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21 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
22 **IN AND FOR THE COUNTY OF ALAMEDA**

23 CITIZENS COMMITTEE TO COMPLETE
24 THE REFUGE, a California nonprofit
25 corporation, and CENTER FOR
26 BIOLOGICAL DIVERSITY, a California
27 nonprofit corporation,

28 Petitioners and Plaintiffs,

29 vs.

30 CITY OF NEWARK, a municipal corporation;
31 NEWARK CITY COUNCIL; and DOES 1-20
32 inclusive,

33 Respondents and Defendants

34 SOBRATO ORGANIZATION, LLC, a
35 California limited liability company;
36 NEWARK PARTNERS, LLC, a California
37 limited liability company; and DOES 21-40
38 inclusive,

39 Real Parties In Interest

No.

PETITION FOR PEREMPTORY WRIT OF
MANDATE AND COMPLAINT FOR
INJUNCTIVE RELIEF

[Public Resources Code §§ 21168, 21168.5;
C.C.P. §§ 1085, 1094.5]

(ACTION FILED UNDER CALIFORNIA
ENVIRONMENTAL QUALITY ACT)

40 Petitioners and Plaintiffs CITIZENS COMMITTEE TO COMPLETE THE REFUGE
41 (hereinafter “CCCR”) and CENTER FOR BIOLOGICAL DIVERSITY (hereinafter, the
42 “CENTER” and the foregoing, collectively, “PETITIONERS’) allege as follows:

1 **INTRODUCTION**

2 1. This action challenges the approvals granted by respondents and defendants CITY OF
3 NEWARK (“CITY”) and NEWARK CITY COUNCIL (“COUNCIL” and the aforementioned
4 hereinafter referred to collectively as “RESPONDENTS”) for the Sanctuary West Residential
5 Project (hereinafter, “Project”) and the approval of the Environmental Impact Report
6 Addendum/Compliance Checklist (“Checklist”) for the Project. These approvals were granted at
7 the behest of and for the benefit of Real Parties in Interest SOBRATO ORGANIZATION, LLC
8 (hereinafter, “SOBRATO”) and NEWARK PARTNERS, LLC (hereinafter “PARTNERS” and,
9 together with SOBRATO, collectively, “REAL PARTIES”). PETITIONERS allege that
10 RESPONDENTS’ approvals for the Project and for the Checklist violated provisions of the
11 California Environmental Quality Act (“CEQA”).

12 2. RESPONDENTS’ actions violated CEQA in that the Checklist for the project incorrectly
13 asserted that there was no substantial evidence in the record that the Project would have a
14 significant effect on the environment not already studied and addressed in the certified 2015
15 Recirculated Environmental Impact Report (“REIR”) for the Area 3 and 4 Specific Plan when, in
16 fact, substantial evidence in the record, submitted by PETITIONERS and others, showed that
17 there were site-specific significant impacts from the Project, as well as changes to the Project,
18 changes to the circumstances surrounding the Project and its proposed implementation, and new,
19 previously unavailable information, all of which indicated that the Project would have new
20 and/or significantly increased environmental impacts compared to those considered and
21 identified in the REIR for the Area 3 and 4 Specific Plan, requiring the preparation of a
22 supplemental or subsequent EIR.

23 3. PETITIONERS further allege that RESPONDENTS violated CEQA by improperly
24 deferring the determination of mitigation measures to address potentially significant impacts of
25 the Project until after the Project’s final approval by the Council.

26 4. PETITIONERS further challenge the fairness of the CITY’s administrative process, as
27 the CITY withheld important evidence relating to the Project and its environmental impacts from
28 PETITIONERS, other agencies, and the public until the very day of the final hearing before the
29 COUNCIL, thereby preventing PETITIONERS, other public agencies, and members of the
30 public, from being able to review and respond to this evidence prior to the COUNCIL’s final
31 hearing and approval of the Project and the Checklist.

1 5. PETITIONERS seek this Court’s writ of mandate ordering RESPONDENTS to rescind
2 their improper and illegal approvals for the Project, including specifically the approval of the
3 Checklist.

4 6. PETITIONERS also seeks this Court’s temporary restraining order, preliminary
5 injunction, and permanent injunction to prevent RESPONDENTS, REAL PARTIES, and any
6 persons acting on behalf of these parties from moving forward in granting any further approvals
7 to the Project, or taking any steps towards implementation or construction of the Project until it
8 has undergone proper environmental review.

9 7. PETITIONERS also ask that they be granted their reasonable attorneys’ fees as a private
10 attorney general under Code of Civil Procedure § 1021.5 or other applicable statute litigating to
11 protect the rights and benefits of Newark citizens and the general public.

