEQA analysis by law). Nonetheless, protocol-level surveys to ensure avoidance of impacts to individual owls and occupied burrows are still appropriate prior to construction, as required by the mitigation measures in the IS/MND, to account for the unlikely event that burrowing owls move onto the site prior to construction.

A comprehensive, breeding-season survey of areas most likely to support burrowing owls in Santa Clara County was conducted by Albion Environmental, Inc. in 2008.<sup>1</sup> This survey found that the closest burrowing owls to the project site were approximately 0.4 mile to the south on Plant lands and 0.5 mile to the west in New Chicago Marsh. Because of their site fidelity and charismatic nature, burrowing owls are frequently reported by birders in the South Bay (e.g., to the South-Bay-Birds internet group) when they are detected, particularly in the Alviso area, where birding activity is high. The City and the project biologist are aware of no reports by birders of burrowing owls nesting or roosting closer to the project site than the sites identified in the 2008 study.

**Response 10:** (p. 4; 1. Lack of baseline, bullet 3). The MND does provide data on burrowing owl use of the project site in that it indicates that no evidence of owls was observed during the reconnaissance-level survey of the site. In addition, a subsequent survey for burrowing owls conducted by City staff in February 2011, and another by an H. T. Harvey & Associates wildlife ecologist on February 23, 2011, found no evidence of roosting or nesting burrowing owls. The 2008 Albion Environmental study found no owls closer to the site than 0.4 mile.

Because the reconnaissance-level survey completed for the preparation of the IS/MND was completed during the non-breeding season, potential use of the site by burrowing owls during the remainder of the year was inferred by an experienced ornithologist familiar with the behavior of this species in the South Bay, based on habitat conditions on the site, population levels and habitat conditions in surrounding areas, and the biology of the burrowing owl. This analysis is thus not speculative, but instead relies on the biologists’ assessment of how burrowing owls might use the site. Given that (a) the 2008 survey conducted by Albion Environmental detected burrowing owls at only four sites in the entire area of north San Jose north of Highway 237; (b) the 2008 survey, and subsequent reports by birders, have not identified any burrowing owls

---

<sup>1</sup> Albion Environmental, Inc. 2008. 2008 Nesting burrowing owl survey. Santa Clara Valley Habitat Conservation Plan/Natural Communities Conservation Plan (HCP/NCCP).

closer than 0.4 mile from the project site; (c) the project site provides only limited, marginal-quality habitat for burrowing owls due to the height and density of vegetation on most of the site; and (d) there is much higher-quality habitat, in the form of more extensive areas of shorter and sparser herbaceous vegetation throughout much of the area north of Highway 237, there is no reasonable expectation that the project site is heavily used by burrowing owls, or that the owls currently present in the vicinity (i.e., north of Highway 237) rely on this site for foraging, roosting, or nesting habitat. These conclusions are supported by actual observations made during site visits and are based on reasonable inferences resulting from an assessment of the available data made by a highly qualified expert, and were adequate for impact assessment under CEQA (Stephen C. Rottenborn, Ph.D., Principal, Wildlife Ecology, H. T. Harvey & Associates, May 2011).

**Response 11:** (p.4; 2. Disregard for the importance of foraging habitat). As indicated previously, there is no evidence that burrowing owls use the project site at all or ever have. Neither does this comment offer any evidence that owls have used this site. The quote from Mr. Wilcox is assumed to refer to the abundant higher quality foraging and nesting habitat present elsewhere on Plant lands and referred to in Responses 7 and 10 above. Evidence from prior surveys of the vicinity, coupled with the marginal quality of habitat on the project site as compared to the much higher-quality, much more extensive burrowing owl habitat present elsewhere in the vicinity (e.g., on Plant lands), indicates that burrowing owls in the north San Jose area are not expected to use the project site heavily, if at all. Therefore, compensatory mitigation for habitat loss is only warranted if future surveys determine that burrowing owls are occupying the site and must be relocated for the project.

To ensure that any mitigation habitat that is required for this project is suitable, the following sentence will be added to the end of the last bullet under Mitigation Measure MM BIO-2.1:

The mitigation site must be managed to provide habitat that is of equal or greater habitat quality, in terms of vegetation height and density and the density of potential nesting and roosting burrows, as compared to the impact site.

**Response 12:** (p.4; 2. Disregard... bullet 1). Most of the “heterogeneous” vegetation on the project site is unsuitable for use by foraging burrowing owls due to its height and density. According to the *Birds of North America* species account for the burrowing owl, foraging habitat consists of “Typically short-grass, mowed, or overgrazed pastures; golf courses and airports also used”.<sup>2,3</sup> The vast majority of the project site is dominated by tall vegetation such as coyote brush, mustard, and other vegetation. Such vegetation is clearly “less than optimal” for burrowing owls due to its height. Although taller vegetation may help support prey, it is the opinion of the qualified project biologist that burrowing owls will not use small patches of open area surrounded by extensive tall vegetation; in fact, the project biologists have observed burrowing owls abandon sites in San Jose that provided only small patches of sparse vegetation as surrounding vegetation grew up (Stephen C. Rottenborn, Ph.D., Principal, Wildlife Ecology,

---

<sup>2</sup> Haug, E. A., B. A. Millsap, and M. S. Martell. 1993. Burrowing owl (*Athene cunicularia*), *The Birds of North America Online* (A. Poole, Ed.). Ithaca: Cornell Lab of Ornithology.

<sup>3</sup> Thomsen, L. 1971. Behavior and ecology of Burrowing Owls on the Oakland municipal airport. *Condor* 73:177-192.

H. T. Harvey & Associates, pers. obs.). The draft Santa Clara Valley Habitat Plan's<sup>4</sup> species account for the burrowing owl indicates that while owls will tolerate some tall vegetation, "Tall or dense vegetative cover that prevents visibility of approaching predators puts burrowing owls at a severe disadvantage."<sup>5</sup> Since they owls do not occupy such habitat by choice the knowledge of the hazard is apparently instinctive. Only a limited area of more recently disturbed fill present during the preparation of the biological resources report supported vegetation conditions short and/or sparse enough to provide suitable foraging habitat for burrowing owls, and this habitat was surrounded by taller, denser habitat that would prevent burrowing owls from being able to see approaching predators until they are fairly close. Currently, that fill is covered by a large mound of fill that is being deposited, and that contains no burrows or vegetation, as it is actively being worked. Such areas provide no habitat for burrowing owls. Additionally, a line of tall eucalyptus trees run along the southern property line, providing excellent perches for predators such as hawks, and peregrine falcons who prey on burrowing owls. Therefore, although the project site provides some potential foraging habitat, it is not high-quality habitat.

A study of burrowing owl foraging range in the Imperial Valley determined that more than 80% of nocturnal foraging took place within 0.37 mi of the nest, and a study in Saskatchewan found that 95% of movements occurred within 0.4 mi of the nest.<sup>6, 7</sup> Given the distance between the project site and known burrowing owl roosting and nesting sites, as well as the much more extensive, higher-quality foraging habitat present in much closer proximity to those roosting and nesting sites, there is no reasonable expectation that burrowing owls would fly 0.4 to 0.5 mile from their burrows to forage in the small areas of potential marginal or low-quality foraging habitat present on the site, or that the loss of that habitat would preclude the continued presence of burrowing owls in areas of known occurrence.

**Response 13:** (p.4; 2. Disregard... bullets 2- 3). This letter offers no fact-based evidence of any uncertainty about the quality of burrowing owl habitat on this site. Mr. Wilcox's opinion was a general statement; no evidence is offered that he had any knowledge of conditions on the project site. The fact-based reasons why the project will not result in a substantial loss of burrowing owl habitat are given above. There is no expectation that any burrowing owl populations in the North San Jose area rely on the limited, marginal-quality habitat present on the project site, or that the loss of habitat on this site would adversely affect burrowing owls, given baseline conditions. If future protocol-level surveys completed prior to construction determine that burrowing owls have moved onto the site, and those owls require relocation, then conditions (e.g., habitat quality) will have changed to the point that compensatory mitigation is necessary. The IS/MND considers that possibility by incorporating a pre-construction survey and conditional compensatory mitigation requirement.

---

<sup>4</sup> The draft Santa Clara Valley Habitat Plan is both a habitat conservation plan (HCP) and a natural community conservation plan (NCCP) and has yet to be adopted.

<sup>5</sup> ICF Jones & Stokes. 2010. Santa Clara Valley Habitat Plan Public Draft. Prepared for the County of Santa Clara Planning Office.

<sup>6</sup> Rosenberg, D. K. and K. L. Haley. 2004. The ecology of burrowing owls in the agroecosystem of the Imperial Valley, California. *Studies in Avian Biology* 27:120-135.

<sup>7</sup> Haug, E. A. and L. W. Oliphant. 1990. Movements, activity patterns, and habitat use of Burrowing Owls in Saskatchewan. *Journal of Wildlife Management* 54:27-35.

