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Marin County Board of Supervisors
3501 Civic Center Drive, Suite 329
San Rafael, CA 94903

RE: MARIN COUNTY HOUSING ELEMENT UPDATE AND CEQA COMPLIANCE

Dear Chair Sears and Members of the Board,

I represent Community Venture Partners, Inc., (CVP) in regard to the 2015 -2023 Marin County General Plan Housing Element and its Amendment to the 2013 SEIR and the accompanying California Environmental Quality Act (CEQA) compliance regarding the Housing Element. CVP is a non-profit organization dedicated to facilitating and assisting community-based projects, programs and initiatives that demonstrate the highest principles of economic, social and environmental equity and sustainability. CVP's officers, board members, and/or donors use, frequent and enjoy the areas adversely affected by the provisions of the Draft Housing Element and the Amendment to the SEIR. The following comments on the 2015 - 2023 Marin County General Plan Housing Element amendment are submitted by me on behalf of CVP and Joan Bennett, Justin Kai, and Rick Harris.

The County's Housing Element Addendum is legally inadequate and the County is required by State law to prepare a Subsequent Environmental Impact Report (EIR). In particular, the County has not taken a hard look at recent evidence that water supply, drought, climate change and water rights scenarios will result in new and more severe significant impacts to public utilities and biological resources than those identified in previous CEQA documents.

EXECUTIVE SUMMARY:

THE COUNTY HAS NOT COMPLIED WITH STATE HOUSING ELEMENT LAW AND GOVERNMENT CODE REQUIREMENTS FOR PUBLIC PARTICIPATION

CVP is concerned about the Planning Commission's and Board of Supervisors' unfortunate reliance on inaccurate interpretations and implementation of State housing, transportation, and environmental law. The County has not complied with and/or has misinterpreted State law provisions regarding:

- Public participation in the housing element development process;

- County liability for not adopting a housing element by January 31, 2015;
- Waiver of County development review authority for housing element and bonus density units; and
- Reduction of local community review of housing element and bonus density units.

CVP urges Marin County to not proceed in their current plan to rush housing element adoption based on misinformed views of State laws. These four items have been addressed previously in my letters of September 9, 2014 and August 20, 2014, which are incorporated herein by reference.

This letter will address the Deficiencies of the County’s CEQA Process and the requirements to prepare a Subsequent EIR for the 2015-2023 Housing Element.

THE COUNTY HAS NOT COMPLIED WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

I. THE COUNTY’S CEQA PROCESS IS DEFICIENT DUE TO NEW PROJECT MEASURES NOT BEING ANALYZED

An Addendum is not the appropriate CEQA document for environmental review of the 2015 - 2023 Housing Element because new project measures demonstrate that the 2015 - 2023 Housing Element (“Project”) is out of the scope of previous CEQA documents. Because this Housing Element adds the following project measures, CEQA requires full environmental review of those measures subject to a low legal threshold for preparing an EIR.

- A. Residential Equivalent Density (or partial equivalent) policies are new to this housing element and not considered in previous housing elements or CEQA documents.
- B. Density bonus was not analyzed for its environmental impact in the past. County Staff confirms this by reporting that density bonus was not utilized in the past. Approvals of SB 375 and Plan Bay Area and along with State transportation fund incentives will trigger more utilization of the density bonus provisions.

II. THE COUNTY IS REQUIRED TO PREPARE A SUBSEQUENT EIR FOR THE 2015 - 2023 HOUSING ELEMENT BECAUSE OF CEQA’S REQUIREMENTS TO ASSESS NEW CIRCUMSTANCES AND INFORMATION

New project circumstances and information related to water supply and deliveries require the County to consider preparation of a Subsequent EIR, e.g., Sonoma County growth, climate change and drought in the Russian River watershed, depletion of the Santa Rosa Plain Groundwater Basin, and curtailments on water rights from the Russian and Eel Rivers.

III. SUBSTANTIAL INCREASES IN SEVERITY TO IMPACTS TO WATER SUPPLY, BIOLOGICAL RESOURCES, TRAFFIC, AND CUMULATIVE IMPACTS NECESSITATE A SUBSEQUENT EIR

- A. These new project circumstances and information will lead to a substantial increase in environmental impacts to: water supply – violating CEQA’s requirements to not rely on “paper water;” Marin aquatic and riparian habitat; Sonoma aquatic and riparian habitat.
- B. The Addendum does not assess the cumulative impacts from the 2015 Housing Element on water supply, traffic, aesthetics, riparian habitat and other resources. The Addendum does not properly consider alternatives or mitigation measures that would reduce such impacts.

FULL COMMENTS ON THE COUNTY’S CEQA PROCESS

I. THE COUNTY’S CEQA PROCESS IS DEFICIENT DUE TO NEW PROJECT MEASURES NOT BEING ANALYZED IN A SUBSEQUENT EIR

Where a project is outside of the scope of a program level EIR, then the fair argument standard applies. *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307. Only projects that have no new major project features come under the substantial evidence standard. See *Latinos Unidos de Napa v. City of Napa* (2011) 196 Cal.App.4th 1154. Two project measures, density equivalents and density bonus, were not considered in the 2007 EIR or 2013 SEIR.

A. Residential Density Equivalents

The project description in the *Draft 2015 – 2023 Marin County Housing Element Addendum to the 2012 Draft Marin County Housing Element Supplement to the 2007 Countywide Plan EIR* (“Addendum”) includes a new policy under Section 2.4.4 for “Study Residential Density Equivalents.” (Addendum, p. 34.) This project measure was not considered in the 2007 - 2013 Countywide Plan Housing Element or the 2007 Countywide Plan (CWP) EIR (“2007 EIR”) or the 2013 Countywide Plan Supplemental EIR (“2013 SEIR”).

