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Sent via email to erik.pearson@hayward-ca.gov

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RE: Salem Communications Radio Towers Mitigated Negative Declaration and Draft Initial Study

Dear Mr. Pearson:

On behalf of the East Bay Regional Park District ("EBRPD"), we have reviewed the City of Hayward's ("City's") draft Mitigated Negative Declaration and Initial Study (collectively, "MND") prepared for the proposed Salem Communications Radio Towers Project ("Project" or "Towers"). We submit this letter to express our legal opinion that the MND does not comply with the requirements of the California Environmental Quality Act ("CEQA") (Pub. Res. Code §§ 21000 et seq.) and the CEQA Guidelines (14 Cal. Code Regs. §§ 15000 et seq.)

Given the significant and unmitigated environmental impacts of the Towers Project, CEQA requires that the City prepare a legally adequate EIR for the proposed Project prior to considering whether or not to approve the Towers. As discussed further below, the MND is legally deficient in numerous respects: (1) it inadequately analyzes numerous environmental impacts of the Project, including the impacts of the Project on biological resources such as migratory birds, wetlands, and protected species; water quality impacts; interference with EBRPD communications equipment; and, air quality, noise and aesthetic impacts on the Hayward Regional Shoreline, park visitors, and the

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environment; (2) it fails to provide factual support for its conclusion that the impacts will be reduced to less than significant levels through adoption of the proposed mitigation measures, repeatedly deferring both analysis of the environmental impacts and development of mitigation to minimize such impacts; and (3) it fails to accurately or adequately describe the Project and its various components, and as a result it minimizes the Project's environmental impacts.

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Rather than demonstrating that the Project will not have any environmental impacts, the MND and other evidence before the City demonstrates that the Project will result in both individual and cumulative significant impacts on the environment. Thus, pursuant to CEQA, because a fair argument exists that the Project will result in significant environmental impacts, the City must prepare an EIR for this Project.

THE MND DOES NOT COMPLY WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT, AND AN EIR IS REQUIRED

CEQA provides that a lead agency may issue a negative declaration and may avoid preparing an EIR only if "[t]here is no substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment." (Pub. Res. Code § 21080(c)(1); see also CEQA Guidelines §§ 15070(a), (b)(2).) An initial study must provide the factual basis, with analysis included, for making the determination that no significant impact will result from the project. (CEQA Guidelines § 15063(d)(3).) In making this determination, the agency must consider the direct and indirect impacts of the project as a whole (CEQA Guidelines § 15064(d)), as well as the project's cumulative impacts. (See City of Antioch v. City Council of Pittsburg (1986) 187 Cal.App.3d 1325, 1333.)

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An agency must prepare an EIR whenever it is presented with a "fair argument" that a project may have a significant effect on the environment, even if there is also substantial evidence to indicate that the impact is not significant. (No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 75; CEQA Guidelines § 15064(f)(1).) Where there are conflicting opinions regarding the significance of an impact, the agency must treat the impact as significant and prepare an EIR. (CEQA Guidelines § 15064(f)(1); Stanislaus Audubon Society v. County of Stanislaus (1995) 33 Cal.App.4th 144, 150-151.) The fair argument test reflects a "low threshold requirement for initial preparation of an EIR" and expresses "a preference for resolving doubts in favor of environmental review." (Id. at p. 151.) An agency must prepare an EIR even in "marginal

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cases” if there is a “disagreement among expert opinion” over the significance of an environmental effect. (CEQA Guidelines § 15064(g).)

While a negative declaration may include mitigation measures to reduce potentially significant impacts, the agency must prepare an EIR if there is a fair argument that the proposed mitigation measures will not reduce environmental impacts to a less-than-significant level. (San Bernardino Valley Audubon Society v. Metropolitan Water District (1999) 71 Cal.App.4th 382, 389-390.) The guidelines state that a mitigated negative declaration is appropriate in such circumstances only if the mitigation measures would “mitigate the effects to a point where *clearly* no significant effects would occur.” (CEQA Guidelines § 15070(b)(1) (emphasis added).)

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A negative declaration is also inappropriate where an agency has failed to “gather information and undertake . . . environmental analysis.” (City of Redlands v. County of San Bernardino (2002) 96 Cal.App.4th 398, 406.) Furthermore, negative declarations cannot rely on the presumed success of mitigation measures that have not been formulated at the time of project approval. (Sundstrom v. County of Mendocino (1988) 202 Cal.App.3d 296, 306-307.) The “CEQA process demands that mitigation measures timely be set forth, that environmental information be complete and relevant, and that environmental decisions be made in an accountable arena.” (Oro Fino Gold Mining Corporation v. County of El Dorado (1990) 225 Cal.App.3d 872, 885.) This MND fails to meet these standards.

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A. The MND’s Analysis of Biological Resources Is Legally Inadequate.

(1) The MND fails to Adequately Analyze the Potentially Significant Biological Impacts to Listed Species and Migratory Birds.

The MND improperly defers study and analysis of critical biological resources that would be affected by the Project. This deferral violates CEQA’s requirement that the impacts of a proposed project be disclosed at the earliest possible time and always before the decision maker considers whether to approve a project. In particular, negative declarations cannot rely on the presumed success of mitigation measures that have not been formulated at the time of project approval, and any determination that a significant impact would be reduced below significance based on deferred mitigation is invalid. (See Sundstrom, *supra*, 202 Cal.App.3d at pp. 306-307; see also Oro Fino Gold Mining Corporation, *supra*, 225 Cal.App.3d at p. 885.)

