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BY FAX, OVERNIGHT MAIL AND ELECTRONIC MAIL

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Honorable Commissioners
Sonoma County Planning Commission
Sonoma County Permit and Resource Management Department
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RE: COMMENTS ON DUTRA MATERIALS, INC. NOISE "AREA POLICY" AND RELATED LAND USE AND GENERAL PLAN ISSUES (PLP04-0046)

The Petaluma River Council ("Council") and its members offer the following additional comments concerning the Dutra Haystack Landing Asphalt and Recycling Facility, PLP04-0046 (the "Project"). These comments were written jointly with Terrell Watt, AICP, an urban planning consultant with over 25 years of experience. The Council requests that these comments be incorporated into the administrative record of proceedings for this Project.

As set forth in detail below, the Project is fatally inconsistent with the Sonoma County General Plan. The proposed "Area Policy" allowing this Project to exceed the General Plan's specific and mandatory noise limitations is arbitrary and unlawful. Under the plain text of the newly adopted General Plan, moreover, the Project is located within the Petaluma/Novato Community Separator, and thus cannot be approved without the concurrence of the County's voters. Finally, the General Plan precludes redesignation of the Project site for Limited Industrial uses.

I. The Planning Commission Must Receive Public Comment on All Aspects of the Project.

The Staff Report for the Planning Commission's April 16, 2009 meeting suggests that the Commission intends to receive public comments only on a newly proposed "Area Policy" addressing the Project's inconsistency with the General Plan's Noise Element. This is unlawful. Comments on Project's compliance with County land use

and planning policies submitted at a noticed public hearing must be made part of the record of this proceeding. (Gov. Code § 65009(b)(1).) This letter contains comments addressing the Project's inconsistencies with numerous General Plan goals, policies, and objectives. Any attempt by the Planning Commission to prevent such issues from being raised at this hearing will not preclude those issues from being raised in litigation. (Gov. Code § 65009(b)(1)(B).)

The Planning Commission also must receive additional comments at this public hearing concerning the adequacy of environmental review under the California Environmental Quality Act ("CEQA"). (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal. App. 4th 1184, 1201.) As discussed below, each of the land use policy inconsistencies discussed in this letter is also a potentially significant impact for purposes of CEQA. The Council specifically objects to the County's apparent attempt to bifurcate environmental review from project approval. (See *id.* at 1200-01.)

II. The Environmental Impact Report for the Project Failed to Disclose, Analyze, and Mitigate Potentially Significant Land Use Impacts and Policy Conflicts.

Each of the General Plan conflicts described in detail below is a potentially significant impact for purposes of CEQA. (See *Pocket Protectors v. City of Sacramento* (2004) 124 Cal. App. 4th 903, 930, 934 [treating project's conflicts with land use policies adopted to avoid environmental effects, and requiring that those conflicts be discussed in EIR].) The Draft and Final EIRs for this Project examined a number of potential land use policy conflicts, but all of the policies considered were part of the *old*, 1989 General Plan. Nothing in either version of the EIR purports to analyze the Project's consistency with policies now in effect under the new General Plan 2020—even though the Project applicant requested that the Project be reviewed under the new standards. Therefore, to the extent that the EIR prepared for this Project failed to disclose, analyze, and mitigate any land use policy conflicts arising under the new General Plan, including but not limited to the conflicts discussed herein, the EIR is inadequate under CEQA.

The Project EIR also completely failed to analyze the environmental impacts of constructing a new 8-inch water main from the Landing Way area to the Project site. This new water main is proposed for construction along nearly a half-mile stretch of South Petaluma Boulevard. (FEIR at p. III-21.) It does not matter whether this water main is characterized as part of the Project or a mitigation measure. Because this improvement is necessitated by the Project, its impacts must be evaluated in the EIR. (See *Tuolumne County Citizens for Responsible Growth v. City of Sonora* (2007) 155 Cal. App. 4th 1214.)

III. The Project Renders the Sonoma County General Plan Internally Inconsistent and Conflicts with General Plan Policies.

The Project as proposed requires several amendments to the County's recently adopted General Plan, including the last-minute "text amendment" seeking to create an exception from the fundamental, mandatory noise standards applicable everywhere else in the County. The Project also involves zoning amendments and a conditional use permit that conflict with fundamental General Plan policies. These amendments violate state law and cannot be approved.

