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December 7, 2022

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Subject: Housing and Safety Element Update to the Marin Countywide Plan, Draft
Program Environmental Impact Report, SCH No. 2021120123, Marin County

Dear Ms. Reid

The California Department of Fish and Wildlife (CDFW) received a Notice of Availability of Draft Program Environmental Impact Report (DEIR) from the County of Marin (County) for the Housing and Safety Element Update to the Marin Countywide Plan (Project) pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.¹ CDFW previously submitted comments in response to the Notice of Preparation of the DEIR on January 20, 2022.

CDFW is submitting comments on the DEIR to inform the County, as the Lead Agency, of potentially significant impacts to biological resources associated with the Project.

CDFW ROLE

CDFW is a **Trustee Agency** with responsibility under CEQA for commenting on projects that could impact fish, plant, and wildlife resources (Pub. Resources Code, § 21000 et seq.; Cal. Code Regs., tit. 14, § 15386). CDFW is also considered a **Responsible Agency** if a project would require discretionary approval, such as a California Endangered Species Act (CESA) Incidental Take Permit (ITP), a Native Plant Protection Act (NPPA) Permit, a Lake and Streambed Alteration (LSA) Agreement, or approval under other provisions of the Fish and Game Code that afford protection to the state's fish and wildlife trust resources. Pursuant to our authority, CDFW has the following concerns, comments, and recommendations regarding the Project.

PROJECT DESCRIPTION SUMMARY

The Project would update the Housing Element and the Safety Element within the County's General Plan. The Housing Element would identify locations in unincorporated Marin County to meet the need for 3,569 housing units and present programs and

¹ CEQA is codified in the California Public Resources Code in section 21000 et seq. The "CEQA Guidelines" are found in Title 14 of the California Code of Regulations, commencing with section 15000.

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policies to meet the housing needs of unincorporated Marin County. The timeframe for the Housing Element update would be 2022 through 2030. The Safety Element would be amended to address climate change resiliency, including fire risk reduction, emergency evacuation plans, and flood risk reduction. The Safety Element update would also include a vulnerability assessment identifying climate change risks to communities; a list of climate change adaptation and resiliency goals, policies, and objectives; and potential implementation measures. The Project is located in unincorporated Marin County.

REGULATORY AUTHORITY

California Endangered Species Act

Please be advised that a CESA ITP must be obtained if the Project has the potential to result in “take” of plants or animals listed under CESA either during construction or over the life of the Project. **The Project has the potential to impact CESA-listed species including but not limited to northern spotted owl (*Strix occidentalis caurina*), a CESA listed as threatened species, as further described below.** Issuance of an ITP is subject to CEQA documentation; the CEQA document must specify impacts, mitigation measures, and a mitigation monitoring and reporting program. If the Project will impact CESA listed species, early consultation is encouraged, as significant modification to the Project and mitigation measures may be required in order to obtain an ITP.

CEQA requires a Mandatory Finding of Significance if a project is likely to substantially restrict the range or reduce the population of a threatened or endangered species. (Pub. Resources Code, §§ 21001, subd. (c) & 21083; CEQA Guidelines, §§ 15380, 15064, & 15065). Impacts must be avoided or mitigated to less-than-significant levels unless the CEQA Lead Agency makes and supports Findings of Overriding Consideration (FOC). The CEQA Lead Agency’s FOC does not eliminate the Project proponent’s obligation to comply with CESA.

Lake and Streambed Alteration

CDFW requires an LSA Notification, pursuant to Fish and Game Code section 1600 et seq., for project activities affecting lakes or streams and associated riparian habitat. Notification is required for any activity that may substantially divert or obstruct the natural flow; change or use material from the bed, channel, or bank including associated riparian or wetland resources; or deposit or dispose of material where it may pass into a river, lake, or stream. Work within ephemeral streams, washes, watercourses with a subsurface flow, and floodplains are subject to LSA Notification requirements. CDFW would consider the CEQA document for the Project and may issue an LSA Agreement.

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CDFW may not execute the final LSA Agreement until it has complied with CEQA as a Responsible Agency.

Raptors and Other Nesting Birds

CDFW has jurisdiction over actions that may result in the disturbance or destruction of active nest sites or the unauthorized take of birds. Fish and Game Code sections protecting birds, their eggs, and nests include sections 3503 (regarding unlawful take, possession or needless destruction of the nests or eggs of any bird), 3503.5 (regarding the take, possession or destruction of any birds-of-prey or their nests or eggs), and 3513 (regarding unlawful take of any migratory nongame bird). Migratory birds are also protected under the federal Migratory Bird Treaty Act.