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Although the MND acknowledges that listed species may be found in the Project site and area, the MND admits that “[s]pecies-specific protocol level surveys were not conducted.” (See MND, Appendix A, at 2; see also MND at 55 [acknowledging that as to migratory birds, “project implementation would disturb nests within the grassland and tress if they are present,” and that the destruction of any such nests, if they are present, would be a significant impact].) An agency cannot “hide behind its failure to collect data.” (Sundstrom, supra, 202 Cal.App.3d at p. 306.)

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Moreover, the MND discussion is incomplete as it omits several special status species that have been found in the Project area, such as Cooper’s Hawk, and it fails to disclose that several of the species listed in the document are protected under the state or federal Endangered Species Acts (see Cal. Fish & Game Code §§ 2050 et seq.; 16 U.S.C. §§ 1531 et seq.), as well as under the California Fully Protected Species Act (see Cal. Fish & Game Code § 3511). (See MND at 51; see id., Appendix A.) For instance, the EBRPD’s employees have identified Cooper’s Hawks and White-Tailed Kites nesting in trees adjacent to the Project site, and they have identified Cooper’s Hawks flying in the Project vicinity numerous times. The document should be revised to clearly state that the Project may adversely impact species listed under these laws.

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(2) The MND’s Mitigation Measures are Inadequate to Reduce Impacts to Protected Species to an Insignificant Level, and the MND Demonstrates that Those Impacts Will be Significant.

The MND recognizes that the Project, particularly construction of the Project, may adversely affect special species plants and animals. (See MND at 51-52.) In particular, the MND admits that construction “noise from pile drivers and other machinery on the site would result in temporary but significant impacts that could disrupt nesting and foraging of special status species on the project site and adjacent lands.” (Id. at p. 52.) The MND also states that these impacts would be considered significant if the project would result in “an adverse impact to special status species.” (Id. at p. 50.) As such, the MND’s conclusion that these impacts are less than significant contradicts the evidence in the document and is erroneous. This is particularly true because, as discussed below, the MND defers analysis of proposed mitigation measures and provides no evidentiary support for their efficacy. Thus an EIR is required. (San Bernardino Valley Audubon Society, supra, 71 Cal.App.4th at pp. 389-390 [finding that if there is a fair argument that the proposed mitigation measures will not reduce environmental impacts to a less-than-significant level, then an EIR is required].)

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The MND explicitly relies on plans and mitigation measures to be formulated in the future. (See MND at 52 [asserting that an adequate buffer distance would be established in consultation with the Department of Fish and Game (“DFG”), and that a plan for burrow excavation and elimination would be prepared and implemented in coordination with DFG].) This is true as well for the proposed mitigation measures to reduce impacts on migratory birds. (See MND at 55-56.) CEQA prohibits the MND from deferring its analysis of potentially significant biological impacts.

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Moreover, the mitigation measures proposed are not supported by any evidence of their efficacy. An environmental document may not simply identify mitigation measures and assert that they will be effective; instead it must provide data and analysis supporting each measure’s efficacy. (See Sundstrom, *supra*, 202 Cal.App.3d at pp. 306-307; Oro Fino Gold Mining Corporation, *supra*, 225 Cal.App.3d at p. 885; see also Save Our Peninsula Committee v. Monterey County Board of Supervisors (2001) 87 Cal.App.4th 99, 130.)

Not only do the mitigation measures proposed in the MND rely on measures to be proposed in the future, but the MND fails to provide any evidentiary support for its conclusion that the impacts would be reduced to a less than significant level. This is particularly important for MM BIO-3, which proposes that the noise impacts from pile drivers -- which the MND admits would be significant (see MND at 52) -- would be reduced by using a padded enclosure or padding on the driver. (See *id.* at p. 53; see also *id.* at p. 55.) The MND provides no objective analysis of the efficacy of such measures, such as the how much these mitigation measures would reduce the decibel level of such pile driving. Use of pile drivers can create some of the loudest construction noise found on construction sites, creating noise from 88-105 dBA at 50 feet. (See Handbook of Noise Control, Cyril M. Harris, 1979.) As such, the MND’s analysis of mitigation measures fails to demonstrate that the Project will clearly result in less than significant impacts on listed species through implementation of those mitigation measures, and the MND is legally deficient. In addition, there may be additional mitigation measures, such as temporary noise barriers, that may be necessary to reduce these impacts to less than significant levels. Further analysis of such mitigation measures is necessary.

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As a result, the MND fails to adequately analyze the potential impacts to listed species, and the evidence in the MND, as well as the MND’s explicit admission, demonstrate that construction of the Project likely will result in significant impacts to listed species. Therefore, an EIR must be prepared.

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In addition, because the MND indicates that the Project likely will have an impact on species listed under the federal Endangered Species Act (“ESA”), and federal permits are required for the Project, it would appear that a consultation with the U.S. Fish and Wildlife Service under section 7 of the ESA may be required for this project. (See MND at 3, 51; 16 U.S.C. §§ 1536(a)(2)-(3).)

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Finally, the MND proposes a mitigation measure to reduce erosion and sedimentation associated with construction of the project in order to mitigate impacts on biological resources, including protected species. Because the primary impact of any soil erosion as a result of the project would affect the Hayward Regional Shoreline, EBRPD requests that mitigation measure MM BIO-4 be modified to allow EBRPD to review and comment on the proposed erosion control plan, and for the City to incorporate EBRPD’s comments into the final plan.