A. Legal Background

In order to protect California's land resources and improve the quality of life in the state, each California city and county must adopt a comprehensive, long-term general plan governing development. (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal. App. 4th 342, 352, citing Gov. Code[1] §§ 65030, 65300.) The general plan sits at the top of the land use planning hierarchy (see *DeVita v. County of Napa* (1995) 9 Cal. 4th 763, 773), and serves as a "constitution" or "charter" for all future development. (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal. 3d 531, 540.)

General plan consistency is "the linchpin of California's land use and development laws; it is the principle which infused the concept of planned growth with the force of law." (*deBottari v. Norco City Council* (1985) 171 Cal. App. 3d 1204, 1213.) State law mandates two levels of consistency. First, a general plan must be internally or "horizontally" consistent: its elements must "comprise an integrated, internally consistent and compatible statement of policies for the adopting agency." (§ 65300.5; *Sierra Club v. Bd. of Supervisors* (1981) 126 Cal. App. 3d 698, 704.) A general plan amendment thus may not be internally inconsistent, nor may it cause the general plan as a whole to become internally inconsistent. (See *DeVita*, 9 Cal. 4th at 796 n. 12.)

Second, state law requires "vertical" consistency, meaning that zoning ordinances and other land use decisions also must be consistent with the general plan. (See § 65860(a)(2) [land uses authorized by zoning ordinance must be "compatible with the objectives, policies, general land uses, and programs specified in the [general] plan."]; see also *Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1184.) A zoning ordinance that conflicts with the general plan or impedes achievement of its policies is invalid and cannot be given effect. (*Lesher*, 52 Cal. 3d at 544.)

State law requires that all subordinate land use decisions, including conditional use permits, be consistent with the general plan. (See Gov. Code § 65860(a)(2);

[1] All statutory references are to the Government Code unless otherwise specified.

Neighborhood Action Group v. County of Calaveras (1984) 156 Cal. App. 3d 1176, 1184; Sonoma County Code § 26-02-040.) A project *cannot* be found consistent with a general plan if it conflicts with a general plan policy that is "fundamental, mandatory, and clear," regardless of whether it is consistent with other general plan policies. (*Endangered Habitats League v. County of Orange* (2005) 131 Cal. App. 4th 777, 782-83; *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal. App. 4th 1332, 1341-42 ("*FUTURE*").) Moreover, even in the absence of such a direct conflict, an ordinance or development project may not be approved if it interferes with or frustrates the general plan's policies and objectives. (*Napa Citizens*, 91 Cal. App. 4th at 378-79; see also *Lesher*, 52 Cal. 3d at 544 [zoning ordinance restricting development conflicted with growth-oriented policies of general plan].)

B. The Noise Policy Is Arbitrary, Unlawful, and Renders the General Plan Internally Inconsistent.

According to both the EIR and the April 16, 2009 Staff Report (hereafter "Staff Report"), Project noise will exceed the clear, numerical limits set forth in Noise Element Table NE-2. Noise Element Policy NE-1c states that new, non-transportation noise sources "*shall not exceed* the standards in Table NE-2" as measured at the exterior property line of any adjacent noise-sensitive land use. (General Plan at NO-12 [emphasis added].)

It is undisputed that the Project violates Policy NE-1c. According to the EIR, the barge docking and off-loading associated with the proposed Project would generate noise levels in excess of the allowable noise standards in Table NE-2. Specifically, the EIR found that the median existing ambient noise levels for the riverside residences and the trail at Shollenberger Park are 53 decibels during the day and 50 decibels at night. Based on subsection (1) of Policy NE-1c and Table NE-2, the maximum allowable ambient noise level for the project increases by 3 decibels during the day and 5 decibels at night to match the current noise levels. The EIR concluded that even with mitigation, the composite noise levels from the barge off-loading, asphalt plant and the recycling operations would exceed the noise standards in the General Plan. Although the Commission and the Board added additional noise mitigation, including sound walls, reduced hours of operation for recycling and barge off-loading operations, containment and enclosure of the plant's burner and drum mixer, and sound insulation blankets for the crusher, Project noise will still exceed General Plan noise standards.

