



# MARIN COUNTY COMMUNITY DEVELOPMENT AGENCY

ALEX HINDS, DIRECTOR

## STAFF REPORT TO THE PLANNING COMMISSION LAWSON'S LANDING MASTER PLAN, COASTAL PERMIT AND TIDELANDS PERMIT DRAFT ENVIRONMENTAL IMPACT REPORT

<b>Item No:</b>	9.	<b>Application No:</b>
<b>Applicant:</b>		
<b>Planner:</b>	Tim Haddad, Environmental Coordinator	
<b>Owner:</b>	Families of Carl Vogler and Michael Lawson	
<b>Assessor's Parcel:</b>	100-100-48 et al.	
<b>Property Address:</b>	137 Marine View Drive, Dillon Beach	
<b>Hearing Date:</b>	October 10, 2005	

**RECOMMENDATION:** Conduct public meeting regarding preparation of a Final EIR Response to Comments or possible action recommending a revised project baseline and recirculation of a new Draft EIR for review and comment.

**APPEAL PERIOD:** Submit appeal within 5 days of Planning Commission action recommending Draft EIR recirculation. (Appeal to Board of Supervisors)

**LAST DATE FOR ACTION:** N/A

### **ACTION:**

#### Recommended Action

This is a continued public meeting on the Draft EIR for the Lawson's Landing master plan, Coastal Permit, and Tidelands Permit for the approximately 940-acre property known as Lawson's Landing located south of the Community of Dillon Beach, between Tomales Bay and the Pacific Ocean.

At this meeting, the Commission is expected to consider possible action recommending that the Draft EIR be fundamentally revised to incorporate and evaluate a different baseline of existing uses and environmental setting conditions and that the EIR be recirculated for public review and comment as a new Draft EIR. If no action is taken to recommend revision of the EIR baseline and recirculation of the Draft EIR, it is expected that the Commission will discuss the issues of primary concern to Commissioners that need to be addressed in a Final EIR Response to Comments.

#### Previous Action

On September 12, 2005, The Planning Commission conducted a public hearing on the Lawson's Landing project Draft EIR. Written comments submitted during the public review period on the Draft EIR received from the public and agencies up to the date of the hearing were also provided to the Commission. After receiving public testimony on the adequacy of the Draft EIR from all those present that wished to speak, the Commission closed the public hearing and initiated discussion on the adequacy of the Draft EIR.

The Commission's discussion focused on the Draft EIR's inclusion of existing uses of the site in the environmental baseline. Commissioners expressed concerns regarding the EIR's incorporation of the 233 trailers, 1000 vehicle campground and 200 vehicle day users in the existing site conditions instead of evaluating the impacts and mitigation for this level of use in the Draft EIR, since these uses were included in the Master Plan being considered

for approval and were not previously permitted by the County. The Commission suggested that the maximum level of use associated with the above existing conditions be permitted should be evaluated against a revised baseline of the “actual” or “average” uses that occur on the site to determine impacts and mitigation in the Draft EIR. The Commission continued the meeting for further discussion on whether use of the proposed baseline was incorrect, thus possibly making the Draft EIR so fundamentally inadequate that it would require major revision and recirculation to allow meaningful opportunity for review and comment on it. The Commission also expressed additional concerns regarding the level of detail provided for the Master Plan project description; adequacy of impact analysis and mitigation, particularly for sensitive species and habitat; range of alternatives, including a natural resource alternative; policy analysis of existing uses and future mitigation study and impacts of mitigation.

### **CEQA EIR RECIRCULATION PROCESS:**

#### State CEQA Guidelines Section 15088.5 Recirculation Of An EIR Prior To Certification:

The State CEQA Guidelines Section 15088.5 provides the procedure for determining whether to recirculate an EIR after the initial review period on the Draft EIR, but before certification of the Final EIR. (Relevant provisions of Section 15088.5 are set forth for reference in attachment #1 of staff’s report).

In summary, Section 15088.5 provides that when significant new information is added to an EIR after notice and review, but before certification, a new round of notice and review is required. New information is not significant unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment. However, Section 15088.5 does not specify the appropriate circumstances for recirculating a Draft EIR as opposed to a Final EIR. The Section as written does not provide clear direction on whether recirculation applies to a Draft EIR right after review and comment, or only after responses to comments are completed for a Final EIR, or both. Normally, agencies will have EIR technical consultants prepare responses to comments in a Final EIR before determining whether new information added to the EIR is “significant” and triggers a requirement for recirculation, because responses may add information that resolves issues raised for the Draft EIR by clarifying, amplifying or making minor modifications that do not require another round of review. This approach also facilitates due process for evaluating all of the relevant facts of an issue before making a determination.