12 **PARTIES**

13 8. Petitioner CITIZENS COMMITTEE TO COMPLETE THE REFUGE is a California
14 nonprofit corporation established and operating under the laws of the State of California and
15 qualified as a 501(c)(3) public charity under the U.S. Internal Revenue Code. CCCR was
16 established to protect the area along the San Francisco Bay shoreline proposed for inclusion in
17 the Don Edwards San Francisco Bay National Wildlife Refuge (hereinafter, “Refuge,”),
18 including specifically the valuable and irreplaceable plant and animal species and natural habitat
19 included in that area and promote its inclusion in the federally protected area of the Refuge.
20 CCCR therefore has an interest in protecting the environmental values of Area 4 of the City of
21 Newark’s shoreline and specifically the area proposed for the Project, as a majority of the site
22 has been identified as a potential addition to the Refuge. CCCR also has an interest in ensuring
23 more generally that the environment is properly protected by RESPONDENTS’ adherence to the
24 requirements of CEQA. These interests will be directly and adversely affected by the approvals
25 at issue in this action in that RESPONDENTS’ approvals for the Project violate provisions of
26 law as set forth in this Petition and would cause significant and avoidable environmental
27 damage. CCCR’s interests, as described above, are adversely affected by RESPONDENTS’
28 approval of the Project.

29 9. Petitioner CENTER FOR BIOLOGICAL DIVERSITY is a California nonprofit
30 corporation established and operating under the laws of the State of California and qualified as a
31 501(c)(3) public charity under the U.S. Internal Revenue Code. The CENTER was established
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1 to protect the existing diversity of biological species both in California and in other parts of the
2 United State and of the entire world. The CENTER works on behalf of its thousands of members
3 throughout the United States and elsewhere to promote the maintenance of biological diversity,
4 and particularly to promote the recovery of currently identified threatened or endangered species
5 and to assist in identifying and protecting species subject to threats that have not yet gained legal
6 protection, as well as protecting the habitat used and needed by such species.

7 10. PETITIONERS brings this action on their own behalves and on behalf of their members,
8 as well as the citizens, residents, and supporters on behalf of whom they advocate and who are
9 citizens and taxpayers of the City of Newark, the State of California, and throughout the United
10 States. These members and supporters include those who live, work, travel and/or enjoy
11 recreational opportunities in the vicinity of the Project and in areas that will be affected by the
12 Project, and will suffer the adverse effects from RESPONDENTS' improper actions in
13 approving the Project.

14 11. PETITIONERS, acting either directly or through their authorized representatives,
15 submitted written and oral comments to RESPONDENTS objecting to the Project, as set forth
16 herein.

17 12. PETITIONERS, acting either directly or through their authorized representatives, public
18 agencies, other organizations, and members of the public submitted written and oral comments
19 raising the violations of CEQA set forth in this complaint prior to the close of the public hearing
20 before RESPONDENTS' approval of the Project and the Checklist for the Project.

21 13. This action is for the purpose of enforcing important public rights and policies of the
22 State of California. It is brought to ensure that approvals made by RESPONDENTS are made
23 consonant with CEQA and that the environmental values threatened by the Project are protected
24 for the public and for the future. The prosecution of this action will confer a substantial benefit
25 on members of the public, and specifically on the citizens of the City of Newark and surrounding
26 areas by enforcing CEQA. PETITIONERS will receive no special financial benefit from the
27 successful prosecution of this action. In this action, PETITIONERS are acting as private
28 attorneys general to protect these public rights and policies and prevent such harms. As such,
29 PETITIONERS are entitled to recover their reasonable attorneys' fees under C.C.P. §1021.5.

30 14. Respondent CITY OF NEWARK is a municipal corporation established and operating
31 under the laws of the State of California. CITY was the lead agency under CEQA for the
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1 environmental review of the Project. CITY directed the preparation of the Checklist that
2 RESPONDENTS used in determining to approve the Project pursuant to CEQA.

3 15. Respondent NEWARK CITY COUNCIL is the duly elected legislative and governing
4 body for the CITY. COUNCIL was responsible for considering and approving the Checklist for
5 the Project, as well as giving final approvals for the Project.

6 16. The true names and capacities of DOES 1-20 are unknown to PETITIONERS at this
7 time; however PETITIONERS allege on information and belief that each party named as DOE is
8 responsible for the acts and omissions of each of the other respondents. Therefore
9 PETITIONERS sue such Parties by such fictitious names, and will ask leave of the Court to
10 amend this Petition by inserting the true names and capacities of said Does when ascertained.

11 17. PETITIONERS are informed and believe, and on that basis allege, that Real Party in
12 Interest SOBRATO ORGANIZATION, LLC is a California limited liability company.

13 18. SOBRATO was the applicant for and sought the Project approvals at issue in this action.

14 19. PETITIONERS are informed and believe, and on that basis alleged that Real Party in
15 Interest NEWARK PARTNERS, LLC (“PARTNERS”) is a California limited liability company.

16 20. PETITIONERS are further informed and believe, and on that basis allege that
17 PARTNERS is the owner of the property within Area 4 on which the Project is proposed to be
18 built, and that SOBRATO, in applying for the Project approvals at issue in this action, was acting
19 as the agent or representative of PARTNERS, or was otherwise associated with PARTNERS in
20 seeking those approvals.

21 21. The true names and capacities of DOES 21-40 are unknown to PETITIONERS at this
22 time; however PETITIONERS allege on information and belief that each such party named as
23 DOE has some interest in the subject matter of this action. Therefore PETITIONERS sue such
24 Parties by such fictitious names, and will ask leave of the Court to amend this Petition by
25 inserting the true names and capacities of said Does when ascertained.