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(3) The MND’s Analysis of Impacts to Federally Protected Wetlands is Inadequate, and the Project will Result in Potentially Significant Impacts to Wetlands.

Under the MND’s threshold of significance, a significant impact would result if the Project has “an adverse effect on federally protected wetlands.” (See MND at 51.) The MND’s discussion of impacts to federally protected wetlands suffers from a simple, and fatal, flaw: “No formal wetland delineation was conducted,” and the Army Corps of Engineers has not yet determined whether the project would affect any federally protected wetlands. (See MND at 53; *id.*, Appendix A p.3.)

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However, the MND acknowledges that potential wetlands under federal protection may be affected by the Project. (MND at 53.) As such, it is impossible to determine whether the Project will have significant impacts on federally protected wetlands, and the negative declaration is legally deficient. Given the evidence in the MND, a fair argument exists that the Project will have adverse impacts on federally protected wetlands, and an EIR must be prepared for the Project.

Moreover, like the other mitigation measures proposed in the biological impacts section of the MND, the document relies on future permitting and mitigation measures to be designed in the future to assert that these measures reduce these impacts to a less than significant level. This it cannot do. (See *Sundstrom, supra*, 202 Cal.App.3d at pp. 306-307.) In addition, the MND admits that one of the proposed mitigation measures to protect wetlands may require elimination of a proposed mitigation measure needed to

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reduce aesthetic impacts. (See MND at 54 [MM BIO-7]; see discussion *supra*, p. 12.) This inconsistency must be resolved before decision makers and the public can determine whether the project will have a significant impact on the environment, with respect to both wetlands or aesthetics.

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Finally, the discussion of impacts to wetlands fails to consider and analyze the potential impacts of how the Project will be supplied with electrical power and irrigation water. (See MND at 29 [admitting that irrigation will be used]; *id.* at 46 [stating the antennas will operate on electricity, and the diesel generator will only be used for emergency situations or testing].) The MND is wholly devoid of any analysis of whether electrical or water lines will have to be run to the Towers and transmitter building and whether this may have a significant impact on wetlands.

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Given the information presented in the MND, a fair argument exists that the Project will have an adverse impact on federally protected wetlands, which would result in a significant impact under CEQA, and therefore an EIR is required. The proposed mitigation measures fail to demonstrate that these impacts will be reduced to less than significant levels, and implementation of the proposed measures would likely result in a significant adverse impacts on aesthetics.

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(4) The MND fails to Provide any Meaningful Analysis of Whether the Project is Consistent with the Hayward Area Shoreline Planning Agency Environmental Enhancement Program.

In a single, conclusory sentence, the MND states that the Project complies with the Hayward Area Shoreline Planning Agency (HASPA) Environmental Enhancement Program. (MND at 58.) The MND fails to provide any evidentiary support for this conclusion. Nor does it include the findings of the Hayward Area Shoreline Planning Agency as to whether the Project is consistent with the Program for the simple reason that, as the MND acknowledges, the MND was prepared prior to the HASPA's meeting. (See MND at 76.)

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However, as Appendix B states, HASPA "was formed in 1970 to preserve the bay shore of San Lorenzo and Hayward in its natural state, restore wetlands, and develop recreational uses, such as trails and educational facilities." (MND, Appendix B, at 1.) Given this mandate, the MND must demonstrate how and why the Project is consistent with this program, and the MND should also include the findings of HASPA.

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It also appears that the Project may be inconsistent with several of the objectives of HASPA's Environmental Enhancement Program. The program objectives include the following:

- Wetlands should be preserved.
- Development in wetlands will be discouraged and should not be allowed at all without appropriate mitigation and proof that alternative sites exist.
- Emphasis shall be placed on the restoration of habitat for endangered and threatened species.
- Following closure, and as available, consider the partial use of former solid waste disposal sites for recreational opportunities that do not infringe on habitat values of the Shoreline and revegetate the remainder of these sites as upland habitats.

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(See HASPA, Hayward Area Shoreline Planning Program: A Shared Vision, 1993.) The MND fails to demonstrate that the Project is consistent with these objectives, particularly the last one. The MND fails to demonstrate that any alternative sites were considered for the project, and it does not analyze how the construction of impervious surfaces on the site is consistent with the objective of revegetating these sites as upland habitat. A fair argument exists that the Project is inconsistent with HASPA's Environmental Enhancement Program, contrary to the conclusion in the MND. Further analysis is required.

5. The MND Incorrectly Concludes that the Project Will Not Affect Habitat Associated with Protected Species.

On the last page of the MND, it states that "[i]mplementation of the proposed project is not anticipated to affect habitat associated with protected species. (MND at 89.) However, this contradicts the evidence in the MND which recognizes that the Project may affect the habitat of listed species, including through the destruction of foraging and nesting habitat. (MND at 51, 55.) As noted earlier, the extent of such impacts is unclear because adequate biological resource surveys have not been conducted at this time. (See discussion *supra*, pp. 3-4.) Therefore, the MND's conclusion that the habitat of protected species will not be affected is not supported by the weight of the evidence, and a fair argument exists that the Project will have significant impacts on the habitat of protected species, such as the Salt-marsh harvest mouse. According to the MND, adverse effects on the habitat of protected species requires a mandatory finding of significance. (MND, 89.) Therefore, an EIR is required.

