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October 11, 2016

VIA EMAIL

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Marin County Parks and Open Space Commission
c/o James Raives, Senior Open Space Planner
Marin County Parks
3501 Civic Center Drive, Suite 260
San Rafael, CA 94903

Re: Vegetation and Biodiversity Management Plan, Final Tiered Program
Environmental Impact Report (Agenda Item 3 for October 11, 2016 Parks
and Open Space Commission Meeting)

Commissioners:

On behalf of the North Coast Rivers Alliance (“NCRA”), we urge you *not* to recommend that the Open Space District (“District”) Board of Directors (“Board”) certify the Marin County Open Space District’s Final Tiered Program Environmental Impact Report (“FEIR”) for the Vegetation and Biodiversity Management Plan (the “VBMP Program” or “Project”) as adequate and complete pursuant to the California Environmental Quality Act (“CEQA”). The FEIR is neither. For that reason, you should recommend that the Board *deny* the Project unless and until significant revisions to the Project and its environmental review are complete.

INTRODUCTION

The FEIR should not be certified because it fails to properly address the VBMP Program’s potentially significant impacts, unduly narrows the objectives of the VBMP Program, fails to study a reasonable range of alternatives, and unlawfully defers mitigation for the potentially significant impacts associated with Project activities. The District’s response to comments in the FEIR fails to adequately address these deficiencies and others raised in the public’s comments. If you have not already done so, please review our comments on the Draft Tiered Program Environmental Impact Report and Vegetation and Biodiversity Management Plan, dated July 8, 2015, which identify issues that the FEIR needs to address and resolve.

I. The VBMP Program Poses Significant Unaddressed Impacts to People with Chemical Sensitivity

As discussed below, the FEIR fails to discuss and consider any alternative that does not include herbicide applications. Yet at the same time, the FEIR declines to address the Project's impacts on individuals with Multiple Chemical Sensitivity ("MCS"). It is a violation of CEQA to ignore the Project's significant adverse impacts on people with MCS, and on chemically sensitive wildlife. By relying upon the use of chemical controls, through herbicide applications, the District threatens the ecological health of the preserve system and the health and safety of those who use it. Yet the District dismisses these concerns and even disparages the individuals who suffer from this medical condition. FEIR 41-44.

None of the District's excuses for this CEQA violation withstands scrutiny. First, the District claims that because the commentors who raised this issue only identified one possible solution – "ceasing use of chemicals" – the District need not consider this impact. FEIR 41, 43. Wrong. CEQA requires that the District provide written responses to comments that "describe the disposition of significant environmental issues raised," and address those comments "in detail" with "reasoned analysis" supported by factual information. PRC § 21091; Guidelines § 15088(c); *Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 937. The District's response to comments "must be [made in] good faith." Guidelines § 15088(c). A cursory dismissal of the issue with no substantive support does not suffice.

Second, the District demeans those individuals who suffer from MCS, a well-recognized medical condition. Despite the fact that MCS is a known medical condition documented by competent scientific research, the District trivializes the impacts to individuals suffering from this condition by claiming that MCS "is a somatic symptom disorder (i.e. *mental illness* that causes bodily symptoms) or an idiopathic condition without a known cause rather than a chemical-caused condition." FEIR 41 (emphasis added). The District goes on to claim that reactions in those suffering from MCS "[may] be related to expectations and prior beliefs" in their head, rather than a reaction "to the chemical itself." FEIR 43. By disparaging those who suffer from MCS, and using this bias as a reason not to analyze the potential effects of the Project on those individuals, the District ignores science. The District's failure to respond in good faith is similar to the tobacco industry's decades-long denial of the addictive properties of nicotine. It violates CEQA's demand for informed decisionmaking and public participation by providing good faith, detailed responses to comments. PRC § 21091; Guidelines §§ 15088(c), 15201.