26 STATEMENT OF FACTS

27 Project Location

28 22. The Project is proposed for an area along the Newark shoreline of San Francisco Bay that
29 is referred to by the CITY as Area 4, and more specifically in three subareas, Sub Area B, C, and
30 E, within Area 4. Area 4 is located north of the mouth of Coyote Creek and directly adjoining
31 Mowry Slough in a diked area that is comprised of ponds, muted tidal marsh, brackish marsh,

1 seasonal wetlands and uplands close to the border of the Don Edwards San Francisco Bay
2 National Wildlife Refuge and encompasses areas designated for inclusion in that Refuge.

3 23. The 460-acre bayfront Project site was predominantly historical tidal wetlands and the
4 home of the Whistling Wings and Pintail duck clubs. The area includes habitat for listed species
5 under both the California and Federal Endangered Species Acts, most notably the federally-
6 endangered and state fully protected salt marsh harvest mouse (“SMHM”).

7 24. The site is located adjacent to Mowry Slough and large portions of the site were subject
8 to tidal influence until the early 1900s, when the site was diked off from the Bay. The site is
9 underlain by Bay muds and groundwater is estimated to be less than five feet below existing
10 ground elevations, which are at, or slightly above current sea level. The site lies within a
11 Liquefaction Hazard Zone and portions of the site are susceptible to liquefaction and lateral
12 spread.

13 **General Background**

14 25. Since the mid-1980s, the lands of Areas 3 and 4 have been proposed for development in
15 the Newark General Plan. The CITY’s purpose, to develop these lands for residential and other
16 uses, has not changed since then despite evidence demonstrating increasing threats from sea level
17 rise due to global climate change and the continued loss of habitat for protected species that live
18 in the area, particularly in Area 4.

19 26. In or about 2007-2008, Newark prepared a Project/Program Environmental Impact
20 Report (“EIR”) for an Area 3 and 4 Specific Plan. The Final EIR was certified, and the Specific
21 Plan, along with a Development Agreement between the CITY and PARTNERS, were approved
22 in or about 2010.

23 27. Petitioner CCCR sued the City challenging the EIR for a variety of inadequacies. In
24 November 2012, the trial court issued an interlocutory order suspending the project approvals
25 and remanding the case to the City for clarification of which portions of the EIR were intended
26 to be “project level” and which portions “program level.” CCCR appealed the trial court order,
27 and the First District Court of Appeal, in an unpublished decision under the expedited *Palma*
28 appellate procedure, reversed the trial court’s order and remanded the case for entry of a final
29 judgment.

1 28. In or about November 2014, the trial court entered final judgment against the City and in
2 favor of CCCR. The final judgment ordered rescission of the certification of the Final EIR and
3 of all of the approvals that had been granted for the Specific Plan.

4 29. In or about March 2015, the CITY certified a recirculated combination programmatic and
5 project-level EIR (“2015 REIR”) to remedy the deficiencies identified in the trial court’s 2014
6 Final Judgment. The CITY also reapproved a Newark Area 3 and 4 Specific Plan (“Specific
7 Plan”) and a Development Agreement with PARTNERS governing the approval of future
8 development under the Specific Plan.

9 30. In 2016, the CITY, also based on the 2015 REIR, granted final entitlements to a project
10 to develop 386 single-family homes in Area 3, which also includes other previously-developed
11 areas. Construction of the residential project in Area 3 is now in process.

12 **The Project**

13 31. The Project would consist of 469 single-family residential homes located in Sub Areas B
14 and C of Area 4. The Project would consist of two major groups of residential lots plus several
15 smaller clusters of residential lots. One of the large groups of lots would be located directly west
16 of the Union Pacific railroad tracks and right-of-way that run from northwest to southeast along
17 the northwest border between Area 3 and Area 4. The second large group of lots would stretch
18 in an east-west direction and would, at its eastern edge, connect to a bridge along Stevenson
19 Boulevard, which would be the only regular access point in and out of the Project from the rest
20 of Newark. The two large groups of lots would be connected to each other and to the smaller
21 groups of lots by a series of four bridges spanning wetland areas between the groups. A fifth
22 bridge is proposed as part of an Emergency Vehicle Access (“EVA”) for the entire development
23 from the northeast corner of the large group of lots, directly adjacent to the Union Pacific
24 Railroad tracks, to Mowry Avenue. The gated and locked bridge providing access to the EVA
25 would span Alameda County Flood Control District’s Zone 5, Line D channel which flows to
26 Mowry Slough.

27 32. The EVA, paralleling the Union Pacific railroad tracks, would serve as an emergency
28 evacuation route from the Project, as well as a pedestrian and bicycle path. The Project proposes
29 that this path cross three sets of Union Pacific Railroad tracks at-grade in an area that is often
30 blocked by freight cars using the switching yard just north of Mowry Avenue.

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1 33. The Project purports to have been designed such that it would not require any direct and
2 intentional fill of wetlands areas. However, the fill pads created by the Project would directly
3 abut the wetlands areas over most of the Project’s extensive perimeter around the two larger
4 groups of lots and three smaller islands of lots.

5 34. The Project would require placing approximately 1.67 million cubic yards of fill directly
6 adjacent to the wetlands to raise the areas of the site identified as uplands by approximately 5 to
7 15 feet, so as to raise the proposed development out of the FEMA 100-year flood plain. The
8 elevated fill pads are proposed to be “armored” with riprap protection to prevent erosion from
9 wave action or in the event of flooding.