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B. The MND Contains Inadequate Analysis and Mitigation of Aesthetic Impacts.

1. Substantial Evidence in the Record Supports a Fair Argument that the Proposed Project would Result in Significant Aesthetic Impacts.

The Project proposes to build four towers, each 199 feet tall, on land directly adjacent to the Hayward Regional Shoreline, a public park that includes popular hiking trails. (See MND at 17.) The MND's discussion of aesthetic impacts is replete with references suggesting that the project will have significant visual impacts. (See MND at 18; *id.* at p. 27 [project would "contrast with the open, horizontal" landscape seen from trails in the site vicinity, would "appear visually dominant within immediate foreground distances," and "would appear prominently and conspicuously in views to the northeast"]; *id.* at p. 28 [describing the impacts as adverse and visually dominant].) The MND also admits that viewer sensitivity to these towers will be high. (See MND at 18, 28 - 29.) Moreover, the visual depictions of the Project demonstrate that the Project will result in significant visual impacts, even with the proposed mitigation incorporated. (See MND at Fig. VIS-4c, Fig. VIS-5c, and Fig. VIS-6c.) The photos make clear that these tall towers dominate the otherwise natural landscape.

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The photos and the text of the MND demonstrate that a fair argument exists that the Project will have significant visual impacts. Yet contrary to the unambiguous evidence in the MND, the document erroneously concludes that the four 199-foot towers will not have any significant visual impact. This conclusion is contrary to the weight of the evidence. Given the admittedly high visibility of the towers and the location of a regional park surrounding the Project site, a fair argument exists that the Project will have significant aesthetic impacts, particularly on visitors to the Hayward Regional Shoreline. Therefore, an EIR is required.

Moreover, there is no explanation for why the 4 viewpoints used in the MND were selected. (MND at 18.) This is particularly important because visitors to the Hayward Regional Shoreline who park at the parking lot near the Project area will be confronted with a view of the Towers to the South, unlike most of the viewpoints identified in the MND. (See MND Fig. VIS-1.) The MND admits that, "potential sensitive receptors would include visitors to Hayward Regional Shoreline on either the east-west trail leading from the parking lots to the shoreline, or the north-south trail leading towards Cogswell Marsh." (MND at 27.)

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Nor does the MND explain why a distance of ½ mile from the Towers is repeatedly used for assessing the visual impact of the Towers, particularly when the Towers will be in closer proximity to visitors to the Hayward Regional Shoreline. (See, e.g., MND at 29 [referring to the “approximately ½ mile visual foreground radius of the project”].) The MND demonstrates that there are several hiking trails in the Hayward Regional Shoreline directly adjacent to the Project site, far closer than ½ mile from the proposed Towers, and thus the visual impacts will be correspondingly greater. (See MND, Fig. 3.) The MND fails to analyze the visual impacts of this close proximity, and as a result, it understates the potential aesthetic impacts of the Project on park users.

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The MND also understates the potential aesthetic impact of the lighting system required for the Towers. (See MND at 41.) In this section the MND discusses the impact of white strobe lights, but it fails to acknowledge, as it does elsewhere, that red lights will be required as well. (See MND at 57-58.) More importantly, the MND asserts that the visual impact of these lights will not be significant because the park will be closed during nighttime hours when the lighting would be “highly conspicuous.” (MND at 41.) This is inaccurate and understates the actual impacts of the Project, as the Park is open from 5 AM to 10 PM. The lighting therefore will be “highly conspicuous” to park visitors, who are highly sensitive to aesthetic impacts, and in particular it will interfere with park visitor’s appreciation of sunrise and sunset.

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For the reasons described above, the MND discloses that the Project will have significant impact on aesthetics, particularly on visitors to the Hayward Regional Shoreline, and therefore an EIR is required.

2. The MND Fails to Describe and Mitigate the Potentially Significant Cumulative Aesthetic Impacts that Would Result from the Additional Towers.

CEQA requires an analysis of the cumulative impacts of a project, and “[a]n EIR must be prepared if the cumulative impact may be significant and the project’s incremental effect, though individually limited, is cumulatively considerable.” (CEQA Guidelines § 15064(h)(1)) “Cumulatively considerable” means that the incremental effects of an individual project become significant “when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.” (*Id.*) Extensive case authority also highlights the importance of a thorough cumulative impacts analysis. (See Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d at 692, 718, 728-729; San Joaquin Raptor/Wildlife

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Rescue Center v. County of Stanislaus (1994) 27 Cal.App.4th 713, 720.)

In Kings County Farm Bureau, plaintiff challenged an EIR’s conclusion that the proposed project would not result in significant cumulative air quality impacts because the existing air quality already was substantially degraded, and the Court invalidated the EIR’s reliance on the existing degraded environment “in order to trivialize the project’s impact.” (221 Cal. App. 3d at 718.) “The relevant question to be addressed in the EIR is not the relative amount of precursors emitted by the project when compared with preexisting emissions, but whether any additional amount of precursor emissions should be considered significant in light of the serious nature of the ozone problems in this air basin.” (Id.)

Unlike the 2001 Project, which proposed to replace the existing nearby towers and relocate them to the Project site (see MND at 13; id., Appendix A, Environmental Checklist Form at 3), the present Project would add, rather than replace, 4 Towers, thereby increasing the aesthetic impacts from the current baseline. (See MND at 13.) The MND acknowledges at one point that the addition of four more towers, as proposed in the Project, may cause cumulatively significant impacts. (See MND at 29 [“These towers may have a cumulative significant impact when combined with the proposed project and other tower facilities in the area”].) Yet the MND fails to analyze the cumulative impacts of adding 4 more towers to the existing viewscape, and instead it concludes that the addition of towers will not have a significant impact because of the existing towers. (See MND at 26.) This turns the CEQA analysis on its head.