The Staff Report suggests two approaches for addressing this inconsistency, both of which are unlawful. First, the Staff Report mischaracterizes the General Plan consistency requirement, suggesting that Policy NE-1c may be disregarded because the Project "meets other General Plan goals and objectives." (Staff Report at p. 4.) This approach is untenable. Policy NE-1 sets forth specific numerical criteria in clear, mandatory terms—criteria that the Project fails to meet. The Project's noncompliance with this specific, mandatory, fundamental and clear General Plan policy requires

disapproval, regardless of whether the Project complies with other General Plan policies. (*FUTURE*, 62 Cal. App. 4th at 1342; see also *Endangered Habitats League*, 131 Cal. App. 4th at 782-83.) Having included such a policy in its General Plan, the County may not ignore it on a project-by-project basis.

Perhaps in recognition of these legal constraints, the Board of Supervisors directed Staff to consider a second approach: a General Plan policy that would exempt this specific property from the Noise Element's standards. Proposed Policy LU-19i would create noise standards for this Project, and this Project alone, that far exceed the specific and mandatory standards of the Noise Element. Policy LU-19i would allow noise from asphalt, aggregate, and recycling operations to exceed the applicable L_{50} limits in Noise Element Table NE-2 *at all times*. The proposed policy would then allow barge docking, off-loading and conveyor operations to further exceed these "adjusted" maximums, "subject to a noise management plan" that does not yet exist.

The Staff Report's suggestion that these exceedances would be limited to six times per year is utterly disingenuous. Rather, the policy appears to have been drafted to allow *unlimited* daytime exceedances from barge operations, while limiting only nighttime exceedances to six events per year. In fact, noise from daytime barge operations apparently would be permitted to reach an L_{50} of 67 dBA, 17 dB above the maximum allowed in Table NE-2, and 14 dB above existing ambient conditions at nearby sensitive receptors. (See FEIR at p. V.I-7.) The Staff Report's proposed finding that this increase would be limited to six nighttime occurrences per year "during the non-nesting season," and thus "less than significant," has no basis in either the text of the proposed policy or the record. (See Staff Report at p. 8 [Proposed Finding #5].) Nothing in the proposed policy limits exceedances during any "nesting season." Indeed, given that a 10-decibel increase represents a *doubling* of acoustical pressure, the 14-decibel increase allowed under the proposed policy represents a staggering deviation from the noise standards applicable to the rest of Sonoma County.

Proposed Policy LU-19i is not just indefensible from a planning perspective. It is also unlawful in at least three major ways, as explained in detail below.

1. Policy LU-19i Violates State Laws Requiring Consistency and Compatibility Among General Plan Policies.

Policy LU-19i has been proposed solely to relieve this Project from specific and mandatory General Plan standards that otherwise apply throughout the County. This tactic is plainly unlawful, as demonstrated by recent decisions striking down planning and zoning decisions intended to exempt specific parcels or projects from policies and standards applicable to all other similarly designated parcels. In *Endangered Habitats League*, for example, the Court of Appeal set aside a specific plan amendment that relaxed otherwise applicable regulations for a particular project, noting that the exemption "gives the developer an unacceptable freebie." (131 Cal. App. 4th at 789-

91.) Another court held that a county may not use conditional use permits or development agreements to grant parcel-specific exceptions from zoning standards that would otherwise apply to all similarly zoned property. (See *Neighbors in Support of Appropriate Land Use v. County of Tuolomne* (2007) 157 Cal. App. 4th 997.)

The principles articulated in these cases, which addressed specific plans and zoning ordinances, apply with equal or greater force in the context of a general plan. The core purpose of a general plan is to set forth a "comprehensive, long-term" scheme for a jurisdiction's development, one that comprises "an integrated, internally consistent and compatible statement of policies" for the adopting agency. (Gov. Code §§ 65300, 65300.5.) To this end, a general plan's land use element must designate the location and extent of particular land uses, and its noise element must guide those designations so as to minimize residents' exposure to excessive noise. (See Gov. Code § 65302(a), (f)(4).) The primary goals of the County's Noise Element are to "[p]rotect people from the adverse effects of exposure to excessive noise and to achieve an environment in which people and land uses may function without impairment from noise." (General Plan at p. NO-12.) The Noise Element's objectives include development and implementation of measures to avoid exposing County residents to excessive noise. (*Id.* [Objective NE-1.2].) The specific noise limitations of Table NE-2 flow from these goals and objectives.