While the current Housing Element has revised the density equivalent policy proposal by providing less detailed direction, the partial density equivalent process proposal remains as part of the project scope in the Housing Element and the Addendum. This density equivalent measure calls for increasing allowable units by counting one bedroom and studio units as partial units. Though the measure is entitled “study...” the plain text of this measure is not to study but to *establish* a CWP policy that will allow the zoning ordinance to be amended to allow developers to create more units than described in the 2007 EIR, the 2013 SEIR or the Addendum. The density equivalent policy states: “If this policy measure is determined feasible and appropriate, consider amending the Development Code to calculate density through density equivalents.”

Also, the County may later argue that since this policy measure was “addressed” in the Addendum, that no further CEQA review would be required for amending the zoning ordinance. But such an approach violates CEQA’s essential requirement to address the impacts of any new project measure that could result in new significant impacts. (Pub. Res. Code 21166.) Such density equivalent impacts could include conflict with other provisions

of the general plan, increased traffic, increased congestion due to parking exemptions and ADT, increased mobile source emissions due to additional residents, and increased visual impacts due to height and bulk increases. Such impacts could conflict with other laws such as the California Building Code, health and safety codes, fire codes, the County permitting regulations and fees, property taxes, tap fees, and special assessment fees. Regarding traffic, the Addendum refers to the 2013 SEIR traffic modeling using 2035 as a baseline. First, use of such a future baseline is not allowed by CEQA in this scenario where there is an update with project measures not included in the previous EIR. Second, the Addendum does not provide any analysis of the incremental traffic and air quality impacts of the Residential Density Equivalent policy – a policy **not** included in the 2007-2013 Housing Element, the 2007 EIR or the 2013 SEIR. Thus, because this Residential Density Equivalent measure is outside the scope of the 2007 EIR and the 2013 SEIR, and the impacts and mitigation measures for these density equivalents are not identified, then a Subsequent EIR must be prepared.

Finally, the Addendum essentially acknowledges that it is improperly deferring the study of impacts and mitigation identification of Residential Density Equivalents by stating that the County will later “Analyze how such a program might interact with inclusionary requirements, parking standards, and density.”

B. Density Bonus

The Staff Report to the Board states that density bonus was not considered; “however, the potential for inclusionary housing is not contemplated in this analysis, consistent with HCD guidelines, which do not encourage projected inclusionary housing to satisfy adequate sites requirements. Similarly, affordable housing projections for each site do not contemplate the potential for increased density through a density bonus.” (P. IV-8, 9.) But HCD’s guidance does not provide any authority for skipping an analysis of density bonus for purposes of CEQA.

Further, LeeLee Thomas of the Marin County Development Agency, has stated that historically, density bonus provisions have not been utilized in Marin County. (Marin County Planning Commission Hearing, August 28, 2014.) This may well be true and provides evidence that it was **not** considered in the past and therefore is a new project element. If so, then new information and circumstances that show that these density bonus provisions will be utilized in the future should be analyzed now for their impacts. First, there was a housing recession from 2007 through 2012, which dampened both financing and demand for denser housing. Second, the elimination of redevelopment agencies in California means that other cities and counties will not have the financial incentives for affordable housing development. Third, the implementation of SB 375 and the adoption of Plan Bay Area will trigger more utilization of the density bonus provisions because higher density development will be incentivized by State and Federal government funds. Further, the County itself is placing an extraordinary emphasis on creating "affordable" units (for income levels from about \$35,000 per year to about \$120,000 per year in income). So, going forward, every project will be required to provide 20% affordable housing, so every project will qualify for the bonus.

The current Housing Element proposal provides for 419 units and the Addendum assesses 502 units (Addendum, p. 24.) When including a 1.35 multiplier for (adding 35%) the number of units due to density bonus, the total new homes will be 566 units. These units can be further expanded because of the Project's change of calculating the number of units under the partial units policy. Thus, because density bonus provisions and the partial unit provisions will provide much more incentive and stimulus to developers, potential build out will be potentially 1066 units. The Addendum does not contemplate such a build out and does not even consider whether these new circumstances and project measures will substantially increase the impacts identified in the 2007 EIR and the 2013 SEIR.

Therefore, because this Project is outside the scope of the 2007 EIR and the 2013 Housing Element SEIR, the Addendum would not come under the substantial evidence standard for but instead would be subject to the higher scrutiny of the fair argument standard. Whether these two policies increasing density in key parts of Marin are advisable or not, CEQA requires that their environmental impacts be examined.

II. THE COUNTY IS REQUIRED TO PREPARE A SUBSEQUENT EIR FOR THE 2015 - 2023 HOUSING ELEMENT BECAUSE OF CEQA'S REQUIREMENTS TO ASSESS NEW CIRCUMSTANCES AND INFORMATION

A. CEQA requires agencies to take a hard look at new circumstances and information that could require preparation of a Subsequent EIR

Pub. Res. Code § 21166 identifies three scenarios in which an SEIR has to be prepared:

- 1) Substantial changes are proposed in the project which will require major revisions of the environmental impact report;
- 2) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; and
- 3) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

Security Environmental Systems, Inc., et al., v. South Coast Air Quality Management District et al., (1991) 229 Cal.App.3d 110 held that where previous EIRs made conclusions based on assumptions, not hard data, that are later brought into question, a new EIR was required. In *Moss v. County of Humboldt*, (2002) 162 Cal.App. 4th 10 at 1059, a County's reliance on previous water supply data was held invalid where new information showed that water usage had increased by 72 percent so that the additional water demands would have much more serious impacts. See also *Eller Media Co. v. Community Redev. Agency* (2003) 108 Cal.App.4th 25.