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Much like the EIR in Kings County Farm Bureau, here the MND attempts to minimize the cumulative aesthetic impacts of the proposed Project by suggesting that the existing visual resources in the Project area are substantially degraded by other towers in the area and the addition of one more tower will not be significant. (See 221 Cal. App. 3d at p. 718.) The MND must consider these cumulative impacts in order to be legally adequate, and it cannot rely on the other existing towers to show that this impact is insignificant.

3. The MND’s Proposed Mitigation Measures are Insufficient to Reduce the Significant Impacts of the Project.

CEQA requires that an initial study or negative declaration include feasible mitigation measures which “mitigate the effects to a point where clearly no significant effects would occur.” (CEQA Guidelines § 15070(b)(2); see also CEQA Guidelines §

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15063.) The California Supreme Court has described mitigation measures as the “core” of environmental review. (Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553, 564.) If there is a fair argument that any proposed mitigation measures will not reduce environmental impacts to a less-than-significant level, then an agency is required to prepare an EIR. (San Bernardino Valley Audubon Society, supra, 71 Cal.App.4th at pp. 389-390.)

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The MND includes two proposed mitigation measures intended to reduce the aesthetic environmental impacts of the project to less than significant levels: landscape screening to reduce the visual contrast of the transmitter building (MM VIS-1); and landscape screening to reduce the visual contrast of the fencing surrounding Tower #2 (MM VIS-2). However, there is little evidence demonstrating the feasibility of these mitigation measures. The MND says that the landscaping for MM VIS-2 will be planted on the banks of the landfill plateau (not on the clay cap), but the MND fails to identify the location of the landfill so it is impossible to know where the landscaping will be planted. Landscaping for MM VIS-1 apparently will be planted on the landfill, but the MND fails to analyze whether such landscaping can be implemented on top of the landfill, or whether that will cause any environmental impacts.

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In addition, while the MND concludes these mitigation measures are necessary to reduce the Project’s significant impacts to a level of insignificance, elsewhere the MND acknowledges that MM VIS-1 (the landscaping) may not be implemented in order to avoid the Project’s significant impacts on wetlands. (See MND at 54 [MM BIO-7].) The MND cannot have it both ways. It cannot eliminate the mitigation measure required to reduce aesthetic impacts in order to avoid significant impacts on wetlands. The Project will result in significant environmental impacts to either aesthetics or wetlands.

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Moreover, the document includes little meaningful analysis of how effective these mitigation measures will be at reducing the aesthetic impacts of the Project, and it provides little evidence that the Project’s impacts will be reduced to a less than significant level. For instance, the roof of the transmitter building is still visible in Figure VIS-5c even with the landscaping and design mitigation measures. (See MND at 33.)

In addition, because the visual impacts of the Project will primarily affect visitors to the Hayward Regional Shoreline (See MND at 27), EBRPD requests that the proposed mitigation measures MM VIS-1 and MM VIS-2 be amended to require that the

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project proponent submit its building, fencing, and landscaping plans to EBRPD for review and comment, and that the City will consider and require reasonable design and landscaping changes requested by EBRPD for the purpose of mitigating these visual impacts.

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Most importantly, the mitigation measures wholly fail to mitigate the most important and significant aesthetic impact of the project: the towers themselves. The proposed mitigation measures address only the potential aesthetic impacts of the fencing and transmitter building. (See MND at 29-30.) The MND proposes no mitigation measures to reduce the potential significant aesthetic impact of the Towers themselves. Because the Towers create a significant aesthetic impact, and the mitigation measures do not address these impacts, the mitigation measures cannot reduce the aesthetic impacts of the Project to a level where the impacts clearly are insignificant; thus, an EIR is required to analyze and mitigate these impacts. (See CEQA Guidelines § 16070(b)(1).)

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C. The MND Contains Inadequate Analysis and Mitigation of Air Quality Impacts.

The MND asserts that the Project will have less than significant impacts on air quality with mitigation incorporated, although it acknowledges that the air quality impacts of construction (PM₁₀ emissions) on recreational users of the Hayward Regional Shoreline would be a “potentially significant impact.” (MND at 49.) However, this analysis fails to consider the air quality impacts of drilling into the landfill, fails to provide evidentiary support for its conclusion that the proposed mitigation measures will clearly reduce the air quality impacts of construction to less than significant levels, and fails to include enforceable mitigation measures. As a result, the analysis of air quality impacts is inadequate.

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For example, according to the MND a significant impact would occur if the Project would “frequently expose members of the public to objectionable odors.” (MND at 45.) However, the MND fails to analyze whether any objectionable odors would occur as a result of drilling through the clay cap and through the landfill. (See MND at 49.) Other evidence in the MND suggests that such odors may occur, and that a significant environmental impact may therefore result. For instance, the Geotechnical report states that “landfill gas is a potential hazard for the buildings” and that these buildings must therefore be ventilated. (MND, Appendix E, at 6.) This also suggests that the Project may result in a significant hazard to the public involving the release of hazardous

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materials to the environment that the MND fails to analyze or consider. (See MND at 67-70.) Because the document demonstrates that a fair argument exists that such gases may result in a significant environmental impact, which the MND has failed to analyze, an EIR must be prepared to analyze these impacts.