Fully Protected Species

Fully Protected species may not be taken or possessed at any time (Fish & G. Code, §§ 3511, 4700, 5050, & 5515) except for collecting these species for necessary scientific research, relocation of the bird species for the protection of livestock, or if they are a covered species whose conservation and management is provided for in an NCCP.

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist the County in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources. Based on the Project's avoidance of significant impacts on biological resources with implementation of mitigation measures, including those recommended by CDFW below, CDFW concludes that a Program EIR is appropriate for the Project.

I. Subsequent Project CEQA Evaluation

COMMENT 1: The DEIR identifies that "future site-specific development facilitated by the Project, but which has not yet been described at a project-specific level of detail, will be evaluated for consistency with this DEIR if and when the development is proposed" (DEIR, page 2-4). CDFW provided comments on the NOP for the DEIR in a letter dated January 20, 2022 and recommended providing a clear checklist or procedure for evaluating subsequent Project impacts and clearly citing the portions of the DEIR, including page and section references, containing the analysis of the subsequent Project activities' potentially significant effects. The DEIR does not include the checklist and CDFW strongly recommends that the DEIR include a procedure or checklist for subsequent projects in an appendix to ensure subsequent project impacts to fish and wildlife resources are appropriately evaluated in compliance with CEQA and impacts are mitigated to less-than-significant.

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II. Mitigation Measures and Related Impact Shortcomings

Mandatory Findings of Significance: Does the Project have the potential to substantially reduce the number or restrict the range of an endangered, rare, or threatened species?

And,

Would the Project have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by CDFW or U.S Fish and Wildlife Service (USFWS)?

COMMENT 2: Deferred Mitigation, Pages 2-18, 2-19, 2-20

Issue, specific impacts, why they may occur and be potentially significant: The DEIR identifies that development facilitated by the Project could have a substantial adverse effect, either directly or through habitat modifications, on candidate, sensitive, or special-status species (DEIR pages 2-18 and 7-26). The DEIR identifies five candidate housing sites (Bowman Canyon, Buck Center, San Domenico School, 6760 Sir Francis Drake Boulevard, and Vacant Point Reyes Station) which have a moderate to high potential to support special-status species and acknowledges that developed and disturbed sides may also support special-status species (DEIR page 7-26).

Mitigation Measure 7-1 proposes to mitigate this impact by requiring that a biological resources site assessment be prepared to address the presence or absence of biological resources, make recommendations for protocol-level surveys, provide an impact assessment of the proposed activities on biological resources, create mitigation measures for avoidance of harm, and determine compensation for the loss of sensitive biological resources (DEIR pages 2-19 and 2-20). Mitigation Measure 7-1 then states: “the County shall review the results of the biological resources site assessment to determine whether impacts to Special-Status Species are likely to occur and the actions needed to avoid identified impacts, as well as to determine if additional County permits are required, and the appropriate level of CEQA review” (DEIR page 2-20).

CDFW does not consider the biological resources site assessment’s “mitigation measures” a mitigation measures under CEQA, as mitigation measures must be included in the CEQA environmental document, in this case the DEIR (CEQA Guidelines, §§ 15126.4). CEQA Guidelines section 15126.4, subdivision (b) states: “The specific details of a mitigation measure, however, may be developed after project approval when it is impractical or infeasible to include those details during the project’s environmental review provided that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and

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that will considered, analyzed, and potentially incorporated in the mitigation measure. Compliance with a regulatory permit or other similar process may be identified as mitigation if compliance would result in implementation of measures that would be reasonably expected, based on substantial evidence in the record, to reduce the significant impact to the specified performance standards.”

Mitigation Measure 7-1 does not adopt specific performance standards, nor does it identify types of actions² that could meet these standards.

Further, the County reviewing subsequent projects does not provide certainty that impacts to special-status species would be reduced to the level of less-than-significant. Mitigation Measure 7-1 states that the County will determine actions needed to avoid impacts, but there is no requirement that any action would be taken. A potential outcome based on the text of Mitigation Measure 7-1 is that subsequent Project impacts to the state and federally threatened Northern spotted owl, or other special-status species, would not be appropriately evaluated or identified in the biological resources site assessment, and appropriate mitigation measures to reduce impacts to less-than-significant would not be implemented.

Without specific performance standards CDFW considers impacts to special-status species as potentially significant (CEQA Guidelines, §§ 15065, 15380).