The 2007 EIR states that surface water supplies are tied to groundwater extraction levels in Sonoma. (P. 4.9-4.) For example, the 2007 EIR states that "SCWA supplements the Russian River supply [to Marin] with water from three groundwater wells in the Santa Rosa Plain." (Ibid.)

B. Marin County's enormous reliance on Sonoma County Water Agency supplies of groundwater and surface water means that changed circumstance in Sonoma will significantly affect Marin

Marin County receives a huge percentage of its water supply from Sonoma County. The Marin Municipal Water District receives 30% and the North Marin Water District (NMWD) receives 80% from the Sonoma County Water Agency. (2007 EIR p. 2-3, NMWD's 2013 Annual Report) These water supplies are subject to provisions in MMWD's and NMWD's water supply contracts with SCWA that allow SCWA to withhold water deliveries due to water rights and environmental constraints, such as drought. (See *1996 Supplemental Water Supply Agreement*, §§ 7, 8(f) and *Restructured Agreement for Water Supply, By and Between Sonoma County Water Agency, NMWD, etc.*, p. 29, Section 3.5(1-3).

The 2007 EIR addresses such limitations with the general, non-conclusory statement that "However, maximum water allocations to NMWD and MMWD are limited as SCWA's proposed expansion of its water supply has resulted in litigation, endangered species impacts, water rights proceedings, and the prospect of millions of dollars in infrastructure upgrades and environmental mitigations." (P. 4.9-5.)

But the 2007 EIR and the 2013 SEIR only contemplated limited cutbacks in water deliveries and neither includes modeling showing future severe drought scenarios or projected Sonoma County growth. The 2007 EIR does not even acknowledge constraints to MMWD water supplies. The 2007 EIR does acknowledge certain constraints to NMWD water supplies (P. 4.9-24.):

- 1) Physical capacity of SCWA's transmission system;
- 2) Water rights limitations of Novato Creek / Stafford Lake;
- 3) Groundwater quality and quantity limitations;
- 4) Drought impacts to SCWA supplies. An extended drought could result in a supply reduction of 30 percent or more; and,
- 5) Legal and environmental impacts to SCWA supplies. Anticipated future supply increases may be delayed due to approval of additional water rights and challenges to environmental documentation. Three fish species (i.e., Coho salmon, Steelhead trout, and Chinook salmon) in the Russian River system are listed as threatened under the federal Endangered Species Act.

Thus, no constraints that are now new circumstances were assessed for MMWD and NMWD. Identifying some general constraints does not contemplate or mode (mode??) the extreme level of the current drought, Sonoma County growth of over 25,000 units, Russian River and Eel River water rights curtailments or the 2014 USGS Report that the Santa Rosa Groundwater Basin is now being depleted, all **new** information regarding the impacts and mitigation measures identified in the 2007 EIR on page 4.9-5.

All of this new information will cause new impacts to public utilities and biological resources because it is now less likely that the County will receive the share of water that was estimated

in the 2007 EIR. And these lower supply scenarios are lower than those identified in 2007. The County's 2015 Addendum does not address these lower supply scenarios and thus, the County has no evidence for its conclusions that there is no increase in impacts and that a Subsequent EIR is not required for the 2015-2023 Housing Element.

Thus, the 2007 EIR acknowledges anticipated future supply will be delayed due to potential water rights and environmental issues but there is no projections or impact assessment in the 2007 EIR or 2013 SEIR on the actual impacts of such *further* constraints to water supply due to new SCWA, Sonoma County, Russian and Eel River issues relating to water supply, drought or biological resource issues.

C. New Project circumstances and information exist that require the County to consider preparation of a Subsequent EIR

The following new circumstances and information all require review, reconsideration and major revisions to the 2007 and 2013 SEIR, none of which has been done in the 2014 Addendum.

1) Sonoma County Growth

The following new information regarding Sonoma County growth will lead to great increased water demand in Sonoma that will lead to lower water deliveries from SCWA to MMWD and NMWD than stated in the 2007 EIR.

Recent approvals of PDAs for 25,000 units were not known in 2007 and were not vested until May of 2013 **after** the 2013 SEIR was completed. (See *Priority Development Area (PDA) Investment and Growth Strategy*, May 1, 2013. *Metropolitan Transportation Commission Resolution 4035*, 2012.) One study found that “it is anticipated that 31,202 additional housing units will be needed in Sonoma County to accommodate population growth by 2040.”

According to regional projections in the Jobs-Housing Connection Strategy produced by ABAG, PDAs are expected to accommodate the lion's share, approximately 80% of that growth, 25,588 units.” See *Sonoma County Priority Development Area Investment and Growth Strategy Short-term Report*, April 2015.

2) Depletion of the Santa Rosa Plain Groundwater Basin

The following new information regarding groundwater depletion affects SCWA water rights and supply and could lead to lower water deliveries to MMWD and NMWD than stated in the 2007 EIR.