10 **The Project Approval Process**

11 35. PETITIONERS are informed and believe, and on that basis allege, that at some time early
12 in 2019, SOBRATO, or one or more agents acting on its behalf, filed an application for the
13 Project with the CITY.

14 36. In or about September 2019, the CITY released an environmental review document for
15 the Project. The document was entitled a “Draft Compliance Checklist” and purported to be a
16 systematic comparison of the Project to the analysis made and conclusions reached in the 2015
17 REIR. The Checklist had attached to it numerous appendices containing more detailed analyses
18 of topics included in the Checklist. The Checklist reached the conclusion that the Project was
19 entirely consistent with the 2015 REIR and that there were no changes to the Project, changed
20 circumstances surrounding the Project or new and previously unavailable information that would
21 indicate that the Project would have significant new environmental impacts or significantly
22 increased environmental impacts compared to the impacts disclosed and analyzed in the 2015
23 REIR.

24 37. PETITIONERS, public agencies, and members of the public submitted both oral and
25 written comments on the Checklist and its associated exhibits, raising questions about whether
26 the 2015 REIR adequately identified and discussed the Project’s significant environmental
27 impacts.

28 38. In particular, PETITIONERS, public agencies and members of the public submitted oral
29 and written comments providing substantial evidence that there were changes to the Project,
30 changes to the circumstances surrounding the Project, and new and previously unavailable
31 information, all of which showed that the Project would have significant new and site-specific
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1 environmental impacts and/or significantly increased site-specific environmental impacts
2 compared to the impacts disclosed in the 2015 REIR.

3 39. Based on the substantial information provided, PETITIONERS, public agencies, and
4 members of the public asked that the CITY prepare a supplemental or subsequent EIR to address
5 the changes and resulting new or significantly increased impacts compared to the 2015 REIR

6 40. On or about October 22, 2019, the Newark Planning Commission held a public hearing
7 on the Project and the supporting Checklist.

8 41. Representatives of CCCR and other members of the public submitted oral and written
9 comments opposing the Project and presenting evidence supporting the need for a supplemental
10 or subsequent EIR prior to the CITY making any decisions on the Project. Nevertheless, the
11 Planning Commission (with two members abstaining) voted to recommend approval of the
12 Project and its supporting Checklist.

13 42. On or about November 8, 2019, several members of CCCR met with the Mayor and the
14 City Manager of the City of Newark to discuss the Project and its environmental review. At that
15 meeting, members of CCCR inquired whether the CITY had hired its own consultants to conduct
16 peer review of the various technical reports on different aspects of the Project that accompanied
17 the Checklist. The Mayor and City Manager promised to inquire whether peer review analyses
18 had been conducted on behalf of the City. CCCR representatives requested that if such peer
19 review analyses had been conducted, the CITY provide copies of those reports so that they could
20 be reviewed by CCCR and other members of the public.

21 43. On or about November 14, 2019, the COUNCIL held a public hearing on the Project and
22 its supporting Checklist, which had been updated with a set of written responses to written
23 comments that had been submitted on the Checklist. That same morning, the CITY had sent
24 electronic copies of approximately six peer review reports, dating from between roughly April
25 and August 2019 and totaling approximately 39 pages, to a representative of CCCR. Neither
26 CCCR, its attorney, nor experts within CCCR had sufficient time to review and analyze these
27 reports, or provide comments on them, before the COUNCIL's meeting that night. Nor did the
28 CENTER or its experts have the opportunity to review, analyze, or comment on the peer review
29 reports prior to the COUNCIL's meeting.

30 44. At the COUNCIL's public hearing on the Project, representatives of PETITIONERS and
31 others again raised objections to the Project and offered oral and written evidence that there was
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1 substantial evidence pointing out deficiencies in the environmental review of the Project and
2 indicating the need for a supplemental or subsequent EIR on the Project prior to the COUNCIL
3 considering its approval. An attorney representing CCCR also specifically objected to the late
4 release of the peer review documents, the unfairness of the CITY making any decision before
5 those documents could be read and evaluated by PETITIONERS, public agencies, and members
6 of the public, and asked that the hearing be continued for two weeks to allow time for the reports
7 to be read and evaluated.

8 45. Despite all of the testimony and evidence presented, the COUNCIL rejected motions by
9 one COUNCIL member to prepare a supplemental EIR or to continue the public hearing for two
10 months. Instead, the COUNCIL, by a vote of 4-1, approved the Project and its supporting
11 Checklist.

12 46. On or about November 15, 2019, the CITY filed with Alameda County a Notice of
13 Determination for the approval of the Project, including a finding that the Project's impacts had
14 been adequately identified and addressed in the 2015 REIR and the Project was therefore exempt
15 from any further review under CEQA.

16 **General Allegations**

17 47. PETITIONERS have exhausted available administrative remedies to the extent required
18 by law. PETITIONERS, their members and authorized representatives, and others have raised
19 the concerns and objections contained in this petition through oral and/or written testimony
20 during the project approval process and prior to the close of the public hearings on approval of
21 the Project.

