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Via Email

Sabrina Sihakom, Planner
Marin County Community Development Agency
3501 Civic Center Drive, Suite 308
San Rafael, CA 94941
ssihaokom@marincounty.org

Re: Comments on Mitigated Negative Declaration for the Dipsea Ranch Land Division (455 Panoramic Highway; APN 046-161-11; tentative map and grading permit)

Dear Ms. Sihakom:

We submit these comments regarding the above-referenced Dipsea Ranch Land Division (“Project”) on behalf of the Watershed Alliance of Marin (“WAM”), a public benefit non-profit corporation organized in 2014 that promotes informed watershed stewardship in Marin County, with a specific focus on restoring and protecting imperiled fish and wildlife including Central California Coastal steelhead trout and coho salmon, species protected under the Endangered Species Act that inhabit Redwood Creek downslope from this Project. We incorporate by reference the detailed comments on this Project that are being submitted directly by WAM (“WAM Comments”).

The Initial Study prepared for this Project is deficient because it understates or overlooks potentially significant Project impacts. Accordingly, the County may not approve the Initial Study and Mitigated Negative Declaration that were signed prematurely on December 4, 2019. Based on this Project’s potential for causing significant environmental impacts, an Environmental Impact Report (“EIR”) must be prepared, as discussed below.

LEGAL BACKGROUND

The California Environmental Quality Act, Public Resources Code section 21000 et seq. (“CEQA”), is California’s primary statutory mandate for environmental protection. It requires public agencies like the County to “first identify the [significant] environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives.” *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1233. Its most important substantive imperative requires “public agencies to deny approval of a project with significant adverse effects when feasible alternatives or feasible mitigation measures can substantially lessen such effects.” *Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30, 41;

Public Resources Code §§ 21002, 21002.1. CEQA’s mandate for detailed environmental review “ensures that members of the [governmental decision-making body] will fully consider the information necessary to render decisions that intelligently take into account the environmental consequences” of their proposed action. *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 133; Public Resources Code §§ 21080.5(d)(2)(D), 21091(d)(2); CEQA Guidelines [14 C.C.R. (“Guidelines”)] § 15088. The CEQA process thus “protects not only the environment but also informed self-government.” *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

All California “public agencies” and “local agencies” must comply with CEQA when they approve discretionary projects. Public Resources Code § 21080(a). The California Secretary for Resources has promulgated Guidelines, which appear in Title 14, section 15000 et seq. of the California Code of Regulations, to assist agencies in the proper interpretation and implementation of CEQA. The County is both a “public agency” and a “local agency” subject to CEQA. Public Resources Code §§ 21062, 21063; Guidelines §§ 15368, 15379.

A proposed governmental action requires environmental review under CEQA if (1) the agency is contemplating an “approval” of an action as defined by Guidelines section 15352, (2) the subject matter of the contemplated approval constitutes a “project” under Public Resources Code section 21065 and Guidelines section 15378(a), and (3) the project to be approved does not fall within a statutory exemption under Public Resources Code section 21080(b) – as recognized in Guidelines sections 15260-15285 – or a categorical exemption, pursuant to Public Resources Code section 21084(a) and Guidelines sections 15061(b)(2), 15300-15333 and 15354. The County has agreed, and confirmed by preparing its draft Mitigated Negative Declaration, that the Project is a discretionary “project” subject to CEQA.

When an agency determines that a project is subject to CEQA, as the County did here, it prepares an “initial study” to determine the level of environmental review that is required for CEQA compliance. Guidelines § 15063. This initial study must describe the project, the environmental setting, the project’s effects, ways to mitigate those effects, and the project’s consistency “with existing zoning, plans, and other applicable land use controls.” Guidelines § 15063(d)(1)-(5). The agency must also informally consult with “all responsible agencies and all trustee agencies responsible for resources affected by the project.” Guidelines § 15063(g); Public Resources Code § 21080.3(a).

If the agency concludes that a mitigated negative declaration, rather than an EIR, is the appropriate environmental document, then the initial study must document the agency’s reasoning in reaching that conclusion. Guidelines § 15063(c)(5) (purpose of an initial study is to “[p]rovide documentation of the factual basis for the finding in a negative declaration that a project will not have a significant effect on the environment”).