In 2014 the USGS characterized the groundwater basin as having decreasing levels. *Simulation of Groundwater and Surface-Water Resources of the Santa Rosa Plain Watershed, Sonoma County, California*. US Geological Survey, 2014 Edited by Linda R. Woolfenden and Tracy Nishikawa. For instance, the USGS reports that “The drought during water years 1976 – 77 had the lowest average precipitation for the simulation

period (fig. 1), causing an increase in groundwater pump - age (fig. 4) and a decrease in groundwater levels.”

Further, a NOAA article reports that; “This is the driest period in Sonoma County records...” (<http://www.climate.gov/news-features/features/who-rules-californias-russian-river>) Lake Sonoma is 57% full and Lake Mendocino is down to 41%.

While the depletion itself was occurring in previous years and the level of depletion has been increasing, the study regarding same did not exist, therefore, the 2007 EIR and 2013 SEIR could not reasonably have obtained this data. The level of depletion of the Santa Rosa Plain basin was not determined until 2014 and thus is **new** information regarding water supply that must be assessed for the current Project.

Groundwater depletion levels that are related to surface water supplies must be analyzed under CEQA. *Preserve Wild Santee v. City of Santee* (4th Dist. 2012) 210 Cal.App.4th 260,

3) **Climate Change, Drought and Surface Water Supplies**

- a) ***Climate Change.*** The following new information regarding climate change, drought and surface water supplies in Sonoma and Mendocino County watersheds could lead to lower water deliveries to MMWD and NMWD than stated in the 2007 EIR.

Global climate change is exacerbating regional weather patterns in the North Coast, meaning less precipitation in normal periods of winter.¹ The Sonoma Marin Partnership concludes that; “2013 was the driest year on record. Several consecutive dry years on top of the driest year on record in 2013 have culminated into drought conditions in the region. Despite recent rain, rainfall and water supply levels in both Lake Mendocino and Lake Sonoma remain below average.” MMWD itself has also reported on new drought issues.²

The U.S. Geological Survey reports that; “Potential changes in air temperature and precipitation due to changes in climate are likely to result in changes in hydrology in the Russian River drainage basin contributing to the Russian River

¹ Dettinger, Michael, 2011. *Climate Change, Atmospheric Rivers, and Floods in California – A Multimodel Analysis of Storm Frequency and Magnitude Changes*, Journal of the American Water Resources Association (JAWRA) 47(3):514-523. DOI: 10.1111/j.1752-1688.2011.00546.x; Ralph, F. M., Coleman, T., Neiman, P.J., Zamora, R. J., Dettinger, M. D. (2013): Observed Impacts of Duration and Seasonality of Atmospheric-River Landfalls on Soil Moisture and Runoff in Coastal Northern California. *J. Hydrometeorol*, 14, 443–459; *Influence of Climate Change on the Hydrology of the Russian River*, <http://ca.water.usgs.gov/projects/2010-04.html>

² MMWD Board of Directors Meeting Staff Report October 7, 2014 – Climate Vulnerability Assessment with Attachments; Link to the MMWD Drought Resiliency Board Committee agendas & staff reports (<http://www.marinwater.org/382/Drought-Resiliency-Task-Force>)

Water System.”³ The U.S. Department of Agriculture reports that California, including Sonoma and Marin counties, is experiencing the highest level of drought – exceptional drought.

<http://www.wcc.nrcs.usda.gov/ftpref/support/drought/dmrpt-20141016.pdf>

- b) **Drought** The Addendum refers mainly to Page 4.9-90 of the 2007 EIR, which states, “DWR considers a drought to occur when runoff is in the lowest 10 percent in historical range and reservoir storage for same period is tan (less than??) 70 percent of average. The Urban Water Management and Planning Act requires California’s larger urban water suppliers to develop contingency plans for shortages of up to 50 percent.” But the EIR does not go into any detail or estimates about drought conditions in Marin and Sonoma. Those drought conditions are much worse than those identified in the 2007 EIR and the 2013 SEIR. The SCWA has recently acknowledged current drought and water supply issues:

“The drought continues to intensify across the State and North Bay. We have been closely monitoring water supply conditions in our two water supply reservoirs and have determined that additional drought response measures are needed to preserve storage for the coming fall and winter,” said Water Agency Director Efran Carrillo. “I am confident that with these additional measures our communities will continue to beat this drought and be prepared for another potential dry winter.” ~ Sonoma County Gazette, August 14, 2014.

<http://www.sonomacountygazette.com/cms/pages/sonoma-county-news-article-2998.html>

The State Water Resources Control Board has documented the startling drop in flows and supply on the Russian River.

http://www.swrcb.ca.gov/waterrights/water_issues/programs/drought/analysis/russian_river.shtml (See Attachments.)

The scale and threat to State resources by the drought has been confirmed by the State of Emergency declared by California Governor Jerry Brown regarding the State’s drought. (*A Proclamation of a State Of Emergency*, January 2014.) Such a “state of emergency” was not contemplated in the 2007 EIR. Thus, the 2007 EIR’s brief reference to drought conditions does not contain sufficient and adequate analysis of the entirety of new information for purposes of CEQA.

- c) **Water Delivery Constraints.** The 2007 EIR does acknowledge that NMWD could have potential supply interruptions due to SCWA legal and physical constraints. These constraints would clearly be increased by the above identified new information and must be assessed to determine if Marin’s water supply from

³ *Influence of Climate Change on the Hydrology of the Russian River*, <http://ca.water.usgs.gov/projects/2010-04.html>

Sonoma is “paper water.” The 2007 EIR does not acknowledge that MMWD has SCWA ground or surface water related constraints. In fact, the Housing Element *itself* acknowledges the changed conditions for water supply due to drought, but this acknowledgement of an environmental impact is not analyzed or even mentioned in the Addendum:

“In recent years, both MMWD and NMWD undertook substantial water conservation programs resulting in significant reduction in water usage. Other measures utilized by Marin water districts have included reservoir expansion, a recycled water distribution system, and conservation programs. Due to these recently changed conditions, MMWD’s Board is now reconsidering the district’s options to supplement the current water supply and reduce drought vulnerability, including desalination, new conservation initiatives, expanding use of recycled water, and emergency interties with other Bay Area water agencies.” (P. III-5.)