22 48. PETITIONERS have no plain, speedy or adequate remedy in the ordinary course of law
23 unless the Court grants the requested relief, requiring RESPONDENTS to rescind the improper
24 and illegal approvals for the project and its supporting Checklist. In the absence of such relief,
25 PETITIONERS will suffer irreparable harm from the implementation of the project, and from
26 acts undertaken in furtherance thereof. The harm includes significant environmental damage to
27 natural resources, including federally and state protected animal species and their habitat,
28 protected wetlands and other protected habitat, and potential harm to humans, both those who
29 might work on or inhabit the Project and residents of Newark who might be damaged, injured or
30 even killed as a result of earthquake damage to the Project or flooding exacerbated by the
31 Project.

1 49. PETITIONERS have complied with Public Resources Code § 21167.5 by mailing to
2 RESPONDENTS written notices of the intent to commence this action. Copies of said notices,
3 with proofs of service, are attached hereto as Exhibit A.

4 50. PETITIONER has complied with C.C.P. § 388 and Public Resources Code § 21167.7 by
5 providing notice and a copy of this petition to the California Attorney General. A copy of said
6 notice, with proof of service, is attached hereto as Exhibit B.

7 CHARGING ALLEGATIONS

8 FIRST CAUSE OF ACTION

9 **(Violation of CEQA – inadequate environmental review; failure to prepare supplemental**
10 **or subsequent EIR)**

11 51. PETITIONERS hereby reallege and incorporate by reference the allegations contained in
12 paragraphs 1 through 50 of this petition, inclusive.

13 52. With certain exceptions not relevant here, CEQA requires that the lead agency conduct
14 environmental review under CEQA for a discretionary project. If the environmental review
15 indicates that the project may result in a significant impact on the environment, an
16 Environmental Impact Report must be prepared. Once an environmental impact has been
17 prepared and certified without legal challenge, it is conclusively presumed valid, and no further
18 environmental review need be done unless: a) the project is changed, b) circumstances
19 surrounding the project have changed, or c) new, previously unavailable information becomes
20 available, and the changes or new information present substantial evidence indicating that a new
21 impact not previously identified or studied in the prior EIR, or a substantial increase in the
22 severity of a previously-studied impact, will occur. In such cases, the environmental review
23 must be reopened to address the new or significantly increased impact.

24 53. In the case of a project consistent with a previously approved community plan or specific
25 plan, site-specific impacts that were not and could not have been identified and analyzed in the
26 community or specific plan must be addressed through supplemental environmental review.

27 54. Here, substantial evidence was presented to RESPONDENTS by PETITIONERS and
28 others indicating that: 1) the project had been changed in significant ways, in particular, the
29 general outlines of the Area 4 project contained in the 2015 Area 3 and 4 Specific Plan and the
30 accompanying 2015 REIR were replaced by highly specific information on the location and
31 configuration of the Project; 2) circumstances surrounding the Project had specifically changed,

1 in particular, substantial evidence was presented showing that sea level rise was currently
2 increasing more rapidly than had been estimated and evaluated in the 2015 REIR; and 3) new,
3 previously unavailable substantial evidence became available indicating that the *rate* of sea level
4 rise could be expected to increase at an ever-increasing rate, due to passing various “tipping
5 points” that would accelerate climate change and sea level rise, far beyond what had been seen or
6 expected in 2015. This information, coupled to the detailed Project design information revealed
7 in the Checklist, will result in significantly more severe impacts than were disclosed and
8 analyzed in the 2015 REIR.

9 **Count One – significantly increased impacts to protected species (salt marsh harvest**
10 **mouse)**

11 55. The SMHM is designated as an endangered species, due primarily to loss of habitat,
12 under both the Federal Endangered Species Act (16 U.S.C. § 1541 et seq.) and the California
13 Endangered Species Act (Calif. Fish & Game Code § 2050 et seq.). The SMHM is also a
14 California fully protected mammal, which, subject to limited exceptions, may not be taken at any
15 time. (Calif. Fish & Game Code § 4700(b)(7).)

16 56. The SMHM is endemic to tidal wetlands of San Francisco Bay, and is known to occur
17 within the muted tidal wetlands contained within Area 4.

18 57. The Project that the CITY approved in Area 4 includes multiple developed areas that
19 directly abut wetlands within Area 4.

20 58. The 2015 REIR included discussion of the effects of sea level rise, but its primary focus was to
21 identify effects of sea level rise on the Project. There was no discussion of the effect of the
22 combination of the project and sea level rise on the availability of SMHM habitat within Area 4, or on
23 the ability of SMHM habitat to migrate within Area 4 concurrent with or in adaptation to sea level rise.

24 59. As mitigation for the effects of sea level rise on the Project, the 2015 REIR proposed the
25 deposition of fill to elevate the Project above the projected increase in sea level over the lifetime
26 of the Project. That sea level increase was identified in the 2015 REIR as being 4.6 feet by 2100.
27 The Checklist used updated figures for San Francisco from the OPC-SAT (in Appendix G of the
28 Checklist) to set a “Low Risk Aversion”, high emissions rise of 1.9 feet in 2070 (3.4 feet in
29 2100).

30 60. The Project proposes to import and deposit approximately 1.67 million cubic feet of fill
31 material into areas directly adjacent to the wetlands in Area 4 to raise the sites to be developed
32

1 from current elevations ranging from -0.5 to 7.5 feet NAVD¹ to a finished building elevation of
2 12.25 feet NAVD. This will require the placement of fill with final height increases of up to 15
3 feet to provide the necessary fill surcharge to reach a final building elevation of 12.25 feet
4 NAVD. This quantity of fill and the associated final elevations are intended to place the five
5 building areas, and connecting roadways, well above local sea level, even in the event of sea
6 level rise or flooding.