Proposed Policy LU-19i directly contravenes these standards. Although the County has authority to amend "part" of its General Plan where doing so is in the public interest (Gov. Code § 65358(a)), this authority cannot be read so broadly as to allow parcel-specific exceptions to otherwise generally applicable—and clearly mandatory—General Plan requirements. If the County could adopt project-specific and parcel-specific standards on an ad hoc basis, in disregard of the comprehensive land use designations and noise standards it had previously adopted for the whole County, the General Plan would become meaningless. A general plan that sets forth standards and policies only to disregard them on a project-specific basis cannot serve as "an integrated, internally consistent and compatible statement of policies" for development. Policy LU-19i frustrates the very purpose of the general plan consistency requirement, and thus exceeds the County's discretion under the Planning and Zoning Law.

2. Policy LU-19i Is Arbitrary, Irrational, and Discriminatory.

California courts also have held that singling out specific properties for special treatment, where no good reason for doing so exists, is unlawful and discriminatory. In *Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal. App. 3d 330, for example, the Court of Appeal invalidated an initiative zoning ordinance restricting development on a handful of parcels. The court noted that the city, following an 18-month process and more than 30 public hearings, had zoned the property at issue to permit high-density residential development. (*Id.* at 334-35.) Following that decision, however, the city's voters passed an initiative ordinance rezoning the property for

single-family residences, in order to prevent development of apartments. (See *id.* at 335.) The court held that this abrupt reversal—enacted "without any significant change in circumstances" following the city's initial decision—was arbitrary and discriminatory. (*Id.* at 337.)

Again, the same principle applies here. The County has just completed a months-long General Plan update process, including many public hearings, and has adopted a General Plan that protects County residents by imposing quantitative and mandatory limitations on noise. Now, after only a few months' time and no appreciable change in circumstances, the County is proposing to jettison that entire, carefully considered process and to provide this one Project with an exemption from standards that apply to *every other newly proposed land use in the County*.[2] Although Policy LU-19i unfairly favors one particular project, while the zoning ordinance struck down in *Arnel* imposed an unfair burden on a specific parcel, the policy is no less arbitrary or discriminatory.

Staff's proposed findings in support of Policy LU-19i only confirm the policy's arbitrariness. Many of the findings merely state that the Project is compatible with other, unrelated General Plan policies. To the extent such consistency exists, however, it does nothing to demonstrate that an exemption from mandatory noise limitations is warranted. Other findings stressing the "industrial" nature of the area are not only unsupported, but frankly disingenuous. The findings improperly dismiss nearby residences as "nonconforming" uses—as if people do not actually live there—and fail to even mention the Project's impacts on Shollenberger Park and the area's wildlife. Policy LU-19i unfairly and arbitrarily singles out one parcel in the County for special, preferential treatment.

3. Policy LU-19i Operates as an Unlawful Precedence Clause.

The County may not resolve inconsistencies within its General Plan by allowing one element to take precedence over another. In *Sierra Club v. Kern County Board of Supervisors* (1981) 126 Cal. App. 3d 698, the Court of Appeal invalidated such a "precedence clause," which provided that any conflict between the land use element and the open space and conservation elements would be resolved in favor of the land use element. (See *id.* at 703.) Recognizing that state law required an integrated, internally consistent and compatible statement of policies, the court held that legislative intent would be frustrated "if counties can simply subordinate the open space element to other elements of the general plan," and concluded that the precedence clause was void. (*Id.* at pp. 704, 708.)

[2] Even the Infineon Raceway, which is currently exempt from the General Plan's noise limitations under use permits issued more than 40 years ago, will be subject to Noise Element standards if future changes require a new or amended use permit. (See General Plan at NO-8.)

Policy LU-19i, in essence, requires that the Land Use Element take precedence over the Noise Element. Policy LU-19i is by its own terms inconsistent with the Noise Element, yet the policy seeks to trump the Noise Element with respect to one particular project. The County cannot resolve the facial inconsistency between Policy LU-19i and the purposes and policies of the Noise Element by simply stating that Policy LU-19i will control.

For all of these reasons, the Planning Commission must recommend denial of Policy LU-19i. The Planning Commission also should recommend that the Board of Supervisors disapprove the Project as fatally inconsistent with the mandatory, specific, and clear policies of the Noise Element.

C. The General Plan Does Not Permit Redesignation of the Project Site to Limited Industrial.

The General Plan contains mandatory criteria governing redesignation of lands for Limited Industrial uses. The Project cannot satisfy these criteria.