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D. The MND's Analysis of Impacts to Geology and Soils is Inadequate Because it Fails to Adequately Analyze the Risk of Liquefaction.

As the MND properly notes, the Project site is in a high liquefaction hazard zone, where there is a high probability of a major earthquake. (See MND at 62-63.) However, the MND does not explicitly address or discuss the potential liquefaction risk from building on a former landfill in this area. Moreover, the 2001 negative declaration found that the liquefaction risk was potentially significant unless mitigation was incorporated, but the present MND asserts this is a less than significant impact without the need for any mitigation and without any explanation for the changed conclusion. (Compare MND, Appendix A at 13 with MND at 62-63.)

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The MND must analyze the specific risks associated with construction on a landfill and provide more meaningful analysis of how the proposed site construction requirements will alleviate this risk. Because of the known risks of liquefaction associated with construction on landfills, the Project may result in significant impacts that require the preparation of an EIR, and the MND fails to demonstrate that these impacts are clearly less than significant.

E. The MND's Analysis of Hazardous Materials Impacts is Inadequate Because it Fails to Adequately Mitigate the Project's Potential Interference with EBRPD's Communication and other Electronic Equipment.

The MND notes that the Project may cause Radio Frequency Interference ("RFI") and may also interfere with telephone systems, computer networks, and intercom systems. (See MND at 69.) However, while it asserts that no persons permanently live in the Project area, the document fails to address the potential RFI impacts on EBRPD's operations at the Hayward Regional Shoreline. There is no analysis of whether or how the Project will interfere with EBRPD's computers and radio systems. Moreover, contrary to the information in the MND, EBRPD maintains a park residence directly

1-33

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adjacent to the Project site. Although the residence is currently unoccupied, EBRPD has plans to renovate the structure and continue its use as a residence.

Therefore, the MND must analyze whether the Project would cause RFI or other interference with EBRPD's operations or prevent future use of this residence or cause human health risks to anyone residing there. The Project may result in significant impacts through RFI, particularly if the Project interferes with EBRPD communication equipment, and the MND fails to show that these impacts are less than significant.

1-33
cont.

In addition, the Project does not include a mitigation measure to reduce RFI and other interference. However, the 2001 Mitigated Negative Declaration "required" the Project applicant "to mitigate instances of interference within an average radius of approximately 3.5 kilometers from the center of the" tower array. (See MND, Appendix A, at 23.) The current Project provides no such assurances, instead requiring merely that the Project applicant report instances of RFI and assist in resolving interference issues. This is inadequate. In order to ensure that EBRPD's operations and use of the residence are not adversely affected by the Project, this requirement of the 2001 Project must be imposed, namely, that the Project applicant reimburse EBRPD and other affected parties for the costs associated with mitigating RFI and other interference.

1-34

Lastly, because any emergency response would likely involve EBRPD lands and/or personnel, EBRPD requests that it be provided with a copy of the draft emergency response plan prepared under MM HAZ-1, and EBRPD requests that MM HAZ-1 be modified to require EBRPD's review and approval of the plan.

1-35

F. The MND's Analysis of Water Quality Impacts is Inadequate Because the Project Improperly Relies on Future Mitigation Plans and Fails to Analyze Whether Significant Water Quality Impacts Will Result From Drilling Through the Landfill and Clay Cap.

The MND acknowledges that construction of the Project will alter the existing draining pattern in a manner that may result in a reduction of water quality, and that this impact is potentially significant because construction of the Project may result in erosion and storm water runoff into wetlands and waters. (See MND at 73.) However, the MND improperly relies on drainage plans which have yet to be developed in order to conclude that these impacts will be reduced to a less than significant level with the mitigation measures incorporated.

1-36

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If any grading and drainage plan prepared pursuant to mitigation measure MM HYD-1 would result in erosion or sedimentation of lands owned or managed by EBRPD, in order to fully mitigate those impacts upon park lands EBRPD requests that MM HYD-1 be modified to require EBRPD's review and approval of such plans.

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cont.

In addition, the MND wholly fails to discuss or analyze the potential water quality impacts of drilling through the clay cap covering the landfill and into the landfill itself. Because the Project involves drilling through the cap, through the landfill, and into the soil below the landfill (see MND at 49), the Project may result in significant water quality impacts to surface water either during construction or afterwards. Moreover, because the landfill does not appear to have a liner (see MND, Appendix E, at 5), drilling through the landfill may also cause significant water quality impacts to groundwater.

1-37

The 2001 Geotechnical report strongly suggests that "downward migration of contaminants" is possible, and the likelihood of such impacts depends on the type of pilings used. (Id.) Although the MND asserts that the Project will comply with all water quality standards, the discussion and anticipated permitting appears limited to the site's grading plan and the reduction of storm water runoff. (See MND at 72.) There is no discussion of whether driving the pilings through the landfill will impact water quality, or whether a waste discharge permit would be required by the SFBRWQCB for this aspect of the project.

1-38

The MND wholly fails to analyze such impacts, and as such, it cannot clearly show that such impacts are less than significant. To the contrary, the evidence in the MND presents a fair argument that such impacts will be significant, and therefore an EIR should be prepared which analyzes these water quality impacts.

G. The MND's Analysis of Noise Impacts is Inadequate, and the Efficacy of the Proposed Mitigation Measures to Reduce Impacts to Less Than Significant Levels is Not Supported by Any Evidence.