Recommended Mitigation Measure: To reduce potential impacts to special-status species to less-than-significant, CDFW recommends the DEIR evaluate potential Project impacts and include specific mitigation measures for foreseeable potentially significant impacts. Where future site-specific impacts may not be presently foreseeable based on the Project’s broad scope, the checklist discussed in Comment 1 above should be used to determine if a future CEQA environmental document is required. CDFW would appreciate the opportunity to review the revised DEIR and may have further comments once more specific species information is provided.

For example, CDFW recommends including the below mitigation measure in the DEIR:

Northern Spotted Owl Habitat Assessment and Surveys. If forest or woodland habitat is present within 0.25 mile of the project area, a qualified biologist shall prepare an assessment of potential Northern spotted owl (NSO) nesting habitat within the project area and a 0.25 mile radius and obtain CDFW’s written acceptance of the assessment. Alternatively, if the assessment is not completed, or if it concludes that NSO nesting habitat is present, then no project activities within 0.25 miles of potential NSO nesting habitat shall occur between March 15 and August 31 unless a qualified biologist approved in writing by CDFW conducts NSO surveys following the USFWS Protocol for

² Examples of actions that could meet performance standards include conduction work outside of nesting seasons and avoiding individual special-status plants or requiring compensatory mitigation for habitat loss.

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Surveying Proposed Management Activities That May Impact Northern Spotted Owls, dated (revised) January 9, 2012. Surveys shall be conducted in accordance with Section 9 of the survey protocol, Surveys for Disturbance-Only Projects. If breeding NSO are detected during surveys, a 0.25 mile no-disturbance buffer zone shall be implemented around the nest until the end of the breeding season, or a qualified biologist determines that the nest is no longer active, unless otherwise approved in writing by CDFW. The Project shall obtain CDFW's written acceptance of the qualified biologist and survey report prior to project construction occurring between March 15 and August 31 each year.

Alternate buffer zones may be proposed to CDFW after conducting an auditory and visual disturbance analysis following the USFWS guidance, Estimating the Effects of Auditory and Visual Disturbance to Northern Spotted Owls and Marbled Murrelets in Northwestern California, dated October 1, 2020. Alternative buffers must be approved in writing by CDFW.

If take of NSO cannot be avoided, the Project shall consult with CDFW pursuant to CESA and obtain an ITP, and also consult with USFWS pursuant to the federal Endangered Species Act.

Would the Project have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations or by CDFW or the USFWS?

Comment 3: Measures to Reduce Impacts to Sensitive Natural Communities, Riparian Habitat, and Wetlands, and LSA Notification and Clean Water Act compliance, Pages 2-20, 2-21, 2-22, 7-29, 7-30, 7-31, and 7-32

Issue, specific impacts, why they may occur and be potentially significant: The DEIR identifies that, without mitigation incorporated, the Project is likely to have significant impacts to sensitive natural communities, riparian habitat, and wetlands (pages 7-29, 7-30, 7-31, and 7-32).

Mitigation Measure 7-2 (DEIR pages 2-20, 2-21, and 2-22) proposes to reduce this impact by requiring the County and/or contractors to prepare a Construction Management Plan (CMP) including best management practices for subsequent Projects that involve vegetation removal within or in proximity to riparian areas, wetlands, and sensitive natural communities. The best management practices may include but are not limited to setbacks from riparian areas and wetlands, identification and delineation of sensitive areas, erosion control measures, and measures to control pollutants (DEIR page 7-32). Mitigation Measure 7-2 does not include mitigation for temporary or permanent impacts to sensitive natural communities, riparian habitat, or wetlands resulting from subsequent Project activities, require subsequent Projects to submit an

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LSA Notification to CDFW and comply with the LSA Agreement pursuant to Fish and Game Code section 1602 et seq., or require obtaining permits for impacts to waters and wetlands pursuant to the Clean Water Act.

CDFW does not consider preparation of a CMP to be a mitigation measure under CEQA. While Mitigation Measure 7-2 identifies types of actions, it does not adopt specific performance standards, as outlined in Comment 2.

Further, the County and/or contractors preparing a CMP would not provide certainty that impacts to sensitive natural communities, riparian habitat, and wetlands would be reduced to the level of less-than-significant. Mitigation Measure 7-2 states that the County and/or contractors shall prepare a CMP including best management practices but makes the best management practices optional and does not state that the best management practices shall be implemented. A potential outcome based on the text of Mitigation Measure 7-2 is that best management practices would not be appropriately evaluated or identified in the CMP to reduce impacts to less-than-significant and the CMP would not be implemented.