7 61. The fill is proposed to be graded so as to have a 2:1 slope extending from the developed
8 area down to the toe of the fill, directly adjacent to the wetland areas, as identified in the U.S.
9 Army Corps of Engineers' now-expired 2007 wetlands delineation.

10 62. The slopes facing the wetland areas are proposed to be "armored" with riprap – i.e., an
11 assemblage of broken stones deposited on or embedded in the slope and intended to resist
12 erosion – to protect against erosion due to wave action or storm water flooding.

13 63. Neither the 2:1 slope of the fill nor the application of riprap to the fill slopes were
14 identified in the 2015 REIR as provisions of the Area 4 development, and therefore the 2015
15 REIR did not consider or discuss any impact that might arise due to the slopes or riprap.

16 64. In a response to comments on the draft Checklist, the Final approved Checklist, which
17 included responses to comments received, revealed that, because the 2:1 slope of the fill would
18 have the potential for being eroded by wave or floodwater action, riprap would be placed on the
19 lower portions of the west-facing slopes as mitigation, and the Final Checklist concluded that it
20 would reduce the erosion impact to less than significant.

21 65. The combination of locating the development in the Project directly adjacent to the
22 wetland areas of Area 4, placing up to 15 feet of fill in these areas at a 2:1 slope down towards
23 the wetlands, and armoring the lower portions of the slopes adjacent to and facing wetlands with
24 riprap, coupled to the high rate of sea level rise projected over the next fifty years, results in a
25 significant impact on the SMHM and its habitat. Sea level rise will inundate the current SMHM
26 wetlands habitat within Area 4 with at least an additional 1-2 feet of water, making much of the
27 current habitat no longer usable by the SMHM. The placement of 15 feet of fill directly adjacent
28 to the current wetland areas identified in the Checklist as potential SMHM habitat, with a 2:1
29 slope and armored with riprap, will make it impossible for the SMHM habitat (i.e., tidal
30

31 ¹ North American Vertical Datum – a system of orthometric heights for surveying in the United
States, used to determine flood plain elevations.

1 wetlands) to migrate inland as it would otherwise be able to in the absence of the project and its
2 associated fill. Further, the 15 feet of steeply sloping armored fill will make it virtually
3 impossible for the SMHM themselves to escape from the flooded wetland areas during flooding
4 events, which will become increasingly more severe over the next fifty years due to sea level rise
5 and the expected increase in severe weather events, both reasonably foreseeable consequences
6 within the San Francisco Bay Area from already-occurring and increasing climate change. The
7 result would be the loss of the SMHM habitat and the extirpation of the existing SMHM
8 population in much if not all of Area 4, both of which are significant but unacknowledged
9 impacts.

10 **Count two – significantly increased impact on protected species (salt marsh harvest**
11 **mouse)**

12 66. In addition to the direct impact caused by the combination of the Project’s location and
13 configuration in conjunction with sea level rise, there will also be a secondary impact from the
14 installation of riprap on the sloping fill areas next to the wetlands. The 2015 REIR
15 acknowledged the potential for human habitation to attract predators of the SMHM, notably
16 black and Norwegian rats. However, the newly-disclosed specific location of the human
17 habitation, along a greatly increased development perimeter directly adjacent to the wetland
18 SMHM habitat, in conjunction with the placement of riprap on the bottom portions of the 2:1
19 slopes of the added fill next to the wetlands, creates a new and significant impact. The newly-
20 disclosed configuration will inadvertently create an attractive habitat where rats (and other
21 predators) can hide and/or live, placing them in close proximity to both humans, and to the
22 SMHM and its young. This further significantly increases the jeopardy to the SMHM, a
23 significant impact. In response to a comment raising this issue, the Final Checklist opines that a
24 pest control program identified in the 2015 REIR will adequately mitigate this potential impact.
25 However, neither the 2015 REIR nor the Final Checklist provide any substantial evidence to
26 support a claim that the kind of nonspecific pest control program identified in the 2015 REIR
27 will adequately mitigate the adverse predation impact on SMHM under these circumstances,
28 which would place predators in close proximity to both human habitation and SMHM and its
29 habitat, without resulting in secondary impacts on the SMHM (for example, from the use of
30 poisons or traps).

31 67. A closely related impact is that, due to the close proximity of the new homes in Area 4 to
32 the wetlands that are habitat for SMHM, household pets, notably cats, can be expected to also be

1 predators on SMHM and their young. This is a significant impact. While the 2015 REIR
2 discussed this potential impact, and provided mitigation (MM BIO 4.7), the evidence fails to
3 show that mitigation measure will be effective given that, unlike the Area 4 project analyzed in
4 the Specific Plan EIR, almost all of the Project will be constructed in close proximity to
5 wetlands, and significant portions in close proximity to SMHM habitat. The Checklist provides
6 no substantial evidence that MM BIO-4.7 will be effective in preventing predation by household
7 pets under these changed circumstances.