The case law that resulted in the addition of Section 15088.5 to the Guidelines provides some further guidance to help resolve the ambiguity in the guidelines on this issue. Section 15088.5 was adopted into the CEQA Guidelines in 1994 to reflect the Supreme Court’s holding in *Laurel Heights Improvement Ass’n v Regents of Univ. of Cal.* (1993) 6 C4th 1112, 26 CR2d 231 (Laurel Heights II). The Court’s decision was based on a Final EIR that was prepared to correct deficiencies found by the Court in a prior Final EIR prepared for the project, (Laurel Heights I). The revised Final EIR was not circulated for review and comment prior to certification.

The first three tests for recirculation as set out by the court and later adopted into the Guidelines as Section 15088.5 (a)(1)(2) and (3) relied heavily on the court’s review of earlier appellate cases on recirculation of a Final EIR before certification and are written to suggest that significant new information added to an EIR after review requires the **Final EIR** to be recirculated. These three tests assume that the Draft EIR was fundamentally and legally adequate, but significant new information added to the Final EIR (before certification) requires further review and comment. The court adopted as a fourth trigger a threshold test derived from a 1989 appellate court ruling in the *Mountain Lion Coalition v. Calif. Fish and Game Comm.* case, [cited in Guidelines Section 15088.5 (a)(4)], involving a Draft EIR that the court initially determined to be inadequate and also later determined that flaws in the document were not cured by a Final EIR that was prepared but not circulated for further public review. The court determined that recirculation is required if new information reveals that the **Draft EIR** is “so fundamentally and basically inadequate and conclusory in nature that public comment on the **Draft** was in effect meaningless”. Under this fourth trigger, addressing the issues of concern in the Final EIR cannot cure the original inadequacy.

#### Marin County EIR Guidelines Section VI- I Certification Review:

Marin County EIR Guidelines Section VI-I provide additional procedures for determining the adequacy of an EIR prior to certification. . (Relevant provisions of Section VI-I are set forth for reference in attachment #1 of staff’s report).

Marin County EIR Guidelines generally provide for a Final EIR Response to Comments to be prepared and circulated for review before a determination is made, (either by the Environmental Coordinator or Planning Commission) whether the Final EIR is adequate to recommend certification, or to revise and recirculate it. There is no specific provision for the Commission to determine to revise and recirculate a Draft EIR prior to completing a Response to Comments. Local Guidelines adopted to implement CEQA add to and extend CEQA requirements to local procedures, but do not supplant State CEQA regulatory requirements. The County is required to comply with State CEQA Guideline procedures as well as Marin County EIR Guidelines.

#### EIR Recirculation Procedure Applicable to Lawson's EIR

Based on State and County CEQA Guideline procedures as discussed above, the correct procedure to determine the need to recirculate the Lawson's EIR is to first consider the baseline issue separately from the other possible flaws in the Draft EIR identified during review. A determination that the Draft EIR used the wrong baseline automatically renders the Draft EIR "fundamentally and basically inadequate" such that comment on it was in effect meaningless. It is certain that addressing the topic in the Final EIR Response to Comments would not cure this inadequacy. The only way to correct this deficiency would be to require a corrected baseline to be developed and analyzed in a new Draft EIR that is circulated for review. The Planning Commission could make this determination under the fourth threshold trigger in Section 15088.5 (a)(4). The determination can be appealed to the Board of Supervisors.

It is not a certainty, however, that any of the other possible flaws in the Draft EIR identified during review automatically render the Draft EIR fundamentally inadequate under Section 15088.5 (a)(4), or that these concerns cannot be resolved or corrected by addressing them in the Final EIR Response to Comments. The validity of the information and conclusions presented in the review comments has not been thoroughly evaluated yet. It is also premature at this juncture to attempt to determine if new information added in response to comments would trigger the significant new information tests in Section 15088.5 (a)(1)(2) and (3). All of the relevant facts to make this judgment will not be available until the EIR consultant technical experts have analyzed and responded to all of the comments received during the Draft EIR review.

Under State and County Guideline procedures, after preparation of the (Draft) Final EIR Response to Comments, the Environmental Coordinator is first required to determine if any the recirculation tests of Section 15088.5 apply. The Final EIR is either required to be revised to correct any deficiencies and recirculated for review if Section 15088.5 is triggered, or pursuant to County procedures it is circulated for review for a minimum 10 day period prior to being considered by the Planning Commission for a recommendation for certification. A determination of the Environmental Coordinator to revise and recirculate the EIR can be appealed to the Planning Commission. When the Final EIR is sent to the Planning Commission for recommendation for certification, the Commission similarly determines either that the Final EIR is adequate for certification, that minor modifications and clarifications are required, or that Section 15088.5 is triggered and significant new information requires revision of the EIR and recirculation for review. The determination of the Commission can be appealed to the Board of Supervisors.