The MND's analysis and mitigation of noise impacts from construction of the Project is woefully inadequate. The MND admits that the construction noise would "substantially exceed the 50 DBA significance threshold." (MND at 79.) Construction of the Project is anticipated to last six to nine months. (Id. at p. 3.) The Project therefore would result in a substantial temporary noise impact that exceeds the standard of significance, and it must therefore be considered a significant impact. (See id. at p. 78.)

1-39

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As the MND admits, these impacts clearly would affect visitors to the Hayward Regional Shoreline and employees of the EBRPD (see id.), yet the MND fails to consider that these noise impacts would be significant because they interrupt the scenic, quiet enjoyment of the park in its natural state.

Moreover, the MND fails to provide any factual or evidentiary support of how implementation of the mitigation measures would reduce the noise impacts of the project to less than significant levels. Indeed, because the proposed mitigation measures would not reduce the amount of noise below the threshold of significance, it would appear that the mitigation measures could not reduce the impact to less than significant levels. The evidence demonstrates a fair argument that the noise impacts of the Project will be significant, and as such, an EIR must be prepared and additional mitigation measures imposed to reduce the noise impacts of the Project.

1-39
cont.

The MND also admits that Project's noise impacts, particularly from the use of pile drivers and other construction machinery, are likely to create significant impacts on protected species, such as birds, as well as migratory birds. (See MND at 52-53, 56.) The MND proposes mitigation measures to reduce such noise impacts, but it fails to provide any evidentiary support that the measures would be effective. The MND fails to disclose how loud the use of pile drivers would be with or without the padded enclosures or padding around the driver, and what threshold of noise impacts on birds would be significant. (See discussion supra, pp. 4-5.) As such, the MND fails to show that the Project clearly would have less than significant noise impacts on biological resources, a fair argument exists that the impacts would be significant, and an EIR must be prepared which analyzes these impacts and the effectiveness of the proposed mitigation measures.

1-40

H. The MND Fails to Demonstrate that the Impacts to the Hayward Regional Shoreline Will be Less Than Significant (Public Services).

As noted throughout this letter, the MND demonstrates that the Project likely will have significant impacts on the Hayward Regional Shoreline, and it fails to demonstrate that these impacts will clearly be reduced to less than significant levels, notwithstanding the contrary conclusion reached in the MND. (See MND at 83.) In addition to the impacts identified elsewhere in this letter, the document must also discuss whether construction would affect park operations by requiring the closure or relocation of any roads, parking lots, or buildings. As detailed herein, the impacts to Parks likely will be significant, even with the mitigation measures presently proposed, and an EIR

1-41

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must be prepared for the project.

I. The MND Fails to Adequately Consider the Potential Substantial Impacts on Human Health Resulting from the Project's Location on a Former Landfill.

The MND also fails to provide any analysis of the potential impacts to human health as a result of drilling through the landfill. Although the MND concludes these impacts will be reduced to less than significant levels with mitigation measures incorporated, the MND includes no factual support for this conclusion and the document as a whole omits any meaningful analysis of any such health risks. (But see MND, Appendix E, at 6 [noting that landfill gas is a potential hazard for the buildings and that the buildings must be ventilated].) These risks must be analyzed and factual support must be provided to demonstrate that these health risks are clearly less than significant; otherwise, an EIR must be prepared.

1-42

J. The MND's Project Description Lacks Necessary Substantive Details About Components of the Proposed Project.

The MND fails to provide a legally-adequate description of the Project. Specifically, CEQA requires an accurate project description that provides sufficient detail to reveal a proposed project's potential impacts on the environment. (See CEQA Guidelines §§ 15063(d)(1), 15071.) Without a complete project description, an agency and the public cannot be assured that all of a project's environmental impacts have been revealed and mitigated.

Here, the MND omits critical detail about several components of the proposed Project, resulting in an incomplete description of the Project and an inadequate foundation on which the decision makers may determine that the Project would not result in significant impacts. (See CEQA Guidelines § 15063(a)(1) [initial study must include the entire project].)

1-43

First, the description of the Project Location and Existing Conditions are inadequate because the MND wholly fails to describe the boundaries of the landfill on which the Project is proposed to be located, the types of materials that were disposed of in the landfill, and the restrictions and regulations in place to protect the landfill. The MND

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downplays the fact that the Project includes drilling into the landfill and planting landscaping into the landfill. (See MND at 2.) The Project Location also fails to state explicitly that the Project is a private project proposed to be located on public property.

1-43
cont.

The MND also contains several errors which make it difficult for the public to understand the impacts of the Project. For instance, Figure 3 incorrectly identifies the Park residence as a Caretaker's office, it incorrectly labels the Hayward oxidation ponds as being Cogswell Marsh, it fails to identify the Hayward shoreline access road and staging area, and it fails to identify the boundaries of the landfill.

1-44

Similarly, the Project Location and Existing Conditions fail to adequately disclose and discuss that the Project is proposed to be located adjacent to the Hayward Regional Shoreline, a public park operated by EBRPD. The proposed project site is visually and functionally a part of this park unit, and the MND's introductory sections fail to disclose the proximity of the Project to the Park's office and to a popular parking lot used for access to the Hayward Regional Shoreline. Although this information is disclosed to some degree elsewhere in the MND, it should be included in this section as well. (See MND at 17 [describing the project area as "surrounded" by the Hayward Regional Shoreline and adjacent to the park office, parking lot and trailhead].) As currently drafted, these sections lead the reader to underestimate the impact of the Project on the Hayward Regional Shoreline. The Project Location should also disclose that the Project site is accessible via maintenance roads from the South by way of Depot Road. These introductory materials also fail to adequately describe the nearby wetlands that may be affected by the Project.