The Proposed Project requires a General Plan Amendment to change the land use designations of APNs 019-320-022 and 019-320-023 from Limited Commercial to Limited Industrial; an Area Plan Amendment to the Petaluma Dairy Belt Area Plan to change the land use designation from Limited Commercial to Limited Industrial; and a change in zoning from LC (Limited Commercial) to M3 (Limited Rural Industrial). APN 019-220-001 would retain its current designations of GI (General Industrial) and M2 (Heavy Industrial).

Under the General Plan, seven specific criteria must be met before the Project parcels can be redesignated for Limited Industrial uses:

(1) Lands shall be designated to recognize an existing permitted use or to serve the projected employment needs of the planning area,

(2) Lands outside Urban Service Areas shall have adequate water and septic suitability,

(3) Lands shall have convenient access to an arterial or collector highway,

(4) Lands shall be located near population concentrations,

(5) Lands shall not be in areas subject to flood, fire, and geologic hazards or in areas constrained by groundwater availability or septic suitability,

(6) Outside of the unincorporated communities shown on Figure PF-1 of the Public Facilities and Services Element, lands shall not be located in a scenic corridor,

(7) Any applicable Land Use Policies for the Planning Area

Like its noise standards, the General Plan's policies governing redesignation of land to Limited Industrial are phrased in unmistakably mandatory terms. In order to be redesignated for industrial uses, land "must" meet seven specific criteria, each of which employ the mandatory term "shall." (General Plan at LU-43.) As outlined below, and as documented in the EIR, the Project site fails to meet several of these criteria, and thus cannot be redesignated for Limited Industrial uses.

1. Criterion #1: Lands shall be designated to recognize an existing permitted use or to serve the projected employment needs of the planning area.

The EIR concluded that there are no "existing permitted" industrial uses on the Project parcels within the meaning of this criterion. Although industrial uses of some kind have previously existed on the site according to permit records,

> [b]ecause these permit records do not indicate that any permitted uses for industrial purposes have existed legally, recognizing an existing industrial use would not be applicable as a basis for a change in designation from Limited Commercial (LC). The project site is designated LC because the General Plan envisions commercial uses on the site instead of other uses, such as industrial uses. While the project site is proposed to accommodate a relocated existing use from another nearby site, the project site is currently vacant, thus the proposed project does not replace an existing industrial use on the project site. Therefore, the proposed project does not appear to meet the first part of Criterion #1.

(DEIR at p. V.H-25.)

The Project is also inconsistent with the second part of Criterion #1. Neither the EIR nor any of the Staff Reports offers any evidence concerning the area's "projected employment needs." The Project's potential for job creation, moreover, is minimal. Accordingly, there is insufficient evidence in the record to support a finding that the Project meets Criterion #1.

2. Criterion #2: Lands outside Urban Service Areas shall have adequate water and septic suitability.

The EIR's discussion of the adequacy of water to serve the site is inconclusive and fails to support with evidence the conclusion that the water availability criterion has been met. According to the EIR, the North Marin Water District has indicated that it can provide up to 4,452 gallons per day ("gpd") to both the Project and existing non-conforming residences, based on historical use. (DEIR at p. V.H-26.) The FEIR

concluded that 4,080 gpd will be required to serve the Project and other uses in the area. (FEIR at p. III-12.)

The North Marin Water District obtains 80 percent of its water from the Sonoma County Water Agency ("SCWA"). SCWA recently announced that low water storage levels in Lake Mendocino and Lake Sonoma may force the agency to implement mandatory water conservation measures.[3] The EIR's assumption that adequate water supplies exist, in contrast, is predicated on North Marin Water District estimates dating from October and November 2006. (DEIR at p. V.H-26.) The EIR thus fails to provide competent, up-to-date evidence that there is sufficient water both for the Project and for the legal non-conforming residences.

The Project also proposes to pump 40 gallons per minute ("gpm") of water from the Petaluma River for dust suppression and other non-potable uses. The Project applicant claims a riparian right to use this water, but as the EIR notes, this right has not been perfected and may not legally exist. (DEIR at p. V.H-26.) If no riparian right exists, the Project applicant will have to file a petition with the State Water Resources Control Board for an appropriative right. The mere possibility that the Project might be able to obtain adequate water is not the same as a showing that adequate water supplies actually exist.