Without specific performance standards and ensuring compliance with LSA Notification requirements, CDFW considers impacts to sensitive natural communities, riparian habitat, and wetlands as potentially significant.

Recommended Mitigation Measure: To reduce impacts to sensitive riparian habitat to less-than-significant and comply with Fish and Game Code section 1602 et seq., CDFW recommends that Mitigation Measure 7-2 clearly require: 1) subsequent Projects to submit an LSA notification to CDFW prior to construction and comply with the LSA Agreement, if issued, if the Project may substantially impact a stream or lake; 2) preparation and implementation of a restoration plan to restore all temporarily impacted areas on-site, and to offset permanent impacts, restore riparian habitat on-site or off-site at a minimum 3:1 mitigation to impact ratio for acreage and linear distance of impacts; 3) the restoration plan to include the below minimum tree replacement to removal ratios; and 4) the restoration plan and any reduction from the ratios to be approved by CDFW in writing. Restoration shall occur as close to the Project site as possible and within the same watershed and same year of the impacts.

- 1:1 for removal of non-native trees;
- 1:1 for removal of native trees other than oak (*Quercus* sp.) up to 3 inches DBH (diameter at breast height);
- 3:1 for removal of native trees other than oak 4 to 6 inches DBH;
- 6:1 for removal of native trees other than oak greater than 6 inches DBH;

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- 4:1 for removal of oak trees up to 6 inches DBH;
- 5:1 for removal of oak trees greater than 6 inches to 15 inches DBH; and
- 10:1 for removal of oak trees greater than 15 inches DBH.

Planted trees shall be monitored for a minimum of five years to ensure survival. The trees must survive the last two years of the minimum five-year monitoring period without irrigation. Replanted trees shall have the same five-year monitoring requirements.

Additionally, Mitigation Measure 7-2 should require restoration on-site or off-site to mitigate temporary or permanent subsequent Project impacts to sensitive natural communities at a minimum 1:1 (restore onsite temporary impacts) or 3:1 (permanent impacts) mitigation to impact ratio for acres of impacts, or habitat compensation including permanent protection of habitat at the same ratio through a conservation easement and preparing and funding implementation of a long-term management plan. Mitigation Measure 7-2 should also require habitat compensation for permanent wetland impacts and obtaining permits from the Regional Water Quality Control Board and Army Corps of Engineers pursuant to the Clean Water Act.

ENVIRONMENTAL DATA

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a database which may be used to make subsequent or supplemental environmental determinations. (Pub. Resources Code, § 21003, subd. (e)). Accordingly, please report any special-status species and natural communities detected during Project surveys to the California Natural Diversity Database (CNDDDB). The CNDDDB field survey form can be filled out and submitted online at the following link: <https://wildlife.ca.gov/Data/CNDDDB/Submitting-Data>. The types of information reported to CNDDDB can be found at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Plants-and-Animals>.

ENVIRONMENTAL DOCUMENT FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of environmental document filing fees is necessary. Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW. Payment of the environmental document filing fee is required in order for the underlying project approval to be operative, vested, and final. (Cal. Code Regs, tit. 14, § 753.5; Fish & G. Code, § 711.4; Pub. Resources Code, § 21089).

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CONCLUSION

CDFW appreciates the opportunity to comment on the DEIR to assist the County in identifying and mitigating Project impacts on biological resources. Due to the issues presented in this letter, CDFW concludes that DEIR does not adequately identify or mitigate the Project's significant, or potentially significant, impacts on biological resources. Deficiencies in the Lead Agency CEQA document can affect later project approvals by CDFW in its role as a Responsible Agency. In addition, because of these issues, CDFW has concerns that the County may not have the basis to approve the Project or make "findings" as required by CEQA unless the environmental document is modified to eliminate and/or mitigate significant impacts, as reasonably feasible (CEQA Guidelines, §§ 15074, 15091 & 15092).

Questions regarding this letter or further coordination should be directed to Alex Single, Environmental Scientist, at (707) 799-4210 or Alex.Single@wildlife.ca.gov; or Melanie Day, Senior Environmental Scientist (Supervisory), at Melanie.Day@wildlife.ca.gov or (707) 210-4415.

Sincerely,

DocuSigned by:
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ec: Office of Planning and Research, State Clearinghouse (SCH No. 2021120123)