The Housing Element then goes on to address measures relating to West Marin water supply, but does not address the actual constraints on water supply from Sonoma County sources that may be affected by a severe drought. The Addendum also acknowledges a new, more serious water supply issue by including a mitigation measure meant to reduce demand. But the Staff Report, without any mention of the severity of the drought or other new information, concludes blithely that, “Taken together, these long-term planning efforts and approaches to water delivery and conservation should alleviate concerns about water supply in areas served by public water.” For example, NMWD has identified certain constraints.⁴ Such a conclusion as is made in the Staff Report/Housing Element – with no impact assessment – does not contain the required support or evidence and is not even considered in the Addendum as required by CEQA.⁵

d) State Curtailments on Water Rights from the Russian River and Eel River

⁴ Interconnection Agreement between North Marin Water District and Marin Municipal Water District, February 2014; Stafford Lake Agreement between North Marin Water District and Marin Municipal Water District, February 2014; and the North Marin Water District Emergency Water Conservation Ordinance No. 28, April, 1, 2014. See also, the following documents on file with NMWD and the City of Novato that include recent analysis regarding water supply constraints: Consider Reduction in Facilities Reserve Charge for New Accessory Dwelling Units (approve item); City of Novato General Plan 2035 Policy White Paper on Water Supply (information item); Marin County Long Term Water Supply Workshop (information item), SCWA Temporary Urgency Change Petition (information item); and Sustainable Groundwater Management Act presentation (by SCWA Chief Engineer).

⁵ Thus, the County has concluded that there are no new impacts to water supply, but contradicts itself by adding a new mitigation measure to reduce water supply impacts. The County, then, is acknowledging that new water supply issues exist and need to be addressed, but is not analyzing, modeling or determining what the increased impact is. Thus, the impact assessment is clearly inadequate.

The following new information regarding water rights affects SCWA water rights and could lead to lower water deliveries to MMWD and NMWD than is stated in the 2007 EIR.

Russian River. The State Water Resources Control Board sent notice of curtailment, dated May 27, 2014, to water right holders in the Russian River Watershed upstream of the Russian River's confluence with Dry Creek. "Based upon the most recent reservoir storage and inflow projections, along with forecasts for future precipitation events, the State Water Board has determined that the existing water supply in the Russian River watershed is insufficient to meet the needs of all water rights holders." *Notice Of Unavailability Of Water And Immediate Curtailment For Those Diverting Water From The Russian River Watershed Upstream Of The Russian River's Confluence With Dry Creek, And With A Post-1914 Appropriative Right Having A Priority Date Of February 19, 1954 Or Later*, State Water Resources Control Board, May 27, 2014.

Eel River. The State Water Resources Control Board sent notice of curtailment in 2014 to water right holders in the Eel River. "Based upon the most recent water availability and water demand projections, the State Water Board has determined that the existing water supply in the North Fork Eel River, Main Stem Eel River, and the Van Duzen tributary is insufficient to meet the needs of senior water rights holders." *Notice Of Unavailability Of Water And Immediate Curtailment For Those With Post-1914 Water Rights Diverting Water In The North Fork Eel River, Mainstem Eel River, And The Van Duzen Tributary*, State Water Resources Control Board, June 30, 2014.

These curtailments are due to increased pressure on aquatic habitat and endangered species in the Russian and Eel Rivers and are due to water withdrawals. (See Biological Opinion, footnote 4, and Curtailment Orders.) Both MMWD and NMWD utilize water withdrawn from these rivers and Marin's continuing and growing use contributes to the need to curtail withdrawals and to mitigate impacts to public utilities and aquatic resources caused by these withdrawals.

D. *New Impacts to Public Utilities, Biological Resources and Traffic - Due to New Circumstances and Information - Require the County to Prepare a Subsequent EIR*

CEQA Guidelines Section 15162 requires subsequent EIRs to be prepared where project changes will substantially increase the impacts and where new information and circumstances related to the project will substantially increase the impacts. Section 15152 requires that when tiering, particularly regarding any cumulative impacts identified in previous EIRs, a related project CEQA document must revisit, on a project-by-project basis, each proposal's cumulatively considerable contribution to impacts and adopt a statement of overriding considerations regarding the previously identified impacts. The Addendum did not do so. It included no analysis regarding whether the 2007 EIR and 2013 SEIR adequately

addressed the new potential impacts to public utilities, biological resources, and traffic due to the new information and circumstances identified in this letter.

Regarding new information, Section 15162 provides that:

New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the Negative Declaration was adopted, shows any of the following:

- The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
- Significant effects previously examined will be substantially more severe than shown in the previous EIR;
- Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
- Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.

There are at least four main types of impacts caused by housing growth in Marin County that have increased substantially:

1) Water Supply Shortages Due to Lack of Certainty Regarding Water Supply (e.g. “Paper Water”)

CEQA’s Water Supply Analysis Requirements. The four main requirements for impact analysis of water supply in CEQA documents are set out in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412.