1-45

The MND also fails to include any discussion of the purpose and need for this Project. There is no analysis of why the City is proposing to grant this CUP, why the project is necessary or useful, under what terms the City is leasing this property for the Project, and how the City and its residents will benefit from the proposed project. Any financial benefits obtained by the City for approving this project should be disclosed in order to facilitate informed decision-making.

1-46

The MND's Project Description is also inadequate. The introductory materials in the MND fail to describe the size and height of the transmitter building, which is important given the aesthetic and water quality impacts that may result from this building. Moreover, the Project Description fails to disclose whether the project would require drilling into the landfill and through the clay cap, and how the project would affect the landfill. (See MND at 49 [acknowledging that the Project would drill through

1-47

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the clay cap into the landfill]; see also MND, Appendix E.)

Nor does the Project Description, or other parts of the MND, describe whether construction of the Project would require closure of, or damage to, the Hayward Regional Shoreline access road or parking lot. Most importantly, the MND wholly fails, in this section or elsewhere in the document, to describe how electricity and irrigation water will be supplied to the project, and whether this aspect of the project will require trenching or overhead power lines, the location of such power or water lines, and whether these power or water lines will cross property owned by the EBRPD or other private landowners. (See MND at 29 [stating that the landscape planting shall be irrigated]; id. at p. 46 [stating that the antennae will operate on electricity, but will not rely on generators].) The MND appears to improperly segment these aspects of the project. The MND must be revised to include a description of how electricity and irrigation water will be supplied for the project, as well as an analysis of the environmental impacts of doing so. (See CEQA Guidelines § 15063(a)(1).)

1-48

Because the Project Description and other introductory materials omit a key part of the project, fail to adequately describe the project environment, and misidentify or fail to identify important landmarks, the MND fails to provide the reader with information necessary to make an informed decision, and the MND understates the potential impacts of the Project on the Hayward Regional Shoreline.

CONCLUSION

Because the MND fails to adequately analyze the environmental impacts of the Project, fails to adequately describe the project, omits portions of the Project from all environmental review, and fails to support its conclusion that the Project will have less than significant environmental impacts, the MND is legally deficient. Therefore, EBRPD requests that the City prepare an EIR in accordance with CEQA prior to further consideration of the Towers Project.

1-49

3.0 COMMENT LETTERS AND RESPONSES

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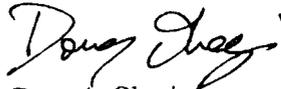
Thank you for consideration of our views. If you have any questions or comments, please do not hesitate to contact us or the EBRPD.

Sincerely,

SHUTE, MIHALY & WEINBERGER LLP



Tamara S. Galanter



Doug A. Obegi

cc: Jesus Armas, City Manager
Susan Daluddung, Director of Community and Economic Development
Hayward Area Shoreline Planning Agency

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Letter 2



San Francisco Bay Chapter

Serving the counties of Alameda, Contra Costa, Marin and San Francisco

Erik Pearson
Hayward Planning Division
City of Hayward
777 B St.
Hayward, CA 94541-5007

RE: Salem Communications Radio Towers -- Draft Initial Study-Mitigated Negative Declaration

Dear Mr. Pearson,

My first concern regarding this project process is that the key environmental groups were not notified. Sierra Club has a local Southern Alameda County Group which has been active in Hayward for many years. Many of the elected officials come to the Group for endorsement during the campaign process. I first heard of this project 3 days before the HASPA meeting. I did not receive a copy of the Draft Initial Study-Mitigated Negative Declaration (DIS/MND) until the evening of the meeting.

2-1

I have read through the DIS/MND. For a project of this magnitude a full EIR is required. The impacts of this project on the environment and on the public who view and utilize this park are certainly far more significant than identified. We must remember the importance of wetland and adjacent upland areas which include the project site. We have lost most of these habitats due to development and projects such as these. The City of Hayward calls itself the Heart of the Bay. The San Francisco Bay is one of the most sensitive, unique and endangered ecosystems in the United States. It is surprising that the City of Hayward would consider approving this project without a full EIR.

2-2

The site of the proposed project lies within a major flyway for migratory birds. People from all over the State come to the Hayward Regional Shoreline and Cogswell Marsh to see the wonders of the natural world. To place these towers adjacent to this magnificent wildlife area significantly degrades the view and the natural sights that shoreline visitors come to the shoreline to experience. The shoreline area is open to view from many locations throughout the Bay Area. The mitigations for protecting the view of this site are ineffective, and very likely to fail. They will alter the natural appearance of this park giving it the look of an extension of an industrial city, not a natural wonder as it should be.

2-3

The DIS/MND did a woefully inadequate job of assessing the wildlife that utilize the area and the impacts of this project upon these wildlife species. It dismisses impacts based on lack of knowledge about the particular aspects that may be significant impacts to this area.

The DIS/MND states that "*because mortality rates from bird collisions at towers of different sizes and different locations are unknown, and population numbers of bird species that could potentially collide with the towers is also not known, the determination of significance is extremely difficult to evaluate. As a result, the cumulative effect of the towers on bird collisions is determined not to be considerable.*"