Finally, the District attempts to blame its failure to analyze MCS on the lack of a "strong consensus" among "the scientific community." FEIR 41. But the District's own response to comments shows that there actually *is* a consensus among the scientific community – MCS is a well-documented medical condition from which a substantial number of people – particularly females – suffer. FEIR 41-42 (District's summary of the scientific research presented in

comments). While there are “a variety of theories” on the cause of MCS, that does not excuse the District’s failure to analyze and discuss potential impacts, especially on those *already suffering* from MCS. FEIR 41. Furthermore, the County’s own 2001 Marin Community Health Survey, which is cited in the 2007 Marin Countywide Plan, acknowledges that *10% of males and 23% of females (17% overall) in Marin County in 2001 were “allergic or sensitive to everyday chemicals.”* Health Council of Marin, 2001 Marin Community Health Survey, Field Research Corporation, (data recorded June 2001-October 2001), p. 26, attached hereto as Exhibit 1. The District’s decision to ignore this significant impact despite the fact that it would harm 17% of Marin County’s population is not a good faith response to the legitimate concerns raised in the public’s comments. Rather than disrespecting Marin residents and claiming that they are not actually suffering from this medical condition, the District must analyze the Project’s potential impacts to those who suffer from it.

II. The FEIR Unlawfully Narrows the Objectives of the Project and Fails to Study a Reasonable Range of Alternatives, Including a No Herbicide Alternative

CEQA requires agencies to determine the objectives and underlying purpose of projects, and allows them to dismiss alternatives that do not meet most of those objectives. But agencies are *not* allowed to artificially narrow project objectives to preclude consideration of reasonable alternatives that would meet most of them. *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 654, 667-670. Nor may an agency refuse to analyze an alternative “that feasibly might reduce the environmental impact of a project on the *unanalyzed theory* that such an alternative *might not* prove to be environmentally superior to the project.” *Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1305 (emphasis in original). Here, the District has done just that. The FEIR states:

the primary purpose of the VBMP is to provide a comprehensive, long-term plan for vegetation management. Its objectives are to:

- Guide a science-based approach to vegetation management that will protect the natural biodiversity of the preserves, maintain public access, and manage fuel loads.
- Coordinate all aspects of vegetation management, including invasive plant control, needs for access, and fuel management, across all the [Marin County Open Space District] preserves, to improve program effectiveness and efficiency.
- Provide the foundation for a systematic approach to priority setting, budgeting, and staffing, to further improve program efficiency and effectiveness over the long term.

FEIR 58. On their face, these purposes and objectives are reasonable. But when the District discusses implementing the purposes and objectives of the VBMP, the District artificially

narrows these purposes and objectives by stating that the VBMP requires “use of an integrated pest management (IPM) approach,” and that “herbicides cannot be excluded” from IPM. FEIR 58 (first quote), 62 (second quote). This artificially narrowed objective committed the District to a specific course of action and therefore precluded an adequate study of the VBMP Program and a reasonable range of alternatives thereto.

“The Guidelines provide: ‘An EIR shall describe a range of reasonable alternatives to the project . . . which would feasibly *attain most of the basic* objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.’” *North Coast Rivers Alliance v. Kawamura, supra*, 243 Cal.App.4th at 666 (quoting Guidelines § 15126.6(a)). Here, the FEIR presents three action alternatives, *none of which consider eliminating the use of herbicides*. Consequently, the range of alternatives fails to “foster meaningful public participation and informed decision making.” Guideline § 15126.6(f).

While the FEIR does not purport to provide project-level, site-specific analysis, the District must still analyze reasonable alternatives at the program level. Yet instead of studying whether a no-herbicide alternative would be environmentally superior because it would pose less risk of harm to non-target wildlife and people at the Program level, the District states that the alternative “would not further any of the basic objectives described in the VBMP, in that it would not provide a science-based technique for vegetation management, coordinate all aspects of vegetation management, or provide the foundation for a systematic approach to priority setting, budgeting, and staffing.” FEIR 64.

Thus, the District appears to claim – without analysis – that the elimination of herbicides would prevent it from making systematic planning decisions. *Id.* But eliminating a reasonable alternative that may lessen the VBMP Program’s significant impacts without fairly comparing its environmental benefits to the proposed project violates CEQA. PRC § 21002; *Habitat and Watershed Caretakers, supra*, 213 Cal.App.4th at 1305. “Without meaningful analysis of alternatives in the EIR, neither the courts nor the public can fulfill their proper roles in the CEQA process.” *Id.* at 1303. “[T]he EIR must contain facts and analysis, not just the agency’s bare conclusions and opinions.” *Id.* “[A]n EIR should not exclude an alternative from detailed consideration merely because it “would impede to some degree the attainment of the project objectives.”” *Id.* (citations omitted).