- An EIR cannot ignore or assume a solution to the problem of supplying water to a land use project. (*Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3d 818.)
- An adequate environmental analysis cannot be limited to the water supply for the first stage or the first few years. (*Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715.)
- Water sources must bear a likelihood of actually proving available, and speculative sources or unrealistic amounts (“paper water”) will not be sufficient bases for decisions under CEQA. (*Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715.)

- When a full discussion leaves some uncertainty regarding future water sources, then CEQA requires some discussion of possible replacement sources or alternatives, and any environmental impacts from those contingencies. (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342.)

Further, in *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182 the failure to identify a source of water in a program level EIR beyond the first five years of development rendered the EIR inadequate.

Marin-SCWA Contracts Allow for Cutting Water Deliveries. Section 7 of the SCWA-MMWD/NMWD amended 1996 Supplemental Water Supply Agreement conditions availability on many factors, including: “if Agency has water in excess of its needs to supply other customers and contractors...” Prior rights or in stream flow requirements for the Russian River or creeks also could constrain water supplies to Marin. Section 8(f) relieves SCWA from any liability for not supplying due to drought or other physical cause.⁶

Marin’s EIR Violates CEQA’s Prohibition on Dependence on “Paper Water. New climate change and drought scenarios, groundwater depletion and Sonoma County growth, development, and Russian and Eel River curtailments of water rights and the corresponding shrinking water rights by SCWA would most probably lead to lower supply of water to its customers, including MMWD and NMWD. Therefore, new information demonstrates that imports assumed in the 2007 EIR are now out of date and not accurate. Thus, under *Vineyard Area Citizens*, the County must analyze the new information that shows that there will be lower imports because: a) long term supplies will have less reliability; b) uncertainty about available water supplies increases, thus becoming more speculative; and c) there is a need for increased analysis of replacement sources.

The 2007 EIR estimates are not only now out of date, but they are now speculative as well due to new information. Exhibit 4.9-44 of the EIR reports “Current Dry year supply assumptions: MMWD annual imports from SCWA – now 8,150, 3 year dry 6520, 4 year dry 5,705.” Thus, the EIR assumes 0, 10, 20, 30 percent reductions in water supply. These estimates are now much more uncertain due to supply constraints.

Thus, MMWD’s contract provides that water supplies may drop if other issues such as drought or other contracts require it and thus, MMWD and NMWD’s water supply has become much more speculative and the 2007 EIR assumptions must now be reassessed under *Moss v. County of Humboldt*, (2002)162 Cal. App. 4th 10 at 1059.

⁶ Restructured Agreement for Water Supply by and between Sonoma County Water Agency, City of Cotati, City of Petaluma, City of Rohnert Park, City of Santa Rosa, Forestville Water District, North Marin Water District, Valley of the Moon Water District, Town of Windsor, June 23, 2006; and the North Marin Water District 2010 Urban Water Management Plan, June 2010. Supplemental Water Supply Agreement, January 1996 between MMWD & SCWA; 2014 Amendment to the Supplemental Water Supply Agreement; Interconnection Agreement between MMWD & North Marin Water District; Restructured Agreement for Water Supply.

The attached chart prepared in May 2014 shows that demand for Russian River and Eel River water is steady and rising, but that water levels have plummeted. This new information demonstrates that environmental and drought conditions could well turn MMWD and NMWD contracted water into “paper water.”

Mitigations for Water Supply Impacts Are Not Legally Adequate. There is a new mitigation measure in the Addendum not present in the 2007 EIR or 2013 SEIR.

“Program PFS--2.s Require Sustainable Water Supply. No new development project construction or uses requiring an additional water meter or increased water supply as determined by the appropriate district shall be approved without a specific finding, supported by facts in the administrative record, that an adequate, long--term, and sustainable water supply is available to serve the project. These measures should be achieved in partnership with the applicable water district.”

The Addendum also does not comply with CEQA’s requirements for mitigation. First, there is no impact assessment or baseline established in the Addendum. Second, the mitigation measure does not provide enough detail to determine if it actually mitigates the impact. Third, no other potential measures, such as mandatory use of recycled water, are identified and considered. Measure PFS-2.s simply requires a finding. Fourth, this mitigation measure is completely uncertain as it depends on another agency for approval. Fifth, this mitigation measure is infeasible due to constraints on the County to impose conditions where units are certified as low income units as required by the California Housing and Community Development Department.

A valid mitigation measure would instead be an actual commitment to restricting increase in water supplies for new projects and/or at least a specific finding. This restriction on new development could be total or a percentage; such a measure is easily identifiable and feasible.

Since such a mitigation measure would be feasible, identification of this measure requires that the County prepare a Subsequent EIR. CEQA Guidelines Section 15162(a)(3)(d) requires a subsequent EIR when a “mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.” Since the County itself has introduced a mitigation measure that demonstrates how such water supply impacts could be mitigated but has not required any actual limit or policy on the issue, the County has rejected a new, feasible mitigation measure.

Deferred Mitigation. Also, the County appears to be acknowledging the need for mitigation, but is deferring it until later. It is not even clear when and at what level the County would adopt the actual specifics of such a mitigation measure and not clear if the water districts would cooperate. Such deferral (and uncertain implementation) is

improper under CEQA. CEQA Guidelines § 15126.4(a)(1). *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296.

2) New Impacts to Marin Riparian Habitat

The Addendum does not provide any updated analysis of new, potential impacts to riparian habitat despite the new information and circumstances. (Addendum, p. 59.) The Addendum references the reader to the 2007 EIR, which concludes, “Increased surface water and use would lead to alteration of in stream flow regimens and subsequent effects on aquatic habitat.” (2007 EIR. pp. 4.9-6, 4.9-18, and 4.5.3.) This analysis is quite sparse and does include an impact determination.