Accordingly, the Project fails to satisfy Criterion #2.

3. Criterion #5. Lands shall not be in areas subject to flood, fire, and geologic hazards or in areas constrained by groundwater availability or septic suitability.

According to the DEIR, this criterion is not met. The site includes land in hazardous areas, including areas subject to groundshaking and liquefaction and areas within the 100-year flood plain. (See DEIR at pp. V.H-28, V.H-30 to 31.) Proposed mitigation measures may reduce these potential hazards, but they do not ensure that the Project *avoids* hazardous areas, which according to the EIR is the clear intent of the Criterion. (DEIR at p. V.H-28.) Therefore, the Project does not meet Criterion #5.

4. Criterion #6: Outside of unincorporated communities, lands shall not be located in a scenic corridor.

Like Criterion #5, Criterion #6 requires avoidance of areas designated as Scenic Corridors. (General Plan at p. LU-43 [requiring that "lands" proposed for redesignation to Limited Industrial "shall not be located in a scenic corridor"].) The proposed Project site includes land (the frontage of Areas B, C and D) designated as Scenic Corridor and

[3] Sonoma County Water Agency, *Water Supply*, at http://www.sonomacountywater.org/about_your_water/water_supply.php (last visited March 2, 2009).

zoned Scenic Resources Combining District. (DEIR at p. V.H-28.) Although the Project site and landscape plan are proposed to be located outside of the setback required under Scenic Resources Combining District zoning, the area subject to redesignation still includes lands located in the Scenic Corridor. Therefore, the Project does not meet Criterion #6.

5. Criterion #7: Lands Proposed for Redesignation Shall Meet Any Applicable Land Use Policies for the Planning Area.

The proposed Project is inconsistent with land use policies applicable to the Planning Area, including but not limited to the following:

LU-19c: Policy LU-19c requires that the "Limited Industrial" category be applied only to appropriate uses existing as of 1986. (General Plan at p. LU-79.) However, the policy allows the County to "consider additional river dependent commercial and industrial uses along the Petaluma River, *where necessary to maintain the river as a navigable waterway* connecting the Bay to downtown Petaluma." (*Id.* [emphasis added].) According to the February 3, 2009 Staff Report prepared for the Board of Supervisors, "the proposed use conforms to the intent of LU-19c because the new language allows for river dependent industrial operations along the Petaluma River, and the proposed asphalt plant will import a majority of its materials by barge." (Feb. 3, 2009 Staff Report at p. 4.)

This statement has nothing to do with Policy LU-19c. Policy LU-19c does not provide exceptions for "river dependent industrial operations," but rather provides exceptions only for uses "necessary" to "maintain" the river as a navigable waterway. There is no evidence that this Project is "necessary" for that purpose. Indeed, the same Staff Report stated that Project-related barges "would encroach on the navigable channel" of the river. (February 3, 2009 Staff Report at p. 15.) The Project does not "maintain" the river as a navigable waterway. It impedes navigation. The Project is therefore facially inconsistent with Policy LU-19c.

LU-7a, LU-7c: Policy LU-7a requires that the County "avoid" General Plan amendments that would allow additional development in floodplains. (General Plan at p. LU-26.) The Project includes a General Plan amendment allowing development in a floodplain. (DEIR at p. V.H-31.) General Plan policy LU-7c requires the County to "*[p]rohibit* new permanent structures within any floodway." (General Plan at p. LU-26 [emphasis added].) The Project would require placement of dolphins and piles for the barge dock within the floodway. (DEIR at p. V.H-31.) The Project is facially inconsistent with both of these policies, and in fact is expressly prohibited by Policy LU-7c.

Each of these policy conflicts, on its own, would require a finding that the Project is inconsistent with the General Plan. Taken together, these conflicts confirm that the Project site cannot be redesignated for Limited Industrial uses.

D. The Project Conflicts With the General Plan's Community Separator Policies.

The Project facially conflicts with General Plan policies—including policies adopted by initiative—governing development of the Petaluma/Novato Community Separator. Either the Project area is within the Community Separator, or the General Plan suffers from a fatal internal inconsistency regarding the boundaries of the Community Separator. In either case, the Project cannot be approved.