**Response 14:** (p.5; Inadequate Mitigation...bullets 1-2). The project site is not located within the draft Santa Clara Valley Habitat Plan’s planning area, and thus is not subject to mitigation according to the draft Habitat Plan’s conservation strategy. The compensatory mitigation that was described in the IS/MND (i.e., preservation and management of 6.5 acres per pair or single owl, if relocation of owls is required) is based on the California Burrowing Owl Consortium’s mitigation guidelines, with modifications reflecting the marginal habitat conditions present on the project site.<sup>8</sup> For reasons described above, the project will not result in a substantial impact to foraging habitat for burrowing owls, and thus mitigation for the loss of foraging habitat is not required unless burrowing owls are found to move onto the site, and require relocation, in the future (indicating a change in habitat conditions). As stated previously, Mr. Wilcox’s comment is assumed to apply to the abundant and higher quality habitat present on the Plant lands.

To ensure that any mitigation habitat that is required for this project is suitable, the following sentence will be added to the end of the last bullet under Mitigation Measure MM BIO-2.1:

The mitigation site must be managed to provide habitat that is of equal or greater habitat quality, in terms of vegetation height and density and the density of potential nesting and roosting burrows, as compared to the impact site.

**Response 15:** (p.5; I.2.2.2 Inadequate Mitigation, bullets 3-4). The IS/MND allows for off-site mitigation either in the form of the purchase of credits in a mitigation bank or by preservation and management of habitat on a project-specific mitigation site. There is no evidence that the purchase of credits in a mitigation bank “results in mortality of evicted owls”. Although the purchase of credits in a mitigation bank outside the South Bay would result in a net loss of burrowing owls from the South Bay population (if compensatory mitigation is even necessary for this project), mitigation in the South Bay may not be feasible given the high cost of acquiring 6.5 acres of suitable habitat. Therefore, the purchase of credits in a mitigation bank has been accepted as an acceptable form of mitigation for impacts to burrowing owl habitat by CDFG.

**Response 16:** (p.5; I.2.2.2 Inadequate Mitigation, bullet 5). The IS/MND specifies that if mitigation for burrowing owl habitat impacts is necessary, and off-site preservation and management (as opposed to purchase of credits in a mitigation bank) is pursued to satisfy this mitigation requirement, a Burrowing Owl Habitat Management Plan must be prepared to describe the means by which the site would be preserved, enhanced, and managed. The IS/MND specifies that this Plan would also describe the monitoring program and the amount of an endowment that would be established for the long-term maintenance of the site. Specific habitat enhancement and management activities would depend, to some degree, on the particular site that is used for mitigation. For example, mowing or grazing schedules would depend on soils, vegetation, and precipitation, all of which may vary from site to site. Also, whether or not artificial burrows are necessary on the mitigation site would depend on the abundance of natural burrows provided by California ground squirrels. As a result, the precise details of enhancement and management cannot be identified at this time, but rather should be determined once a mitigation site has been identified (if mitigation ever becomes necessary). The standard for the mitigation is clarified in an added sentence (see Response 14).

---

<sup>8</sup> California Burrowing Owl Consortium. 1993. Burrowing owl survey protocol and mitigation guidelines.

**Response 17:** (p.5; I.2.2.2 Inadequate Mitigation, bullet 6). The IS/MND indicates that the buffer during the non-breeding season should be 150 feet, “though a reduced buffer is acceptable during the non-breeding season as long as construction avoids direct impacts to the burrow(s) used by the owls.” It is the expert opinion of the qualified project biologist that a 150-foot buffer is acceptable. Nevertheless, to maintain consistency with the California Burrowing Owl Consortium guidelines<sup>9</sup>, the second bullet under Mitigation Measure MM BIO-2.1 is revised as follows:

If burrowing owls are present during the nonbreeding season (generally 1 September to 31 January), a ~~150~~160-foot buffer zone, within which no new Project-related activity will be permissible, should be maintained around the occupied burrow(s) if feasible, though a reduced buffer is acceptable during the non-breeding season as long as construction avoids direct impacts to the burrow(s) used by the owls....

**Response 18:** (p.5; I.2.2.2 Inadequate Mitigation, bullet 7). The 30-day pre-construction survey window has long been a standard measure, based on the following statement in the California Burrowing Owl Consortium’s Burrowing Owl Survey Protocol and Mitigation Guidelines: “A preconstruction survey may be required by project-specific mitigation no more than 30 days prior to ground disturbing activity.”<sup>10</sup> The City has sometimes reduced the lead time to 14 days when disturbance would occur during the nesting season, if so advised by biologists familiar with the site. Requiring that no more than 2 days elapse between the survey and the start of construction is an extremely cautious approach that may be appropriate on sites where burrowing owls are known to be nesting, but is not necessary on this site, given the marginal quality of habitat and lack of any evidence of current or previous burrowing owl occurrence. Nevertheless, to further protect against the unlikely event that an owl moves onto the site between the pre-construction survey and the initiation of ground disturbance, the first bullet under Mitigation Measure MM BIO-2.1 is revised as follows:

Pre-construction surveys for burrowing owls should be conducted in potential habitat in conformance with CDFG protocols, no more than ~~30~~14 days prior to the start of any ground-disturbing activity such as clearing and grubbing, excavation, or grading, or any similar activity within 250 feet of suitable habitat that could disturb nesting owls. If no burrowing owls are located during these surveys, no additional action would be warranted. However, if burrowing owls are located on or immediately adjacent to impact areas the following mitigation measures will be implemented.

With minor clarifications noted above in response to previous comments, the IS/MND’s mitigation measures provide adequate protection of individual burrowing owls and occupied burrows, in the unlikely event that they occur on the project site. For reasons discussed previously, impacts to habitat on the site that is probably not used by foraging burrowing owls, and that is not used by nesting or roosting owls, are less than significant, and the IS/MND provides measures to compensate for impacts to occupied habitat, should the site become

---

<sup>9</sup> California Burrowing Owl Consortium. 1993. Burrowing owl survey protocol and mitigation guidelines.

<sup>10</sup> California Burrowing Owl Consortium. 1993. Burrowing owl survey protocol and mitigation guidelines.

occupied by burrowing owls that require eviction in the future. Thus, the mitigation measures specified by the IS/MND, with the minor clarifications or enhancements noted above, adequately reduce potential project impacts to burrowing owls to less-than-significant levels.

**Response 19:** (p. 6; I.2.3 Impacts to Salt Marsh Harvest Mouse... thru bullet 2). The IS/MND analyzed effects of the operation of the facility on wildlife (*Impacts of Project Operation on Wildlife*). This impact statement considered all the potentially occurring wildlife species, including common species and special-status species such as those listed in the comment, and specifically noted the increase in noise and site activity, which would include vibrations. However, due to the absence of the California clapper rail and western snowy plover (biological report pp. 15,21-23) and the scarcity of burrowing owl, salt marsh harvest mouse, and salt marsh wandering shrew (biological report pp. 15,23-26, 36) on or near the site and its immediate vicinity, the existing levels of disturbance from adjacent facilities (ZRRROL, ZMPF, and Plant facilities) (to which any individuals in the project vicinity must already be habituated), and screening vegetative cover incorporated into the project, such indirect impacts were considered less-than-significant for most species. These impacts were specifically characterized as identified by the consulting biologists as less than significant due to a combination of the low level of potential effect (e.g., the indirect effects of lighting, noise, or vibration, when viewed in the context of existing levels of lighting and disturbance in the vicinity (including ZRRROL, ZMPF, and Plant facilities) would not be sufficient to cause these special-status birds to abandon nests) and the low number of individuals or pairs (few or none) that could possibly be affected by the project, relative to regional populations.

The only special-status species that might occur in the vicinity of the site are the salt marsh harvest mouse and salt marsh wandering shrew. As discussed on pages 36-37 of the biological resources report (Appendix B of the IS), specific mitigation measures for the orientation and shielding of lights and the screening vegetative cover incorporated into the project will reduce all such impacts to less-than-significant levels.

Of the species listed by the commenter, the California clapper rail and western snowy plover do not nest in or near the project site due to the total absence of suitable habitat, which for the plover includes sandy beaches on estuarine shores and for the clapper rail includes tidal salt marsh dominated by cordgrass and pickleweed. California clapper rails have not been documented breeding along Artesian Slough, the only marsh channel in the project vicinity, and the freshwater influence of Plant effluent discharge here maintains marsh vegetation dominated by freshwater species. Although clapper rails are typically found in tidal salt marshes, they have also been documented in brackish marshes in the South Bay. However, brackish habitats where clapper rails have been found are dominated by alkali bulrush, as opposed to the tule-dominated habitat in the channel near the project site (biological resources report pp. 21-23). While Alameda song sparrows or common yellowthroats may occasionally forage on the project site, there is no suitable nesting habitat for Alameda song sparrows or common yellowthroats within the project area. Suitable nesting habitat for the Alameda song sparrows and common yellowthroats includes salt marsh or brackish marsh habitats and the project site provides ruderal grassland/baccharis scrub habitat (biological resources report pp. 15, 24-26).