The Addendum also references the 2013 SEIR, which references the 2007 EIR that concludes that Housing Element policies will have a significant, unavoidable impact on sensitive species. The SEIR contends that Countywide Plan policies will mitigate these impacts. (2013 SEIR, p. 58-59.) First, where a program level EIR identifies significant impacts, CEQA requires that a supplemental or subsequent EIR be prepared to assess those impacts. *Communities for a Better Environment v. California Resources Agency* (2001) 103 Cal.App.4th 98. Particularly, regarding any cumulative impacts identified in previous EIRs, including impacts to sensitive species, water quality, flooding and runoff, Marin County must revisit, on a project-by-project basis, each proposal’s cumulatively considerable contribution to impacts and adopt a statement of overriding considerations regarding the previously identified impacts. The Addendum did not do so. It included no analysis regarding whether the 2007 EIR and 2013 SEIR adequately addressed the new potential impacts due to the new information and circumstances identified in this letter that new constraints on water deliveries will substantially increase these impacts by reducing stream flow in Marin’s creeks. New information about possible constraints on water imports would show that impacts to aquatic habitat in Marin would be increased due to the need to draw down Marin reservoirs, leaving fewer releases for fish.

In addition to such direct and indirect impacts considered in the EIR, CEQA requires that *cumulative* impacts be examined. New information regarding water supply constraints in both Marin and Sonoma and climate change impacts will cause further impacts to riparian habitat in Marin. For instance, climate change will create uncertainties to water supplies which could put more stress on Marin creeks. The combination and incremental contribution of these impacts are potentially cumulative significant impacts that were not discussed or mitigated in the 2007 or 2013 EIR and therefore must be considered in the Addendum.

Mitigation The Addendum itself includes no mitigation measures to protect habitat and cites three mitigation measures from the 2013 SEIR: Policy BIO --- 4.6-2, 4.6-2, 4.6-4. These mitigation measures are only intended to protect wetlands, and special status species, from actual construction and development of homes and do not address reductions in stream flow.

Regarding wetlands, the 2007 EIR identified *no* mitigation measures. Reduction in releases from Marin reservoirs due to a cutback in deliveries from SCWA could potentially have impacts to wetlands due to increases in salinity and lower creek levels. The Addendum does not address this possibility at all.

3) New Impacts to Sonoma Riparian Habitat.

The SWRCB Curtailment Orders limiting withdrawals by rights holders – such as SCWA – on the Eel and Russian Rivers and various recent reports discussing the impacts of withdrawals on endangered species and aquatic habitat show that continued supply of water to municipal uses is having a greater and greater impact. For instance, NOAA reports, “The Russian River Biological Opinion issued by the National Marine Fisheries Service in the fall of 2008 laid out changes for instream flow management and requires SCWA to petition for changes to Decision 1610 flow requirements to protect coho salmon and steelhead trout. The need for changes in Decision 1610 has been highlighted by the low Lake Mendocino storage levels in 2002, 2004, and 2007-09.”⁷ Historically low groundwater levels in Sonoma County also affect aquatic resources and riparian habitat. The USGS Report states that: “The lower water table from the higher pumpage in the future-climate scenarios resulted in the reduction of groundwater discharge to streams, groundwater ET, and surface leakage, and created more losing stream reaches with greater potential for infiltration of available streamflow.” (P. 223.)

The 2007 CWP EIR and the 2013 SEIR contain no analyses or even any information regarding impacts to the aquatic habitat in the Eel and Russian Rivers, including Steelhead and Coho Salmon. Yet these species have been declared endangered by the U.S. National Marine Fisheries Service.⁸ Therefore, County CEQA documents relating to the 2015 Housing Element are either not addressing the impacts at all or concluding there are no impacts from an increase in Marin Housing and water demand on those biological resources.

Specifically, if SCWA honors the water supply agreements with MMWD and NMWD, then the continuing level of withdrawals for Marin would have a cumulative impact on Sonoma County aquatic habitat, along with Sonoma County growth, groundwater depletion, climate change, and other threats. Thus, even maintaining the existing numbers of new units provided for in the 2015-2023 Addendum would combine with competing growing Sonoma County urban uses that would leave less for releases into Sonoma rivers and creeks. The USGS study addresses this by saying that as groundwater

⁷ Influence of Climate Change on the Hydrology of the Russian River, <http://ca.water.usgs.gov/projects/2010-04.html>

⁸ Endangered Species Act Section 7 Consultation Biological Opinion for Water Supply, Flood Control Operations, and Channel Maintenance conducted by the U.S. Army Corps of Engineers, the Sonoma County Water Agency, and the Mendocino County Russian River Flood Control and Water Conservation Improvement District in the Russian River Watershed, September 24, 2008. <http://www.scwa.ca.gov/files/docs/projects/rri/fr/Signed-RussianRiverFinalBO9-24-08.pdf> Russian River Estuary Management Project Environmental Impact Report, July 2011.

depletion increases, there is less in the creeks and there is less ability to release water from Lakes Sonoma and Mendocino for habitat purposes.

Because Marin and Sonoma water demand and supply are inextricably tied, CEQA requires that cumulative impacts to utilities/water supply and aquatic habitat in both counties must be examined **before** making a decision to approve housing in the 2015 Housing Element.