As discussed above, the FEIR improperly downplays the impacts of herbicides on the significant population of Marin County residents who have chemical sensitivities as well as on non-target fish and wildlife. By downplaying those impacts, and by declining to study an alternative that would eliminate those impacts, the District has failed to comply with CEQA.

III. The FEIR Does Not Include Adequate Mitigation for the Project's Potentially Significant Impacts

The FEIR admits that 20 percent of the herbicide application scenarios evaluated for the Draft VBMP showed a risk of significant impacts, mostly to aquatic organisms. FEIR 56. The FEIR states that through Mitigation Measure 5.1-1, these impacts will be mitigated to a less than significant level because of a 100-foot buffer. *Id.* Yet the buffer does not actually prevent the District from applying herbicide within 100 feet of sensitive natural resources, including water bodies. The District may continue to apply herbicide within the 100-foot buffer as long as it restricts use to the “least harmful application methods.” *Id.*, see also DEIR 271. But if the buffer zones or least harmful application methods are not feasible, the District will *still* allow application to go forward despite the risk of impacts. FEIR 56, DEIR 271. Instead the District claims that “preparation of a treatment program that considers site-specific conditions, threats, and benefits to sensitive natural resources while incorporating the latest adaptive management practices will result in no additional significant impact.” FEIR 56, DEIR 271. By merely requiring compliance with a future plan whose contents are wholly unknown, the District violates CEQA. *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1396.

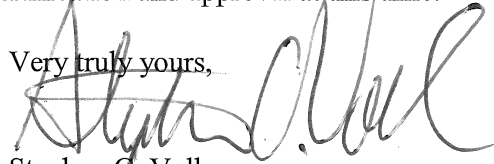
The District concedes elsewhere that in some circumstances “disturbance to essential habitat of special-status species is unavoidable.” DEIR 134; FEIR 114. But such an impact “is *per se* significant.” *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (“*Vineyard*”) (2007) 40 Cal.4th 412, 449. The District claims *both* that the impact of this disturbance would be less than significant (FEIR 114) and that in some instances it would have to resort to compensatory mitigation, such as habitat restoration elsewhere, to prevent this impact from being significant. Just as with the future “treatment programs,” the compensatory mitigation measures are not defined nor do they set specific performance standards. FEIR 343-344. Instead, they “*may* include . . . (1) identification of a combination of habitat creation, restoration and/or enhancement; (2) development of a monitoring and maintenance program where necessary to document success; (3) establishment of performance standards; and (4) provisions for contingency measures to remediate projects that do not meet the performance standards.” *Id.* (emphasis added). None of the possible conditions for compensatory mitigation set specific performance standards. Therefore, this deferred mitigation violates CEQA.

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CONCLUSION

Because the FEIR and the VBMP it studies are profoundly inadequate in the respects discussed above, they must be substantially revised and recirculated. It would be inappropriate for the Commission to recommend certification and approval at this time.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Stephan C. Volker', written over a horizontal line.

Stephan C. Volker
Attorney for North Coast Rivers Alliance

SCV:taf

Attachment: Exhibit 1: Health Council of Marin, 2001 Marin Community Health Survey,
Field Research Corporation, (data recorded June 2001-October 2001), p. 26

EXHIBIT

1

Environmental Sensitivities, Chronic Fatigue Syndrome (CFS), and Fibromyalgia

	<u>% Yes</u>		
	<u>Overall</u>	<u>Males</u>	<u>Females</u>
Do you consider yourself allergic or sensitive to everyday chemicals like those found in household cleaning supplies, paints, air fresheners, perfumes, soaps, garden sprays, or products.....	17%	10%	23%
Do you consider yourself sensitive to power lines or everyday electrical appliances such as televisions, microwaves, computers, cordless or cellular phones, or fluorescent lights?.....	7%	6%	9%
In the past 12 months, have you been diagnosed with chronic fatigue syndrome or experienced fatigue and exhaustion that lasted more than 6 months?.....	5%	3%	7%
In the past 12 months, have you been diagnosed with Fibromyalgia or had chronic muscle pain lasting more than 6 months?.....	4%	3%	6%

Women, more than men, say they are affected by these conditions.