As described in the biological report prepared for the IS/MND, the project site provides suitable breeding and foraging habitat for loggerhead shrike and Bryant's savannah sparrow. Suitable habitat for these species includes tall shrubs and dense trees, grasslands, marshes, and ruderal habitats and the trees and shrubs located on the southwestern portion of project site provide this habitat. Impacts to habitat and individuals of the loggerhead shrike and Bryant's savannah sparrow will be less than significant because project implementation will not substantially reduce the habitat that is regionally available to these species, nor will the project substantially reduce the number or restrict the range of these species.

**Response 20:** (p. 6; I.2.3 Impacts to Salt Marsh Harvest Mouse... bullets 3-4). The trees to be removed were addressed in the biological resources report and the Initial Study (pp.53-55). These trees could be used as roosting or foraging habitat by a number of bird species. Although none were observed on site, several birds, including regionally abundant species such as the lesser goldfinch and Anna's hummingbird, as well as the loggerhead shrike (a California species of special concern), could nest in these trees as well. However, all of these trees are non-natives, and none are particularly large; despite the large circumferences of the 37 eucalyptus trees reported in the IS/MND, these trees have multiple, relatively small-diameter trunks emanating from old stumps, and they are also not very tall (being 15-20 feet tall on average). Thus, none provide valuable or noteworthy resources to wildlife since they are short and have a small canopy (they might be used by avian predators on occasion as hunting perches). These trees do not provide appropriate structure for use by bat colonies because of their lack of canopy and they are too low to the ground. Avoidance Measure BIO-1.1 would avoid impacts to nesting birds associated with tree removal through avoidance of project activities during the breeding season, or pre-removal surveys and maintenance of buffers around active nests.

**Response 21:** (p. 6; I.2.3 Impacts to Salt Marsh Harvest Mouse... bullet 5). The only state or federally listed species that even occurs in the project vicinity is the salt marsh harvest mouse. Implementation of Mitigation Measure MM BIO-3.1 (which specifies certain design features for outdoor lighting) will reduce any possible impacts of lighting on this species to less-than-significant levels because proposed location, orientation, and directionality will limit light spilling into habitat areas outside the facility sufficiently to avoid all significant impacts. Therefore, the success criterion would be the implementation of those measures, and mitigation monitoring would simply entail verification that those measures have been implemented. No more is needed since no other possible source of impact could be identified.

**Response 22:** (p. 6; Trees). Fencing and trees associated with the ZMRF to the west, large metal electrical transmission towers to the west and north, wooden powerline poles on and adjacent to the site, and fencing around the ZRRROL site to the north/northeast already provide numerous taller perches for raptors in close proximity to sensitive wetland habitats (such as those north of the project site that could support salt marsh harvest mice) and potential burrowing owl habitat. Given that raptors are territorial, planting new trees will not result in a substantial increase in the number of raptors that could prey on sensitive species in the vicinity. Trees are only to be planted adjacent to existing street, proposed parking lot and along the southwestern site boundary and no trees are proposed adjacent to the Refuge. Species proposed along the southwestern site boundary which would be the trees closest to the Refuge, will only grow approximately 20 to 35 feet tall. According to the City's consulting biologist, these trees could

be used as raptor perches, but they would not provide substantially better or more perches than are currently out there. Raptors may congregate in areas of high prey abundance, but as mentioned above, they are also territorial enough that each tree, pole, tower, or fencepost would not equate to another raptor. Planting trees will just provide more perches for the raptors that are out there foraging already, but would not substantially increase predation rates. As a result, such tree planting would not result in a significant impact to sensitive species due to the provision of perches for raptors.

**Response 23:** (p. 6; Vector Management Plan). The Vector Management Plan (VMP) is an impact minimization measure that is incorporated into the project; it is not a mitigation measure for a specifically identified impact. CEQA does not prohibit project applicants from incorporating measures to avoid and minimize environmental impacts into their projects, and the VMP does just that.

The IS/MND does not inappropriately defer details of the VMP. Although the VMP itself is not described in its entirety in the IS/MND, Section 3.9 of the Initial Study contains a great deal of detail on the components of the VMP, including specific measures to minimize the abundance of nuisance species at the site, minimize these species' access to food resources, and remove nuisance mammals from the site. The Initial Study describes the monitoring and adaptive management process, lists a number of adaptive measures that could be employed if necessary, and describes the process by which the City would review and approve the VMP and oversee the implementation of the VMP.

The Initial Study notes that, in addition to measures specifically described in Section 3.9, additional measures that are not described in that section whose goals are to limit accessibility of waste to wildlife as described on p. 12 of the Initial Study, may be implemented in the future. This is not inappropriately deferring details of the project description; rather, it acknowledges that as the state of the art in nuisance species abatement and control advances and site-specific experience is gained, the applicant may employ additional measures that will improve the effectiveness of abatement. The IS/MND does not rely on these future improvements to ensure that impacts associated with nuisance species are less than significant, but rather provides an opportunity to use improved techniques if they become available, and are accepted by the City of San Jose Director of Planning, Building and Code Enforcement.

The IS/MND does not defer formulation of mitigation to a later date. The statement quoted in this comment refers very clearly to additional measures that may be implemented. The VMP is identified, discussed at length and is proposed by the project. CEQA does not preclude identification and utilization of different, additional, better, newer, or other elements by an approved program that stipulates the purpose, goal and measures of success. Although not required by CEQA because it is a part of the proposed project, the Vector Management Plan will include a baseline, performance standards, and monitoring requirements to ensure ongoing effectiveness.

**Response 24:** (p. 7; Noise and vibrations). As mentioned in the Initial Study, all final foundations will be subject to review and approval by the City Geologist prior to issuance of grading permits. As the project design has progressed, the project applicant has determined that

they will use grade beam foundations that are designed to avoid the use of piles which would have to be driven into landfill waste. The construction noise impacts have been fully evaluated in the Initial Study including pile driving (although pile driving is no longer required) and appropriate mitigation measures are included in the Initial Study to avoid or reduce these impacts to a less than significant level. The noise report (which includes impacts of construction noise including pile driving) was evaluated by the consulting biologists, who determined that no significant impact would occur (see p. 46-53 of IS).

**Response 25:** (p. 8; Hydrology and Water Quality). As described in the Initial Study both in the biological resources and hydrology and water quality sections, the proposed stormwater control plan includes a series of vegetated swales, forebays, and storm drains designed to avoid and reduce impacts from stormwater run-off from the project site to a less-than-significant level. The stormwater runoff collected in storm drains and discharged from drainage collection areas (basins) will first be channeled into open forebays, where all large sediment particles will settle out and can be removed as needed. The second water quality treatment will occur as each forebay continues to drain into one of six vegetated swales. This system will therefore provide two levels of water treatment before the stormwater is released at a controlled flow rate into the existing catch basin and wetlands to the west of the project site. The rate of outflow being discharged to the existing water and wetlands will be limited so as to avoid exceeding the prevailing pre-developed flow. The forebay and vegetated swale containment system is designed to handle 100-year flood conditions, and therefore will not be overwhelmed and release untreated water into the adjacent wetlands.

In addition, the volume of runoff released from the site in any particular area (as calculated for each location on p. 18, Figure 6 in the Stormwater Control Plan attached as Appendix F of the IS), is not substantially greater than existing conditions as the outfall areas will distribute runoff to four release locations. As a result, release of runoff from the site cannot result in substantial changes in the character of receiving areas off-site (*e.g.*, by converting saltmarsh habitat to brackish or freshwater marsh). Thus, project impacts to adjacent wetland habitats resulting from stormwater runoff, including both quality and quantity-related impacts, are less-than-significant.

**Response 26:** (p.9; Traffic). As described in the Initial Study, a Trip Generation Study was done which identified the number of vehicle trips that would be generated by the project (p. 101). The City of San José then compared the anticipated traffic to the existing conditions and the conditions that will exist when the approved Zanker MRF is built on adjacent property. The City of San Jose defines traffic impacts in terms of level of service of roadway intersections. Adopted Council Policy 5-3 states that cause an intersection to degrade to Level of Service E or greater is inconsistent with General Plan policies to maintain acceptable traffic levels in the City and would therefore, create a significant adverse impact. City staff also maintains an approved methodology for estimating traffic increases and calculating impacts. A trip generation study was prepared for this project and is included in Appendix G. Results of this analysis found that the intersections in the area currently operate and are projected to continue to operate at an acceptable level of service under existing, background, and project conditions because the project will not add sufficient traffic to cause the intersections in the area to deteriorate below acceptable levels of service. The project traffic will not exceed the capacity of the existing circulation system or conflict with relevant standards on regional roadways as established by

adopted City and Congestion Management Program policies. Therefore, traffic impacts were fully and adequately evaluated in the Initial Study.