CONCLUSION

Again, CVP urges the County to direct staff to “restart” the public participation process as set out in HCD guidelines, to reduce the amount of buffer units to a reasonable number that does not unnecessarily cede County authority, and to consider the social, economic, and environmental costs of its proposal for such large scale development. CVP urges the County to fully comply with CEQA by preparing a Subsequent EIR that addresses the increase in environmental impacts due to new circumstances and information.

The Board - as representatives of Marin County taxpayers - has a fiduciary duty to know the law and execute it properly. The public expects that the County, and particularly the Board of Supervisors, to follow CEQA and other laws that provide transparency and the opportunity to participate in decisions that affect us all.

Sincerely,

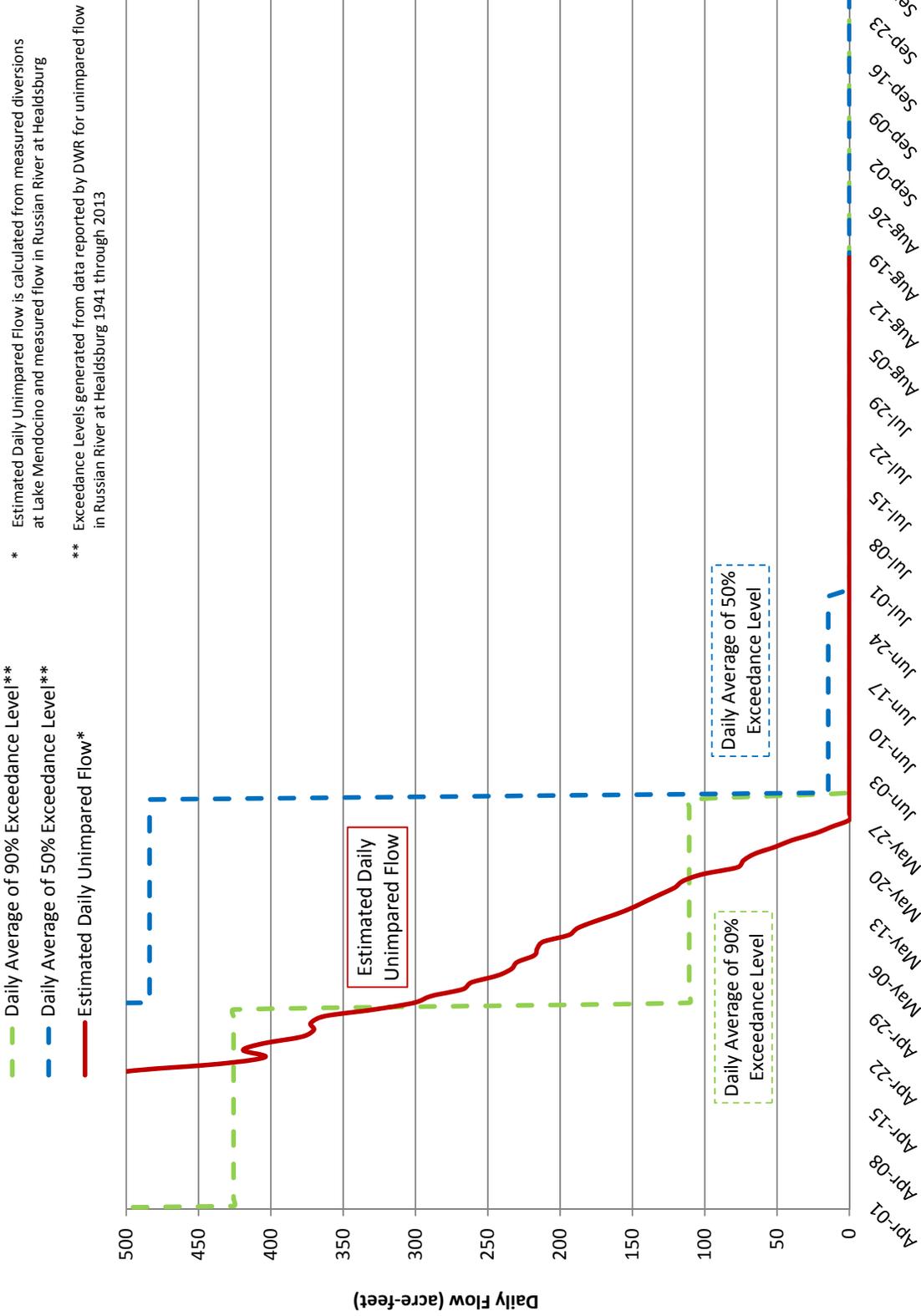
A handwritten signature in black ink, appearing to read "Edward Yates", with a long horizontal flourish extending to the right.

Edward Yates

Cc: Brian Crawford

attachments

Unimpaired Surface Flow in Russian River at Healdsburg



* Estimated Daily Unimpaired Flow is calculated from measured diversions at Lake Mendocino and measured flow in Russian River at Healdsburg

** Exceedance Levels generated from data reported by DWR for unimpaired flow in Russian River at Healdsburg 1941 through 2013

Russian River at Healdsburg Supply/Demand - May 2014 Update

- Riparian Demand*
- Pre-1914 Demand*
- Pre-1949 Demand*
- Demand for all Diverters*
- - - 90% Exceedance Level**
- - - 50% Exceedance Level**

* Demand Levels calculated from reported diversions from Russian River upstream of Healdsburg 2010 through 2012

** Exceedance Levels generated from data reported by DWR for unimpaired flow in Russian River at Healdsburg 1941 through 2013