A lead agency may adopt a mitigated negative declaration when an “initial study identifies potentially significant effects on the environment, but (1) revisions in the project . . . made by, or

agreed to by, the applicant *before* the proposed negative declaration and initial study are released for public review would avoid . . . or mitigate the effects to a point where *clearly no significant effects on the environment would occur*, **and** (2) there is *no substantial evidence* in light of the whole record before the public agency that the project, as revised, *may* have a significant effect on the environment.” Guidelines § 15369.5 (emphases added). By contrast, “the high objectives of [CEQA] require[] the preparation of an EIR whenever it can be *fairly argued* on the basis of substantial evidence that the project *may* have [a] significant environmental impact.” *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75; *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320.

Informed public comments, as WAM has provided here, that provide substantial evidence that a project may have a significant effect on the environment are sufficient to require preparation of an EIR. *The Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927-930. Indeed, even “[r]elevant personal observations of area residents on non-technical subjects may qualify as substantial evidence for a fair argument.” *Id.* at 928 (citing cases).

The Guidelines use “[e]ffects’ and ‘impacts’ . . . synonymous[ly].” Effects are both “[d]irect or primary” – “caused by the project” and occurring “at the same time and place” – and “[i]ndirect or secondary” – “caused by the project” but occurring “later in time or farther removed in distance.” Guidelines §§ 15358, 15358(a)(1).

“‘Cumulative Impacts’ refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.” Guidelines § 15355. “The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” Guidelines § 15355(b). “An EIR must be prepared if the cumulative impact may be significant or the project’s incremental effect, though individually limited, is cumulatively considerable. ‘Cumulatively considerable’ means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.” Guidelines § 15064(h)(1).

“[T]he lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.” *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 729 (quoting Guidelines § 15064(g)). Thus, if the initial study or proposed mitigated negative declaration and public comment thereon indicate that there is substantial evidence that one or more significant environmental impacts may occur, then the lead agency must prepare an EIR to analyze those effects and study feasible alternatives and mitigations to reduce or avoid those effects while still achieving most of the basic objectives. Public Resources Code §§ 21002, 21002.1, 21061; Guidelines §§ 15080-15096, 15120-15132, 15160-

15170.

Here, the informed public comment summarized below as well as the County's own, albeit deficient, Initial Study show that the Project may have a significant effect on the environment. Therefore an EIR must be prepared.

FACTUAL BACKGROUND

According to the Initial Study, the proposed Project would be built upslope from Redwood Creek, which provides documented habitat for Central California Coastal coho salmon (*Oncorhynchus kisutch*), a species federally and state listed as endangered, and Central California Coastal steelhead (*Oncorhynchus mykiss irideus*), a species federally listed as threatened. Initial Study 15, 52-53. According to the same document, the "average slope [on the Project site] is 36.76 percent," a gradient which is considered "steep" under the Countywide General Plan. Initial Study 3. "Two ephemeral streams, both tributary to Redwood Creek, flow along the western and eastern edges of the Project site, and meet just south of the Project boundary." *Id.* Thus, soil erosion anywhere on the site will introduce sediment into these tributaries of Redwood Creek, and over time, ultimately into Redwood Creek itself, degrading its salmonid habitat.

The Project applicant's proposed development of this site will involve substantial cutting (1,709 cubic yards) and filling (1,565 cubic yards) of soil. Initial Study 12. Because the quantity of material to be removed exceeds by about 145 cubic yards the quantity to be used on site for fill, the Project will generate excess soil that must be placed somewhere. *Id.* But the Initial Study fails to specify where this excess material will be placed. This is not an insignificant quantity of soil, and its placement will have consequences somewhere. Those consequences must be disclosed and examined, not ignored.

According to the Initial Study, in 2014 the Project applicant deposited "about 1,200 cubic yards of fill" on the Project site—roughly 240 standard 5 cubic yard dump truck loads--without a grading permit. *Id.* The County admits that this massive unpermitted "grading *may* have resulted in *some* delivery of sediment to the stream system." Initial Study 65. Although the Initial Study claims (at pages 2 and 12) that the impacts of this unpermitted grading are addressed as part of this Project in the Initial Study, in fact they are not. Indeed, the most important impact—sedimentation of Redwood Creek and its ephemeral tributaries—is never quantified, let alone analyzed. Instead, the Initial Study dodges the issue by pretending that the impact may be dismissed with the meaningless words "may" and "some." But this is not an inconsequential issue that may be casually swept under the rug. Instead, as WAM documents in its separately filed comments and photographs, contemporaneous heavy rainfall transported much of this unconsolidated fill downslope, and very probably into the adjacent streams, and thence into Redwood Creek.