**Response 27:** (p.9; Cumulative Impacts). The proposed AD Facility project will have separate utilities and will be owned, managed and operated by Zero Waste Energy Development Company (ZWED). Please refer to Response 1 regarding the Plant Master Plan.

While the adjacent ZMPF and ZRRROL facilities may transfer materials between facilities, they are transacted through independent business relationships. Each company is separate and distinct, while they share some common ownership at the present time, the companies and their facilities are operated independently and have separate and distinct functions. Regardless of ownership, these properties have separate utilities and functions and are not part of the proposed project.

The two adjacent facilities are either existing or have their entitlements. The Initial Study fully describes their proposed interactions with the proposed project. The traffic numbers assumed all existing and approved trips, in addition to the proposed project trips evaluated by City Staff.

As mentioned above, the project traffic was compared to existing and background conditions and the intersections analysis included all traffic from previously approved development projects, including the approved Zanker Materials Recovery Facility (ZMRF) and the First Phase (approved development ) of the North San Jose Vision Plan (on lands south of SR 237). The analysis by City staff found that traffic from this project, in combination with traffic from all existing and previously approved projects will not result in significant increases in traffic congestion and will not exceed roadway capacity. Therefore, traffic impacts were fully and adequately evaluated in the Initial Study.

**Response 28:** (p. 8; owls). Please refer to the responses to comments 7-18 above, which describe the reasons why impacts to burrowing owl foraging habitat are less than significant unless conditions on the site change to the point that burrowing owls begin to nest or roost on the site. If owls nest or roost on the site and must be relocated for project construction, the IS/MND requires compensatory habitat mitigation to offset the impacts to burrowing owl habitat. Otherwise, there is no reason to believe that the project will in any way adversely affect regional populations of burrowing owls. The project site does not provide high-quality habitat for burrowing owls. Extensive potential foraging habitat of far greater quality than that on the project site is present in the North San Jose area, yet based on the best available information on burrowing owl abundance and distribution in the South Bay (the 2008 survey by Albion Environmental), only four pairs of burrowing owls are known from the North San Jose area north of Highway 237. None are on this project site. Thus, much of the available foraging habitat of much greater quality than that on the project site is little used, or is unoccupied, by burrowing owls. As a result, conversion of marginal-quality habitat by the project will not contribute to any cumulative impacts to burrowing owls.

**Response 29:** (p. 8; California water code). Please refer to Response 3. Also, please note that the project will primarily rely on recycled water.

**DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY**

801 K STREET, MS 19-01, SACRAMENTO, CALIFORNIA 95814 • (916) 322-4027 • WWW.CALRECYCLE.CA.GOV

May 9, 2011

Ms. Jodie Clark  
City of San José  
200 East Santa Clara Street, Tower 3  
San José, California 95113-1905

**Subject:** State Clearinghouse (SCH) No. 2011042023 – Proposed Mitigated Negative Declaration (MND) for the closure and postclosure land use of the Nine Par Landfill (NPLF), SWIS No. 43-AN-0005, and the development and operation of the *Dry-Fermentation Anaerobic Digester Facility (D-FADF)* project, requiring the issuance of a full Solid Waste Facilities Permit (SWFP), Santa Clara County.

Dear Ms. Clark:

The California Department of Resources Recycling and Recovery (CalRecycle or Department) thanks the lead agency for including CalRecycle staff in the planning stages of this project proposal. Staff would like to assist the lead agency further by offering CalRecycle staff be available for any meetings regarding closing the NPLF and/or the planning, development and permitting of the proposed D-FADF.

The following comments are intended to aid decision-making bodies of the lead agency and CalRecycle in determining whether the MND is adequate for the permitting needs of the Department when considering concurrence in the issuance of the D-FADF SWFP.

CEQA compliance is required for the establishment, expansion, or change in operation(s) of a solid waste facility (SWF) requiring the issuance or revision of a SWFP. handling and processing of municipal solid waste (MSW) are regulated by CalRecycle.

Page 5 of the MND states that “The project site is located at 2100 Los Esteros Road north of Zanker Road off of State Route 237 in the Alviso area of San José. The project site is part of an approximately 96-acre parcel of land that is adjacent to the Zanker Road Resource Recovery Operation and Landfill (ZRRROL) and the Zanker Material Processing Facility (ZMPF). Of the 96 total acres, approximately 41 acres is considered to be the proposed project site.

The proposed project is the post closure land use of the Nine Par Landfill and construction and operation of a Dry-Fermentation Anaerobic Digestion Facility, which will convert organic waste sourced from the City of San José and surrounding communities into a biogas containing 50 to 60 percent methane. The biogas will be stored onsite at a maximum volume of 1,600 cubic feet (cf) per phase (4,800 cf at complete buildout of Phases I-III) and used to power onsite combined



heat and power (CHP) engines. The proposed facility will accept commercial and municipal organic waste. Municipal feedstock materials are to be trucked directly to the proposed facility or conveyed from the nearby ZRRROL and/or ZMPF facilities.”

Materials to be sorted as part of material handling and pre-processing and separated from the organic fraction of the MSW feedstock will be done inside the AD building or at the ZRRROL or ZMPF facilities. Any contaminants from pre-processing should be stored within the pre-processing building until transport to an appropriate disposal facility.

The Nine Par property is a “disposal site” (an older type of landfill without environmental controls) that is currently a non-operating inactive site. It is subject to applicable state regulations contained in California Code of Regulations (CCR) Title 27, Post-Closure Regulations. The landfill will be required to file a plan for Closure and Post-Closure maintenance and monitoring in addition to a post-closure project application that addresses all applicable requirements of CCR, Title 27, Section 20190, including the approval of the City of San Jose Local Enforcement Agency (LEA), and the 'concurrence' of the Natural Resources Agency - CalRecycle Program. Development and activities on the site will also be regulated by the San Francisco Bay Regional Water Quality Control Board through the issuance of potential Waste Discharge Requirements (WDR).

During construction of the proposed D-FADF, the proposed project has the potential for landfill gas (LFG) to migrate and collect in low-lying pockets and within on-site enclosures (e.g. open-ended pipes, structures, etc.). Please describe the contingency plan, in the event that LFG extraction probes are not installed along the perimeter of the NPLF, for containment and/or monitoring of methane gas levels during construction of the D-FADF. Methane gas is odorless and has the potential to concentrate within the explosive range of 5-15% in air.

The MND does not fully analyze the potentially significant impacts to health, safety and the environment regarding the chemical constituents, and extent, of the chemical discharge that has leached from the closed permitted NPLF. To date, these hazardous chemicals have not been fully analyzed to determine the full extent of impacts to air and water beneath the former landfill and the chemical state (stable state, volatile in air, soluble in runoff water, etc.) that may pose a threat to health, safety and the environment if these impacts are not fully analyzed. It is CalRecycle staff's understanding that a “Phase 2” site investigation is being conducted to further analyze the site's groundwater impacts and potential for future impacts to human health and safety after the site has been fully developed. If further studies indicate that hazardous waste had been disposed, legally or illegally, at the NPLF, and has the potential to affect health, safety, and/or the environment during construction and/or operations, further CEQA compliance and mitigation may be necessary for project approval of both the closure and postclosure land use at this location.

Please contact Mr. Alfred Worcester, Engineering Geologist, of CalRecycle's Engineering Support Branch, Compliance and Enforcement Division, at 916-341-6353 for assistance with the closure and postclosure of the NPLF.

CalRecycle staff requests copies of and consultation on any subsequent or revised environmental documents on the proposed project, including the "Phase 2" site investigation report.

CalRecycle staff requests that the Department be noticed of the date, time and location of any public hearings regarding the project proposal at least ten days in advance.

Please note that correspondence for staff of CalRecycle's Permitting and Certification Division should continue to be sent to 1001 I Street, P.O. Box 4025, Sacramento, CA 95812.

Correspondence specifically for the attention of the Director of CalRecycle should be sent to the address in the letterhead of this letter.

If you have any questions regarding these comments, please contact me at (916) 341-6327, facsimile at (916) 319-7213, or e-mail me at [john.loane@CalRecycle.ca.gov](mailto:john.loane@CalRecycle.ca.gov).

Sincerely,

*Original Signed by:*

John Loane, Integrated Waste Management Specialist (IWMS)

Permits and Assistance North Unit

Permits and Assistance North Central Section

Permitting and Assistance Branch

Permits and Certification Division

**CALIFORNIA DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY**

cc: State Clearinghouse  
Office of Planning and Research  
P.O. Box 3044  
Sacramento, CA 95812-3044

Sue O'Leary, Supervisor  
Permits and Assistance North Unit  
Permits and Certification Division  
CalRecycle

Alfred Worcester, Engineering Geologist  
Closure and Facility Engineering Unit  
Compliance and Enforcement Division  
CalRecycle

Mark de Bie, Division Chief  
Permits and Certification Division  
CalRecycle

D-FADF Anaerobic Digester MND

May 9, 2011

Page 4 of 4

Mr. Dennis Ferrier  
City of San José  
Department of Planning, Building, and  
Code Enforcement  
200 E. Santa Clara Street, Tower 1-C  
San José, CA 95113  
Phone: 408-535-7945

## CalRecycle

**Response 1:** (p.2, 4<sup>th</sup> paragraph). A perimeter gas migration and monitoring program is currently being prepared. The program will be implemented based in existing site conditions and designed in conformance with Title 27 and the LEA. All structures and buildings will have subgrade ventilation with monitoring to meet Title 27 requirements.