1. The Project Area Is Within the Petaluma/Novato Community Separator.

Under the plain text of the operative General Plan, a majority of the Project area is within the Petaluma/Novato Community Separator. The General Plan defines this area as "bounded on the north by the Petaluma Urban Service Boundary, on the east by NWPRR rail right-of-way, on the south by the Sonoma/Marin County line, and on the west by the hills south of Petaluma." (General Plan at p. OS-4.) These boundaries indisputably include Areas C and D of the Project site, which lie south of the Urban Service Boundary and west of the railroad right-of-way.

The February 3, 2009 Staff Report erroneously concludes that none of the Project area is within the Community Separator. According to Staff, Measure D (which expanded the Community Separator and required that any intensification of use within the area be subject to voter approval) excluded properties "that were zoned commercial or industrial in 1988" from the Community Separator. (Feb. 3, 2009 Staff Report at p. 13.) Staff is incorrect. Measure D made no reference to "commercial or industrial" *zoning*, but rather excluded lands "currently" designated as Commercial on General Plan Figure LU-5h. (See Ex. A [Measure D] §2.)

More importantly, Staff's conclusion is contrary to the text of the current General Plan. Measure D, in amending the 1989 General Plan, expressly authorized the Board of Supervisors to adopt a "successor general plan" that "[a]dds additional area to the Petaluma/Novato Community Separator" without prior voter approval. (Ex. A [Measure D] §6.A.) The Board of Supervisors, when it adopted General Plan 2020 (the "successor" to the 1989 General Plan), deleted Measure D's exception for lands previously designated Commercial. In so doing, the Board of Supervisors added additional area—including a majority of the Project area—to the Community Separator.

Under Measure D, the Project requires voter approval. Project Area C—the area where the "major operational portion" of the Project will be located, including the asphalt batch plant and the recycling plant (DEIR at p. III-39 to 40)—is within the Community Separator boundary. General Plan Policy OSRC-1k, part of Measure D, requires voter approval before any land use designation can be changed in order to increase the intensity of development in the Community Separator. (General Plan at p. OS-9.) It is

indisputable that converting this area from open space to an asphalt plant represents an increase in the intensity of development. Voter approval of the Project is therefore required.

The Project also facially conflicts with General Plan policies governing the Community Separator. Policy OSRC-1b also requires avoidance of industrial uses in this area. (*Id.* at p. OS-6.) None of the exceptions to this requirement set forth in Policy OSRC-1c (see *id.*) are applicable here. The Project therefore cannot be approved.

2. At Best, the General Plan's Internally Inconsistent Definition of the Petaluma/Novato Community Separator Precludes Project Approval.

As discussed above, the text of the General Plan provides the controlling definition of the Petaluma/Novato Community Separator. Curiously, a figure attached to General Plan 2020, Figure OSRC-5h, does not appear to show any of the Project area as included within the Community Separator. At best, however, this only indicates that the General Plan is internally inconsistent, and thus invalid, in a manner that precludes Project approval.

The general rule that projects must be consistent with a general plan has an important corollary: projects cannot be found consistent with a general plan, and thus cannot be approved, if the general plan itself is legally inadequate in a way that implicates the project under consideration. (See *Garat v. City of Riverside* (1991) 2 Cal. App. 4th 259, 289-90.) The reason for this corollary is simple: where a general plan provides inconsistent direction to decision-makers and the public, it is impossible to determine whether any particular project is consistent with the general plan.

The General Plan here suffers from exactly this type of inadequacy. Under the plan's plain text, a majority of the Project area is within a Community Separator, and thus subject to policies that both preclude its approval as a matter of substance and require a vote of the people in any event. The boundaries of the Community Separator as shown on Figure OSRC-5h, however, are inconsistent with those described in the text of the General Plan. As a result, the General Plan gives conflicting direction to decision-makers and the public—a hallmark of internal inconsistency. (See *Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal. App. 3d 90, 97.) Because this inconsistency goes to the heart of this Project's compliance with the General Plan, the Project cannot be approved.

For the foregoing reasons, the Project is facially inconsistent with the General Plan and cannot be approved. The proposed General Plan text amendment adopting a parcel-specific exception to the plan's mandatory noise limitations is arbitrary, unsupported, and unlawful. Finally, to the extent that the EIR failed to consider the

significance of the General Plan conflicts discussed herein, it failed to satisfy the minimum requirements of CEQA.

Thank you for considering our comments.

Respectfully submitted,

LOZEAU|DRURY LLP

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cc: David Keller