8 **Count three – Increased flooding risk in areas upstream of the Area 4 Project.**

9 68. The 2015 REIR recognized that sea level rise would increase the risk of flooding to the
10 project. In response, it proposed to place a large volume of fill in the areas to be developed to
11 raise them above the level of flood waters. The proposed project configuration, while reducing
12 the total number of homes, focuses the fill on those homes, rather than also locating some fill in a
13 proposed golf course area. As a result, the low-lying areas available to absorb floodwaters will
14 be decreased, compared to the analysis in the 2015 REIR, where the less-filled golf course area
15 would be available to absorb some flood waters. Consequently, the Project will increase both the
16 flooding in areas adjacent to and east of the Project and increase the velocity of floodwaters
17 entering areas adjacent to and east of the Project. This would be a significant new impact.

18 69. The configuration of the project, with five fill pads connected by short bridges, plus a
19 fifth bridge connecting to the EVA, would further exacerbate flooding impacts. The short spans
20 of the bridges and elevated fill pads would focus flood waters, increasing their velocity and
21 giving them more power to erode and scour banks as they move upstream. Significant Water
22 quality impacts during flooding would also occur. These would be significant new impacts not
23 identified or discussed in the 2015 REIR.

24 **Count four – Increased risk of inadvertent or incidental fill of protected wetlands
25 areas.**

26 70. The 2015 REIR identified the potential for a project in Area 4 to cause inadvertent
27 wetlands disturbance during construction. As mitigation, it proposed to fence off all wetland and
28 aquatic habitat with fencing during construction. In the Checklist, given the proximity of the
29 Project's construction to wetland areas, a mitigation measure is incorporated (MM Bio-12.2)
30 intended to prevent inadvertent wetland fill. However, while the overall size of the Project is
31 decreased compared to the generic Area 4 project analyzed in the 2015 REIR, the Project's
perimeter is greatly expanded compared to that generic project, and more specifically much of

1 the Project is proposed to be built, and require up to 15 feet of fill, directly adjacent to wetland
2 areas. This constitutes substantial evidence that the Project would significantly increase the
3 inadvertent or incidental fill of wetland areas. However, the Checklist does not provide any
4 substantial evidence or analysis to show that either MM Bio-12.2 or other mitigation measures
5 identified in the 2015 REIR will mitigate the significantly increased impact due to inadvertent or
6 incidental fill of wetland.

7 **Count five – Secondary impacts of need for greater mosquito control measures due**
8 **to proximity of project to wetlands in Area 4.**

9 71. The changed configuration of the Project, compared to that analyzed in the 2015 REIR
10 means that the Project will have a greater proportion of its units in close proximity to the
11 wetlands of Area 4. These wetlands are, among other things, a breeding area for the salt marsh
12 mosquito (*Ochlerotatus squaminger*). While this mosquito species is not known to be a vector for
13 human diseases, it favors humans for its blood meal, and is known to be a ferocious biter in both
14 daytime and evening hours. By placing 469 residences in close proximity to this breeding area,
15 the City will be placing great pressure on the County mosquito abatement district to take
16 additional measures to control this mosquito. In particular, there will be strong pressure on the
17 mosquito district, if its current biorational control measures are not adequately effective to curb
18 biting of residents (as seems likely) to resort to the use of adulticide treatments, which can have
19 adverse effects on other non-target species. This secondary impact, not addressed in the 2015
20 REIR because that project was not placed in such close proximity to mosquito-breeding
21 wetlands, is not addressed, in violation of CEQA.

22 **SECOND CAUSE OF ACTION – VIOLATION OF CEQA – IMPROPERLY**
23 **DEFERRED MITIGATION**

24 72. PETITIONERS hereby reallege and incorporate by reference the allegations contained in
25 paragraphs 1 through 71 of this petition, inclusive.

26 73. CEQA requires that environmental review identify all potentially significant impacts
27 from a project and feasible mitigation measures that might reduce that impact to less than
28 significant levels.

29 74. When it is clear with certainty that an impact can feasibly be mitigated but it is not yet
30 possible to specifically define the mitigation measure, CEQA allows an EIR to defer
31 identification of the specifics of the required mitigation to a future time, so long as the EIR
32 commits the agency to adequately mitigate the potential impacts and define a specific

1 performance standard that would be required to be met, while deferring the final choice of
2 mitigation.

3 75. Nevertheless, an EIR must not only identify feasible mitigation measures, but must also
4 identify and discuss, in less detail, potential secondary impacts that might be caused by the
5 mitigation measure. If those impacts are potentially significant, they too must be both disclosed
6 and, if possible, mitigated.

7 76. The environmental review of the Project violated CEQA by deferring the identification of
8 mitigation for potentially significant impacts to future study after the Project's approval without
9 1) identifying and discussing the feasible potential mitigation measures, 2) defining specific
10 performance standards that would be met through the chosen mitigation measure, and 3)
11 identifying, discussing and, where feasible, mitigating any potentially significant secondary
12 impacts that would be caused by the mitigation measures. Specifically:

13 **Count one – deferral of mitigation – predator management program**

14 77. Appendix B to the Checklist (Biological Resources) identifies Mitigation Measure MM
15 Bio-4.7 to mitigate the effect of the Project in introducing and promoting the presence of
16 predators in the Project vicinity. While the measure is listed in the 2015 REIR as associated with
17 burrowing owls, the Checklist also applies it to the SMHM.