**Response 2:** (p.2, 4<sup>th</sup> paragraph).The final site investigation has been completed and submitted to your attention. According to the project geologist for the project (Tom Vercoutere, Professional Geologist, Senior Consultant, Golder Associates Inc.), the proposed project development will have no effect on the existing TCE impact zone (plume) that is located approximately 15 feet below ground surface in a sand layer that is overlain by low permeable bay mud or refuse within that landfill. Additionally, the existing TCE, which is in the landfill waste and in groundwater, will have no adverse effects on future workers or visitors to the site. Due to the depth and location of TCE, no surface runoff from the site will contain TCE, and therefore, surface runoff of TCE into the wetlands will not occur. The reduction of pervious surfaces (paving portions of the site and constructing buildings) on the project site and implementation of the proposed stormwater pollution prevention plan will improve the water quality of surface runoff and reduce stormwater infiltration into the waste that contains TCE. This will reduce the potential for TCE migration because by decreasing the permeable surface area, infiltration into the landfill refuse will be reduced. In addition, the development of the project will have no effect on the current groundwater flow below or nearby the project site because groundwater flow occurs in the sand layers that are 15 to 20 feet or more below ground surface.

**DEPARTMENT OF TRANSPORTATION**

P. O. BOX 23660  
OAKLAND, CA 94623-0660  
PHONE (510) 622-5491  
FAX (510) 286-5559  
TTY 711



*Flex your power!  
Be energy efficient!*

May 9, 2011

SCL-237-7.99  
SCL237188  
SCH2011042023

Ms. Jodie Clark  
City of San Jose  
200 East Santa Clara Street, Tower 3  
San Jose, CA 95113-1905

Dear Ms. Clark:

**Dry-Fermentation Anaerobic Digestion Facility Project (SP09-057) – Mitigated Negative Declaration (MND)**

Thank you for including the California Department of Transportation (Department) in the environmental review process for the above-referenced project. We have reviewed the proposed project's Mitigated Negative Declaration and Trip Generation and Operations Analyses report (Report) and are pleased to offer the following comments.

As lead agency, the City of San Jose is responsible for all project mitigation, including any needed improvements to state highways. The project's fair share contribution, financing, scheduling, implementation responsibilities and lead agency monitoring should be fully discussed for all proposed mitigation measures. The project's traffic mitigation fees should be specifically identified in the environmental document. Any required roadway improvements should be completed prior to issuance of project occupancy permits. While an encroachment permit is only required when the project involves work in the State Right of Way (ROW), the Department will not issue an encroachment permit until our concerns are adequately addressed. Therefore, we strongly recommend that the lead agency ensure resolution of the Department's California Environmental Quality Act (CEQA) concerns prior to submittal of the encroachment permit application. Further comments will be provided during the encroachment permit process if required; see the end of this letter for more information regarding the encroachment permit process.

While the City of San Jose conducts its traffic studies in accordance with guidelines, which conform to the local Congestion Management Program managed by the Santa Clara County Valley Transportation Authority, the Department's thresholds are primarily concerned with potential impacts to the State Highway System. We encourage the City of San Jose to coordinate preparation of traffic studies with our office to help sharpen the focus of your scope of work and answer any questions you may have. Please see the Departments' "*Guide for the Preparation of Traffic Impact Studies*" at the following website for more information:  
<http://www.dot.ca.gov/hq/traffops/developserv/operationalsystems/reports/tisguide.pdf>

### ***Highway Operations***

1. The Report should include geometric lane configurations, traffic volumes and turning movements of the State Route (SR) 237/Zanker Road northbound and southbound intersections. These intersections should be clearly marked in the maps and figures of the Initial Study and the Report. Also, the Initial Study and Report should clearly state whether these intersections are the westbound and eastbound SR 237 on and off ramps intersections with Zanker Road.
2. Please include in the Initial Study and Report analyses, geometric lane configurations, traffic volumes, and turning movements for the project site access of the Zanker Road/Los Esteros Road intersection.
3. The Report and Initial Study should state whether or not there are project impacts on SR 237, within the State ROW.
4. On page 4 of the Report, under "Intersection Level of Service Analysis," the Report should clearly state to which peak period and intersection the level of service (LOS) C is referring.
5. On page 100 of the Initial Study, under "Traffic Impacts," and on page 5 of the Report, under "Traffic Study Requirements," the LOS E mentioned and other references to the LOS E should be clearly defined in the Report and the Initial Study. Why was the LOS E used as the basis of the Initial Study and Report (i.e., is this the intersection threshold standard of the City of San Jose)? Instead, the LOS standards from the Department's "Guide for the Preparation of Traffic Impact Studies" should be used for the analyses of the Zanker Road/SR 237 northbound and southbound intersections.

### ***Traffic Safety***

The data from a three-year safety and traffic accident study from January 1, 2007, to December 31, 2009, indicates the total accident rate at the SR 237/Zanker Road eastbound off ramp and the SR 237/Zanker Road westbound off ramp are higher than the statewide average. The majority of the primary collision factors were due to speeding, leading to rear end and vehicle overturn accidents.

### ***Encroachment Permit***

Work that encroaches onto the State ROW requires an encroachment permit that is issued by the Department. To apply, a completed encroachment permit application, environmental documentation, and five (5) sets of plans clearly indicating State ROW must be submitted to the address below. Traffic-related mitigation measures should be incorporated into the construction plans during the encroachment permit process.

Office of Permits  
California DOT, District 4  
P.O. Box 23660  
Oakland, CA 94623-0660

See the website link below for more information.  
<http://www.dot.ca.gov/hq/traffops/developserv/permits/>

Ms. Jodie Clark / City of San Jose  
May 9, 2011  
Page 3

Should you have any questions regarding this letter, please contact Brian Brandert of my staff at (510) 286-5505, or [brian\\_brandert@dot.ca.gov](mailto:brian_brandert@dot.ca.gov).

Sincerely,



LISA CARBONI  
District Branch Chief  
Local Development-Intergovernmental Review

c: Scott Morgan (State Clearinghouse)

## **California Department of Transportation.**

1. Highway Operations, Bullet 1. A full traffic report is not necessary, based on the peak hour traffic volumes generated. See p. 5 of the traffic study, Appendix G of the Initial Study.
2. Highway Operations, Bullet 2. See comment 1.
3. Highway Operations, Bullet 3. The project description does not include changes to the right-of-way of SR 237; in addition, traffic impacts from the project have been described in the Initial Study as less than significant. There will be no significant impacts on SR 237.
4. Highway Operations, Bullet 4. Levels of service for the SR 237 / Zanker intersection are described on p. 4 of traffic study for the project.
5. Highway Operations, Bullet 5. Level of Service Standards are explained in Table 1 of the City's Traffic Analysis manual, which is available here:  
[http://www.sanjoseca.gov/planning/eir/traffic\\_impact\\_analysis/Vol%201%20San%20Jose%20TIA%20Guidelines%202008.pdf](http://www.sanjoseca.gov/planning/eir/traffic_impact_analysis/Vol%201%20San%20Jose%20TIA%20Guidelines%202008.pdf)

May 9, 2011

Ms. Jodie Clark  
City of San José  
Department of Planning, Building, and Code Enforcement  
200 East Santa Clara Street  
San José, CA 95113-1905  
jodie.clark@sanjoseca.gov  
*Submitted via electronic mail*

**RE: Comments on the Mitigated Negative Declaration for the Proposed Dry Fermentation Anaerobic Digestion Facility, Project No. SP09-057**

Dear Ms. Clark:

Thank you for the opportunity to comment on the Mitigated Negative Declaration (“MND”) for the proposed Dry Fermentation Anaerobic Digestion Facility (“Project”). San Francisco Baykeeper (“Baykeeper”) submits these comments on behalf of our 2,300 members that live, work, and recreate in and around the San Francisco Bay. Baykeeper is a 501(c)(3) non-profit organization with the mission of protecting and enhancing the water quality of the San Francisco Bay for the benefit of its ecosystems and surrounding communities. With the goal of minimizing impacts to the San Francisco Bay, Baykeeper submits the following comments.

**1. The MND Unlawfully Segments Review of the Digestion Facility Project from the Water Pollution Control Plant Master Plan.**

Before adopting a MND, the California Environmental Quality Act (“CEQA”) requires a lead agency to review the environmental impacts of the *whole* project in an initial study. An agency may decide to “tier” review of a large-scale project that involves several small-scale projects in certain situations, but such tiering is unlawful if ignores the future environmental impacts of the project at issue. According to the CEQA Guidelines, “[t]iering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration.” Cal. Code Regs. tit. 14, § 15152(b). The California courts have made it abundantly clear that this practice, which is commonly known as “piecemealing,” does not satisfy CEQA: “The requirements of CEQA cannot be avoided by piecemeal review which results from chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences.” *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal. 4th 459, 503; *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal. App. 4th 351, 370.