The County's attempt to downplay this significant Project impact on Redwood Creek may not be so casually brushed aside. CEQA demands specificity and certainty, not generalities and speculation.

Kings County Farm Bureau Federation v. City of Hanford (1990) 221 Cal.App.3d 692, 736 (an EIR must contain “facts and analysis” rather than mere conclusory words); *Sierra Club v. County of Fresno* (2018) 6 Cal 5th 502, 519 (an EIR must explain the “nature and magnitude of the impact”). Because the Initial Study fails to do so, it is inadequate.

The site’s steep slopes are unstable and prone to erosion. According to the Initial Study, “[t]here are areas of slope instability on the Project site, namely the old landslide in the eastern portion and slump failure along the southern slopes adjacent to the drainages and roads.” Initial Study 79. Although according to the same document these unstable areas “are not . . . expected to adversely impact slope stability conditions within the building envelopes of the proposed lots,” in fact, the “fire roads” which are proposed to be used for “vegetation management” *do* overlap these unstable areas. The Initial Study acknowledges that “[t]he area where the unpermitted grading for the Fire Road occurred overlies an old landslide identified by previous regional mapping and confirmed by [geologist] Herzog’s geotechnical investigation” in 2015. *Id.* Hence, the Project as a whole *does* pose a potential for slope failure and erosion, which in turn poses a potential for sedimentation of the adjacent ephemeral streams that flow into Redwood Creek below the Project site, and thus of Redwood Creek itself.

Even if it were true, as the Initial Study implies without actual documentation, that the unpermitted grading done in 2014 has not in the few years since then *again* deposited sediment into the ephemeral streams and Redwood Creek, that happenstance does not mean that it will not do so in the future. Such impacts may be triggered by high rainfall events of greater duration and magnitude than have been experienced since 2014. It is well known that slope failure and soil erosion are magnified exponentially when soils have become saturated following lengthy rains. Moreover, as noted the County has acknowledged that it must treat the unpermitted grading done in 2014 as if it were part of the Project. Accordingly, the incompletely reported erosion and sedimentation impacts of that grading are cause alone for preparation of an EIR.

It is likewise well known that erosion and sedimentation are a primary cause of the steep drop in salmonid populations along the California coast over the past several decades, leading to their listing under the Endangered Species Act. Sediment fills the interstices in spawning gravels, thereby destroying the large gravel and cobble structure required for successful spawning activity, and preventing access to oxygen by the salmonid eggs that are deposited and the alevins that emerge. It also fills pools and reduces water depth, thereby increasing water temperature above tolerable ranges, eliminating effective cover and exposing fish to greater predation. All of these impacts have a “substantial adverse effect, either directly or through habitat modifications,” on the salmonids residing in Redwood Creek. CEQA Guidelines, Appendix G, section IV(a). Therefore these impacts pose a potentially significant effect on the environment requiring preparation of an EIR.

Many other potentially significant impacts are documented in the separate comments submitted directly by Watershed Alliance of Marin, including loss of terrestrial wildlife habitat and migration corridors, potential loss of Native American cultural resources, and conflicts with land use policies

designed to reduce rather than exacerbate urban-interface wildfire hazards. Each of those impacts must be thoroughly examined in an EIR.

**BECAUSE THE PROJECT MAY CAUSE SIGNIFICANT
EFFECTS, AN EIR IS REQUIRED**

The County may not lawfully adopt the Initial Study and Mitigated Negative Declaration and approve the Project because both the Initial Study itself, as well as informed public comments, show that the Project has already caused, and will cause again if construction is allowed, significant impacts on the environment. These impacts include erosion and sedimentation from the Project's geological and hydrologic hazards including the site's steep and unstable slopes, leading to significant cumulative watershed impacts on the water quality and salmon habitat of Redwood Creek. The Initial Study failed to address the Project's inconsistency with the General Plan's watershed protections, despite indisputable evidence that the Project is located in an area with a documented history of unstable slopes and active landslides, and potential for further instability. *See* Marin 1994 Countywide Plan Policy EQ-3.7. Additionally, the County has failed to evaluate and adopt adequate mitigation measures to avoid and reduce to insignificance the Project's potentially significant watershed impacts.

CONCLUSION

For each of the foregoing reasons, an EIR must be prepared for this Project. Please include these comments in the public record for this Project.

Thank you for your attention.

Respectfully submitted,

Stephan C. Volker
Attorney for Watershed Alliance of Marin

cc: Rachel Reid, Marin County Environmental Planning Manager

Sabrina Sihakom, Planner
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