18 78. Neither the 2015 REIR nor the Checklist provide any details as to what the Predator
19 Management Program would consist of, nor do they provide any substantial evidence to
20 demonstrate that such a program would be effective in preventing predation on SMHM, given
21 the closeness of human habitation to SMHM habitat. Nor does the Checklist (or the 2015 REIR)
22 provide any specific performance standards by which the predator management program's
23 effectiveness could be evaluated. Further, because there are no details given of what the predator
24 control program would consist of, it is impossible to determine what secondary impacts on
25 SMHM (e.g., inadvertent take of SMHM through traps or poison, etc.) might occur. For all these
26 reasons, the proposed future predator management plan is an improper deferral of mitigation.

27 **Count two – deferral of mitigation – future geotechnical studies**

28 79. The Checklist calls for post-project-approval study of the 2:1 slopes of the up to 15 feet
29 of fill to be placed on the fill pads to raise them above the level of any projected flood waters.
30 The study would be to evaluate the risk of slope deformation and instability during grading,
31 surcharge program, and post-construction static and seismic conditions. If the post-approval
^^

1 study identified slope instability conditions, such as “mud waves,” additional mitigation
2 measures would be proposed to prevent such a mud wave from forming. However, the Checklist
3 only mentions, in passing, “appropriate design details” as possible mitigation measures,
4 including retaining walls or staging of fill placement. The Checklist provides no specific
5 performance standards by which the effectiveness of such mitigation measures would be judged.
6 Nor does Checklist provide any consideration of what, if any, secondary impacts (e.g.,
7 interference with migration corridors by retaining walls) might occur, or their significance. For
8 these reasons, the post-approval geotechnical studies involve improper deferral of mitigation.

9 **Count three – deferral of mitigation – future adaptive management measures to**
10 **address sea level rise**

11 80. The Checklist responses to comments document discusses the use of “adaptive
12 management” to cope with the effects of future sea level rise. This amounts to offering
13 undefined future mitigation measures to address sea level rise impacts beyond those identified in
14 the 2015 REIR.

15 81. The Checklist does not identify specific performance standards to assure that the
16 unspecified future “adaptive management” mitigation measures will successfully mitigate future
17 sea level rise impacts to a level of insignificance. Further, because the future “adaptive
18 management” measures remain undefined, it is impossible to determine what secondary impacts
19 these measures may have, or their level of significance. For these reasons, the use of future
20 adaptive management measures to mitigate future impacts from sea level rise is an improper
21 deferral of mitigation, in violation of CEQA.

22 **THIRD CAUSE OF ACTION – FAILURE TO CONDUCT A FAIR TRIAL**
23 **(CODE OF CIVIL PROCEDURE § 1094.5(b))**

24 82. PETITIONERS hereby reallege and incorporate by reference the allegations contained in
25 paragraphs 1 through 81 of this petition, inclusive.

26 83. RESPONDENTS, in conducting the administrative process for approval of the Project
27 and the Checklist, improperly withheld from PETITIONERS, other public agencies, and the
28 public several important documents, whose preparation had been requested by RESPONDENTS.
29 These documents were, however, available to RESPONDENTS for their consideration during
30 the administrative process, and RESPONDENTS relied on these documents in considering and
31 approving the Project.

1 84. By requesting the preparation of these documents, receiving them, and relying on these
2 documents in considering and granting approval of the Project and the Checklist, while
3 withholding them from PETITIONERS, other public agencies, and the public, RESPONDENTS
4 violated PETITIONERS', other public agencies', and the public's right to a fair trial and a fair
5 hearing process for the Project and its Checklist.

6 **PRAYER FOR RELIEF**


7 WHEREFORE, PETITIONERS pray for relief as follows:

- 8 1. For this Court's peremptory writ of mandate directing RESPONDENTS to set aside and
9 vacate their approvals for the Project itself and its supporting Checklist;
- 10 2. For this Court's peremptory writ of mandate directing RESPONDENTS to reopen and
11 reconduct the administrative process for the Project and its Checklist to allow any interested
12 party the opportunity to comment on the documents that RESPONDENTS improperly withheld.
- 13 3. For this Court's peremptory writ of mandate directing RESPONDENTS to fully comply
14 with the provisions of CEQA in taking any further actions to consider said Project;
- 15 4. For this Court's temporary restraining order, preliminary and permanent injunctions
16 restraining RESPONDENTS and SOBRATO, their agents, employees, servants, officers, assigns
17 any those acting in concert with them from undertaking any construction activities, issuing any
18 construction or development approvals or permits, or taking any other action in furtherance of or
19 to implement the Project, pending full compliance with CEQA and this Court's orders.
- 20 5. For an award of reasonable attorney's fees under Code of Civil Procedure section 1021.5
21 or as otherwise authorized by law;
- 22 6. For costs of suit incurred herein; and
- 23 7. For such other and further equitable or legal relief as the Court deems just and proper.

24 Dated: December 15, 2019

25 Stuart M Flashman
26 LAW OFFICES OF STUART M. FLASHMAN
27 Attorney for Petitioner Citizens Committee to
Complete the Refuge

28 John Buse
29 Lisa Belenky
30 CENTER FOR BIOLOGICAL DIVERSITY
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31 By: 
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