In this case, the City of San José will unlawfully piecemeal the Project if it adopts the MND for the new Digestion Facility before it prepares the Programmatic Environmental Impact Report (“Environmental Impact Report”) for the Water Pollution Control Plant and its buffer lands. As stated in the Project’s Initial Study, the Project will be located on only 41 acres of a 96-acre

parcel of land. Initial Study, Page 5. The City of San José has designated the remainder of this parcel as a likely expansion area for the San José/Santa Clara Water Pollution Control Plant. *Id.* Considering the massive size of the Plant, which operates on a 2,600-acre site, the Project will have significant environmental impacts that are reasonably foreseeable when evaluated in conjunction with the Plant's future expansion and redevelopment. Even if the Project would result in relatively small environmental impacts by itself, the Project's impacts will be magnified by the future development of the Plant as seen in its Master Plan. Therefore, these future impacts must be considered by the City of San José *before* it adopts a MND for the Project.

The Project will result in several significant environmental impacts that are not addressed in its Initial Study. For example, the unused portion of the project site currently hosts a tidal marsh area that will be impacted by the future development of the Water Pollution Control Plant. This area also contains sites that may be contaminated with pollutants, such as the former Nine Par Landfill and an inactive recycled water filling station. The future development of these sites could release pollutants into the San Francisco Bay, thereby impacting its water quality. Since the City of San José is well aware of the Plant's future development, it would be feasible for the City to analyze the cumulative impacts of the Project in its Initial Study.

2. **The City of San José Must Prepare an EIR Because the Project Will Have Significant Environmental Impacts.**

A lead agency must prepare an EIR instead of a Negative Declaration ("ND") if a "fair argument" can be made on the basis of "substantial evidence" in the record that the project may have a significant adverse environmental impact. Cal. Code Regs. tit. 14, § 15064(a)(1); *Laurel Heights Improvement Association v. U.C. Regents* (1993) 47 Cal.4th 376. A ND is authorized only when the lead agency determines that no substantial evidence exists to support a fair argument of significant effects. Cal. Code Regs. tit. 14, § 15063. Here, the Initial Study identifies several environmental impacts that are more than significant, mandating the City of San José to prepare an EIR that fully evaluates the Project's environmental impacts.

For example, relying on the Initial Study, the draft MND identifies several impacts that the Project will have on water quality and aquatic ecosystems. First, the MND concludes that the proposed Project will increase impervious surfaces on the project site, which could introduce pollutants into stormwater from the project area. Draft MND, Page 8. The Project may also cause a significant increase in the amount of contaminants in stormwater runoff during construction. *Id.* at 9. Even more, Project-related construction and grading activities could contaminate the adjacent aquatic and wetland habitats, such as the San Francisco Bay National Wildlife Refuge. *Id.* at 2. All of these impacts are significant and must be analyzed in an EIR.

3. **The Notice of Intent to Adopt a MND is Inadequate Because it States that the City of San José Plans to Adopt the MND on the Same Day that it Receives Comments.**

According to the City of San José's Notice of Intent, "the purpose of [the] notice is to inform the public of the Director's intent to adopt a Mitigated Negative Declaration for the proposed project on May 9, 2011," which is also the deadline for submitting comments on the proposed Project. If the City adopts the MND on the same day that it receives comments on the MND, the City will not have an adequate opportunity to consider and respond to comments. Instead, the City should

only adopt the MND after it provides itself with an adequate amount of time to consider and respond to all comments submitted by the public.

Thank you for considering Baykeeper's comments. If you have any questions, please feel free to contact me at (415) 856-0444, extension 109.

Sincerely,

A handwritten signature in cursive script, reading "Abigail D. Blodgett", with a long horizontal flourish extending to the right.

Abigail D. Blodgett  
Legal Fellow  
San Francisco Baykeeper

## **SF Baykeeper**

**Response 1:** The proposed AD Facility project is a separate project from the Water Pollution Control Plant Master Plan. While the proposed AD Facility project is located on land owned by the Plant, it will have separate utilities and owned, managed and operated by Zero Waste Energy Development Company (ZWED). ZWED is a partnership between Zanker and GreenWaste. Zanker, a partner in ZWED, owns and operates the two adjacent facilities. Neither the proposed AD Facility nor Plant Master Plan depend on each other to be approved or operate. In other words, the proposed AD Facility, if approved, can operate with or without approval of the Plant Master Plan project, whenever that may occur.

In addition, each project has separate goals and objectives. One of the main project objectives of the AD Facility is to meet the City's Green Vision by diverting waste from landfills and converting waste to energy. At full buildout, the project will divert approximately 225,000 tons of organic waste from landfills. This is also consistent with the City's General Plan Solid Waste Goals 1 and 5 that promote extending the life span of landfills by composting and transforming solid wastes and encourage alternatives to landfilling.

The main purpose of the Plant Master Plan is to improve and replace the aging infrastructure at the Plant in order to meet new regulations and to serve the projected population growth anticipated by the Association of Bay Area Governments.

In summary, the proposed AD Facility Initial Study evaluated the project as a whole and did not piecemeal the project. The Plant Master Plan EIR will be required to evaluate the cumulative environmental impacts.

**Response 2:** As described in the Initial Study feasible mitigation measure have been identified that reduce all impacts to a less than significant level, therefore, an EIR is not required. This comment does not identify what "fair argument" could be made that any of the project's impacts should be considered significant. It lists the impacts that are identified in the Initial Study but fails to list or even mention the mitigation and avoidance measures proposed for all of them.

**Response 3:** The City Council Hearing is tentatively planned for June 7, 2011. Regardless of the City Council Hearing date, the lead agency will consider the MND with the entire environmental record including the Initial Study and any comments received during the public review process.



# United States Department of the Interior



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

In Reply Refer To:

May 11, 2011

Mr. Joseph Horwedel, Director  
Attn: Mrs. Jodie Clark, Project Manager  
City of San Jose  
Department of Planning, Building and Code Enforcement  
200 East Santa Clara Street, 3rd Floor  
San Jose, California 95113

Subject: Comments on the Intent for the City of San Jose to Adopt a Mitigated Negative Declaration on the Proposed Dry-fermentation Anaerobic Digestion (AD) Facility Project (File No. SP09-057)

Dear Mr. Horwedel:

The U.S. Fish and Wildlife Service (Service) appreciates the opportunity to comment on the findings and conclusions of the Mitigated Negative Declaration and Initial Study on the Proposed Dry-fermentation Anaerobic Digestion (AD) Facility Project (Proposed Project). We understand that the project proposed by the City of San Jose includes construction of a 270,000 ton per year dry fermentation AD facility to process the organic portion of solid waste. The facility includes three 60,000 square foot buildings, incidental office space, biofilters, outdoor space for aerated curing piles, screening and stockpiling finished materials, 6 power generators and 3 emergency generators on an approximately 41-acre site.

The Proposed Project is located at 2100 Los Esteros Road, north of Zanker Road off of State Route 237 in the Alviso area of San Jose, Santa Clara County, California. The Don Edwards San Francisco Bay National Wildlife Refuge (Refuge) is located to the northeast (downslope) of the Proposed Project. As an adjacent landowner, we have concerns that the Proposed Project may affect listed species located within the Refuge. At issue are the potential effects of the Proposed Project on the endangered salt marsh harvest mouse (*Reithrodontomys raviventris*), threatened Pacific coast population of the western snowy plover (*Charadrius alexandrinus nivosus*), and California clapper rail (*Rallus longirostris obsoletus*), as identified under the authority of the Endangered Species Act, as amended (16 U.S.C. 1531 *et seq.*). Because the Proposed Project may also have impacts to the

Environmental Education Center (EEC) programs and visitors that enjoy the species and habitats that are present near the Project site, we recommend the following be thoroughly evaluated:

*Effects to Listed Species.*

The Proposed Project is located adjacent the Refuge (New Chicago Marsh unit) with tidal marsh and associated intertidal mudflats that provide habitat for listed and special-status species, such as the Federal- and State-endangered salt marsh harvest mouse, threatened western snowy plover, and the Federal- and State-endangered California clapper rail.

New Chicago Marsh is known to have a population of salt marsh harvest mice and western snowy plover nests have been observed within the dry pan areas of New Chicago Marsh. In addition, tidal marsh habitat is present within the slough which may provide habitat for the California clapper rail. Due to the potential to impact these three species, we suggest the analysis include all direct and indirect effects including, but not limited to, construction of the Proposed Project and increased presence of predators (e.g., Norway rats, California gulls, feral cats, red foxes) that prey on California clapper rails, western snowy plovers, and salt marsh harvest mice; and the construction of buildings, towers, and transmission lines adjacent to the salt marsh that may create artificial perches for raptors that prey on these species. We recommend you evaluate toxic air contaminants such as petroleum hydrocarbons that may directly or indirectly affect listed species through toxicity or a decrease in prey base.

*Effects from Noise, Lighting and Vibration:*

We recommend evaluating construction noise, lighting and vibration that may displace these species temporarily and/or permanently from the area. Construction activities should be timed not to occur during sensitive breeding and nesting periods for these species. In addition, lighting and noise impacts could also affect species after construction is complete. Construction within the project area could affect individuals through increased noise and vibrations from equipment and construction activities. Operation of construction equipment could result in displacement of species from protective cover and their territories. These disturbances likely would disrupt normal behavior patterns of breeding, foraging, sheltering, and dispersal, and likely result in the displacement of species from their territory in the areas where their habitat is disturbed. Displaced species may have to compete for resources in occupied habitat, and may be more vulnerable to predators. Disturbance could cause short-term effects such as failure to breed, nest abandonment, lower numbers of eggs/young, juvenile abandonment, and overall lower juvenile survivorship.

*Effects Due to Sea Level Rise:*

We recommend you evaluate the potential for the project to preclude the landward transgression of the marsh in the face of sea level rise which may result in the eventual elimination of the salt marsh and the loss of an important buffer to coastal

Mr. Joseph Horwedel

3

flooding. The Proposed Project should also analyze the potential need for additional flood protection due to sea level rise.

Thank you for considering our comments. Please keep us informed of the Proposed Project review process, especially any and all future opportunities to provide comments. If you have any questions, please contact me at 510 792-0222 x125.

Sincerely,



Digitally signed by Eric Mruz  
DN: cn=Eric Mruz, o=US Fish and  
Wildlife Service, ou=Don Edwards  
San Francisco Bay NWR,  
email=eric\_mruz@fws.gov, c=US  
Date: 2011.05.11 09:42:33 -07'00'

Eric Mruz  
Manager, Don Edwards San Francisco Bay  
National Wildlife Refuge

cc:

Cay C. Goude, U.S. Fish and Wildlife Service, Sacramento, CA  
Scott Wilson, California Department Fish and Game, Yountville, CA  
John Bourgeois, California Coastal Conservancy, Oakland, CA

## USFWS

**Response 1:** (p. 2; Effects to Listed Species). The Biological Resources Report prepared to support the Initial Study evaluated the direct and indirect impacts to the salt marsh harvest mouse, threatened western snowy plover, and California clapper rail. The evaluation determined that the proposed project would not result in any significant unavoidable impacts to these species. In addition, a Vector Management Plan has been included in the project and will be adaptive in order to be successful.

Toxic air contaminants including emissions related to petroleum hydrocarbons were fully evaluated in an air quality assessment for the proposed project. The project is subject to Bay Area Air Quality Management District (BAAQMD) rules and regulations, including the requirement for the CHP engines, backup flares, and biofilters to have Best Available Control Technology (BACT). To comply with BACT requirements and to provide design features that avoid significant adverse air quality impacts, the project emitting units will be equipped with the air pollution control systems. These systems include the following design features:

- The CHP engines will involve the use of Selective Catalytic Reduction (SCR) to reduce nitrogen oxides (NOx) emissions by at least 90 percent, use of oxidation catalyst to reduce reactive organic gas (ROG) emissions by at least 25 percent, and use of iron sponge filtering or equivalent technology to remove at least 80 percent reduced sulfur compounds from biogas
- The biofilters will each have a baghouse control technology upstream of each biofilter to remove 99.25 percent of PM10 and PM2.5.

Based on the air assessment, the facility's maximum emissions of nitrogen oxides, ROG, PM10 (exhaust), and PM2.5 (exhaust) would be less than the BAAQMD CEQA daily and annual thresholds of significance. In addition, the results of a human health risk assessment completed to assess impacts and public exposure associated with airborne emissions of toxic air contaminants from operation of the project were all well below the threshold of significance.

**Response 2:** (p.2; Effects from Noise, Lighting, and Vibration). The Initial Study included a biological assessment that evaluated noise, vibration, and lighting during both the construction and operation phases of the proposed project and their effects on the adjacent Refuge. All impacts were determined to be less than significant or were reduced to a less than significant level with the inclusion of specific mitigation. Mitigation measures to protect relevant species, particularly during the nesting and breeding seasons have been included in the Initial Study based on the recommendations in the biological resources report. In addition, specific mitigation and avoidance measures have been included in the proposed project to minimize lighting and noise impacts to sensitive species at the Refuge during project operations. For example, these measures require all lights to be directed downward and inward toward the facility roads and buildings, away from the marsh and adjacent grasslands, and shielding must be installed on each light to prevent illumination from shining upward or outward into the marsh and adjacent grasslands, thus limiting the quantity of light visible from off the project site and reducing amount of light spilling into areas outside of the facility.

**Response 3:** (p.2; Effects Due to Sea Level Rise). Based on the Bay Conservation and Development Commission preliminary recommendations for amendments to the Bay Plan to incorporate climate change, the proposal reflects sea level rise estimates of 16 inches (1.3 feet) by 2050 and 55 inches (4.6 feet) by 2100. According to the projected sea level rise and coastal flooding maps for the South Bay, the project site, including proposed buildings and facilities, all are above the

55-inch projected sea level rise area. Since the project site is above this predicted sea level elevation and most of the site is already above current mean sea level, it will not have any impact on the elimination of existing marsh habitat due to the projected sea level rise.

**Clark, Jodie**

---

**From:** Keith Roberson [KRoberson@waterboards.ca.gov]  
**Sent:** Tuesday, May 10, 2011 3:22 PM  
**To:** Clark, Jodie  
**Cc:** Julie Mier; Davidson, John; Prevetti, Laurel; Gurza, Renee; Brian Wines; Terry Seward  
**Subject:** RE: Nine Par landfill (File No. SP09-057)

Ms. Clark,

Thanks for the clarification regarding your schedule, and thank you for sending the link to the circulated CEQA documents. We understand your need to operate within a prescribed timeframe regarding CEQA documents. Unfortunately, because we only recently learned about the circulated documents and have not yet had the opportunity to review them, it will not be possible for Water Board staff to submit specific comments to you by May 11.

However, now that we have access to the reports, Regional Water Board staff (Brian Wines and myself) will likely prepare and submit some comments because we do have some concerns about certain water-quality aspects of the proposed project. Based on our limited familiarity with the proposal, we have concerns about the following aspects of the project and the site in general:

- Foundation stability
- Results of the Phase II environmental investigation
- Extent of TCE in groundwater detected on northwest edge of the site
- Effects of future sea-level rise on the proposed site location

Although we will not be able to meet the comment deadline for the Mitigated Negative Declaration and supporting documents, we hope that any comments we submit may be helpful to you so that City staff understands how the Water Board will regulate the facility. Our comments may be applicable to the Special Use Permit when that document is circulated and considered.

Please be aware that if future action on this project requires permits from the Regional Water Board, we will need to make findings on the adequacy of the CEQA review with respect to the protection of waters of the State, prior to issuing such permits. If, at that time, we determine that the City's CEQA review did not adequately address our concerns, we are required to make our own CEQA findings. Depending on the significance of such findings, we may require modifications to the project and any associated mitigation measures before we are able to issue permits to the project.

Thanks,

Keith Roberson  
Engineering Geologist  
Regional Water Quality Control Board  
San Francisco Bay Region  
510-622-2404

>>> "Clark, Jodie" <jodie.clark@sanjoseca.gov> 5/6/2011 5:05 PM >>>

Mr. Roberson,

I left you a phone message but wanted to respond in writing as well. I am sorry to hear that you have not seen the Initial Study for the Dry-Fermentation Anaerobic Digestion Facility (Nine Par Site, SP09-057). The City of San Jose does its best to inform all responsible and interested agencies, to that end the document was sent to

5/13/2011

the State Clearinghouse and has been circulating since April 8<sup>th</sup>. According to the Clearinghouse database (<http://www.ceqanet.ca.gov/DocDescription.asp?DocPK=650849>) the document was sent to the Region 2 office. Therefore, the City of San Jose is not able to extend the comment period beyond the current deadline of May 9, 2011.

If you are not able to locate the Clearinghouse paper copy, the document is available on the City's website for your review under File No. SP09-057 - <http://www.sanjoseca.gov/planning/eir/MND.asp>

Please let me know if you have any additional questions,

**Jodie Clark, AICP**  
**Project Manager**  
*Department of Planning, Building and Code Enforcement*  
*City of San Jose*  
*City Hall Tower - Third Floor*  
*(408) 535-7818*  
*fax (408) 292-6055*  
[jodie.clark@sanjoseca.gov](mailto:jodie.clark@sanjoseca.gov)

**Interested in being informed on Planning, Development and Land Use Issues?** You can subscribe to e-mail notifications on issues that interest you. Please go to [http://www.sanjoseca.gov/development/subscription/email\\_updates.asp](http://www.sanjoseca.gov/development/subscription/email_updates.asp)

---

**From:** Keith Roberson [mailto:KRoberson@waterboards.ca.gov]  
**Sent:** Friday, May 06, 2011 2:09 PM  
**To:** Clark, Jodie  
**Cc:** Brian Wines; Terry Seward  
**Subject:** Nine Par landfill

Dear Ms. Clark,

The Groundwater Protection Division of the San Francisco Bay Regional Water Quality Control Board is involved in the oversight of the Nine Par and Zanker landfills. Terry Seward and I have met twice with City of San Jose Planning Department staff (Nap Fukuda and others) and consultants regarding the proposed Anaerobic Digester facility to be located above the former Nine Par landfill. We have also spoken with Dennis Ferrier with the San Jose Local Enforcement Agency. While we are generally in favor of the AD facility moving forward, we do have outstanding questions regarding the proposal, especially relating to the closure status of the Nine Par landfill. It would be appropriate for us to have the opportunity to comment on the proposed redevelopment; however, to my knowledge, this agency has not received a copy of the Initial Study and associated technical documents that have been put out for public review. I also do not know if the documents are available for downloading on-line.

It is my understanding that the Public Comment period closes Monday May 9. If it is not too much trouble I would like to request a two-week extension so that our agency can review the materials and provide written comments if necessary. Please let me know if this is possible. If not, I still would like to receive copies of the documents that have been circulated to facilitate our review of the project.

Thank you.

5/13/2011

Keith Roberson  
Engineering Geologist  
San Francisco Bay Regional Water Quality Control Board  
1515 Clay Street, Suite 1400  
Oakland, CA 94612  
510-622-2404

**Responses to comments from Keith Roberson , Engineering Geologist, Regional Water Quality Control Board, dated 5/10/2011**

**(Responses are keyed to the bullets in Mr. Roberson's e-mail)**

**1.** (Foundation Stability). As mentioned in the Initial Study, all final foundations will be subject to review and approval by the City Geologist prior to issuance of grading permits. As the project design has progressed, the project applicant has determined that they will use grade beam foundations that are designed to avoid the use of piles into landfill waste. The construction noise impacts have been fully evaluated in the Initial Study including pile driving (although pile driving is no longer required) and appropriate mitigation measures have been included in the Initial Study to reduce these impacts to a less than significant level. This was part of the project evaluated by the consulting biologists.

The Geotechnical Investigation addressed the slope stability including an analysis of the north slope adjacent to the wetlands and considered loads from the proposed buildings and other improvements (refer to Appendix C of the Initial Study). Historic borings located in the northern portion of the site were used to confirm that the conditions there are similar to the conditions the borings encountered in the southern portion.

**2 and 3.** (Results of the Phase II environmental investigation and extent of TCE in groundwater) The results of the Phase II study were distributed on May 13, 2011. The extent of TCE at the subject site is described in the Phase II report.

According to the project geologist for the project (Tom Vercoutere, Professional Geologist, Senior Consultant, Golder Associates Inc.), the proposed project development will have no effect on the existing TCE impact zone (plume) that is located approximately 15 feet below ground surface in a sand layer that is overlain by low permeable bay mud or refuse within that landfill. Additionally, the existing TCE, which is in the landfill waste and in groundwater, will have no adverse effects on future workers or visitors to the site. Due to the depth and location of TCE, no surface runoff from the site will contain TCE, and therefore, surface runoff of TCE into the wetlands will not occur. The reduction of pervious surfaces (paving portions of the site and constructing buildings) on the project site and implementation of the proposed stormwater pollution prevention plan will improve the water quality of surface runoff and reduce stormwater infiltration into the waste that contains TCE. This will reduce the potential for TCE migration because by decreasing the permeable surface area, infiltration into the landfill refuse will be reduced. In addition, the development of the project will have no effect on the current groundwater flow below or nearby the project site because groundwater flow occurs in the sand layers that are 15 to 20 feet or more below ground surface.

**4.** (Effects Due to Sea Level Rise). Based on the Bay Conservation and Development Commission preliminary recommendations for amendments to the Bay Plan to incorporate climate change, the proposal reflects sea level rise estimates of 16 inches (1.3 feet) by 2050 and 55 inches (4.6 feet) by 2100. According to the projected sea level rise and coastal flooding maps for the South Bay, the project site, including proposed buildings and facilities, all are above the

55-inch projected sea level rise area. Since the project site is above this predicted sea level elevation and most of the site is already above current mean sea level, it will not have any impact on the elimination of existing marsh habitat due to the projected sea level rise.



**Loma Prieta Chapter**

◆San Mateo ◆ Santa Clara ◆San Benito Counties

May 9<sup>th</sup>, 2011

Ms. Janis Moore, Senior Planner  
Department of Planning, Building and Code Enforcement  
City of San Jose

Re: City File No. SP09-057

Dear Ms. Janis Moore:

The Sierra Club Loma Prieta Chapter is a strong supporter of renewable energy, zero waste, and the California Environmental Quality Act (CEQA). Regarding the latter, we are somewhat surprised that a Mitigated Negative Declaration is proposed for this Special Use Permit for multiple buildings and support equipment for an anaerobic digestion project of this magnitude in this location.

We believe that an Environmental Impact Report (EIR) could avoid perceptions of segmentation, of incomplete analysis of impacts, and of deferred mitigations. Important projects such as this one merit thorough examination and full integration with other plans in the same area. We are hopeful that our voice, in unison with other voices, will encourage the production of a full EIR.

Sincerely,

Michael J. Ferreira  
Chair – Conservation Committee  
Sierra Club Loma Prieta Chapter

Via email -- hard copy to follow

## Sierra Club

**Response:** The City of San Jose agrees that public perception is important in protecting the credibility of CEQA processes and the City environmental programs. The City is, therefore, particularly careful to avoid distortion and overstatements in evaluating environmental effects and to adhere to accepted standards and policies.

As described in the Initial Study, the collection and processing of City's municipal solid waste including organic materials is an allowed use under the existing *Public/Quasi-Public* designation in the Alviso Planned Community Specific Plan and City of San Jose's General Plan. The proposed uses are allowed under the existing zoning designation of *Light Industrial* with a Special Use Permit. The Initial Study was prepared in accordance with CEQA and the City of San Jose standards and the evaluation identified no significant impacts that could not be mitigated to a less than significant level. For the above reasons, an EIR was not required.



# CITY OF MILPITAS

455 EAST CALAVERAS BOULEVARD, MILPITAS, CALIFORNIA 95035-5479 • [www.ci.milpitas.ca.gov](http://www.ci.milpitas.ca.gov)

May 9, 2011

Jodie Clark  
Department of Planning, Building & Code Enforcement  
200 East Santa Clara Street  
San Jose, CA 95113

RE: Draft Mitigated Negative Declaration for the Dry-Fermentation Anaerobic Digestion Facility Project – SP09-057

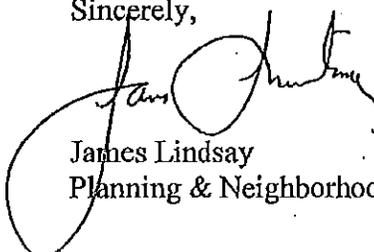
Dear Ms. Clark:

Thank you for the referral of San Jose's intent to adopt a Mitigated Negative Declaration (MND) for the anaerobic digestion facility proposed along Los Esteros Road on the San José/Santa Clara Water Pollution Control Plant buffer lands. The project is a new facility that will process organic solid waste (e.g. food waste and yard waste) into biogas using a dry anaerobic digestion system. The description of the project within the Initial Study (IS) states that the processing and digestion of the organic material will take place in enclosed facilities that will have exhaust filters. The IS further concludes that no odors from the processing of these materials will be detectable outside the project boundary.

Figure 3.0-1 shows a portion of the site being used for windrows and it was not clear in the IS that the same no-impact conclusion could be made about the curing of the finished material in the windrows. The Air Quality Impact Assessment (Appendix A of the IS) that was made available late last week did analyze the potential odor impacts from the curing process and concluded that no detectable odors from the windrows would leave the project boundary.

The City of San José is aware that there are several potential odor sources located in the vicinity of the project, including the San Jose/Santa Clara Water Pollution Control Plant and Newby Island landfill and composting. Over the past several years, these potential sources worked together as stakeholders to reduce the number of odor complaints, as documented in the Odor Control Maintenance-Level Plan adopted by the Milpitas City Council. The City of Milpitas expects that the owner of this new facility will become a stakeholder in the Plan and actively participate in the Bay Area Air Quality Management District's Rapid Notification Program.

Sincerely,

  
James Lindsay  
Planning & Neighborhood Services Director

**City of Milpitas.**

The City of San Jose acknowledges the City of Milpitas' comments and will encourage the applicant to become a stakeholder in Odor-Control-Maintenance Level Plan.