#### **BASELINE:**

##### Background for Determination of the Baseline used

The County determined that the central purpose of the current Master Plan application would be to establish a comprehensive proposal for the property that would require County approval and regulation of all of the recreational uses and activities on the site and combine this with all of the existing permitted agricultural, sand quarry, and residential uses in one complete record of the property's land use entitlements, rather than continue the historic pattern of continuing ineffective land use regulatory review or initiate difficult, costly and potentially lengthy and protracted enforcement proceedings against the property. The baseline for the EIR is a necessary outcome of that approach to the requirement for a Master Plan and treatment of existing uses.

The concept of utilizing a Master Plan process to resolve the issues for treatment of existing recreational and other land uses on the site goes back at least to 1970. In a memorandum dated August 21, 1970, from County Counsel

to the County Planning Director, Counsel recommended that the Planning Commission require the submission of a Master Plan to permit and upgrade the existing development on the site to appropriate standards. (See attachment #2, August 21, 1970 memorandum from County Counsel, Richard Godino).

The baseline for the current Master Plan application was first developed for the Initial Study prepared in 2000. Authorized uses were assumed to be part of the existing environmental setting and not considered in evaluating the potential environmental effects of the proposed Master Plan. Authorized uses included existing residential uses authorized by the County, the agricultural uses authorized under County zoning, the existing quarry use permitted by the County and the existing recreational facilities and uses authorized in a Permit To Operate by the State Housing and Community Development (HCD) issued in 1992, including the 233 trailers and 1,000 vehicle campsites at the landing. (The Permit To Operate issued by HCD was never challenged under CEQA).

When the Initial Study was circulated in support of a Negative Declaration, it generated considerable controversy. Numerous comments raised a variety of significant environmental impact issues and the need for an EIR for the Master Plan. Comments also objected to the environmental baseline used. In particular, an attorney, representing local environmental groups in this matter, (including the Environmental Action Committee of West Marin, the Tomales Bay Association, the Sierra Club Marin Chapter, Marin Conservation League, California Native Plant Society, Marin Audubon Society and the Planning and Conservation League) argued that use of this baseline created a fundamental flaw in the impact analysis. (See attachment #3 letter of October 23, 2000, from John Silver, California Law Project).

The County determined to require an EIR for the Master Plan and the Applicant agreed to it. Prior to initiation of the EIR, the applicant's attorney submitted a legal opinion on the baseline required for the EIR. This legal opinion took the position that inclusion of existing uses in the baseline was correct. The legal opinion identified the existing uses on the site in a listing of baseline conditions attached to the opinion. (See attachment # 4, Letter of March 14, 2001 from Leah Goldberg, (formerly) Hanson and Bridges law firm).

County Counsel was consulted regarding the legal controversy over the baseline issue. A decision was made to seek a formal independent legal opinion from a Counsel specializing in CEQA issues. With the agreement of both the environmental groups' attorney and the applicant's attorney, Mr. Michael Remy of the Remy, Thomas and Moose law firm was asked to prepare the formal legal opinion on the appropriate baseline for the EIR. Mr. Remy and his firm is recognized as one of the foremost legal experts on CEQA matters and his firm authors the "Guide To The California Environmental Quality Act", a comprehensive analysis of CEQA regulations and case law, frequently cited as an authoritative source by the California courts. When it was completed, Mr. Remy's legal opinion on the appropriate baseline was provided to both the environmental group's attorney and the applicant's attorney for consideration prior to initiating the EIR. (No response to the Remy opinion was received from the environmental groups' attorney). Although this opinion was included in the EIR, it is attached to staff's report for ease of reference. (See attachment #5, Memorandum of September 17, 2002 from Michael Remy).

#### Legal Basis for the Baseline

Mr. Remy's legal opinion cites State CEQA Guidelines and relevant appellate case law to support what can be summarized as essentially three basic conclusions:

- Impacts of a project must be measured against the environment, as it exists on the ground. As with the *Environmental Planning Information Council v. County of El Dorado (EPIC)* case, use of a hypothetical baseline for the Lawson's Landing project could lead to similar confusing results. Attempting to exclude existing uses would necessarily be speculative, as many of the uses have existed since the late 1800's. Use of a hypothetical baseline would exaggerate the actual impacts and inaccurately minimize the potential environmental benefits of the proposed Master Plan. Use of a baseline that includes existing uses in the current environmental conditions serves important goals of administrative convenience and accuracy with regard to impacts.
- The general rule stated in CEQA Guidelines Section 15125 which provides that the proper baseline is *normally* the environment as it exists at the time environmental review begins applies regardless of whether this is a normal situation. The agency has discretion to use the existing environment as a

baseline in order to resolve unusual circumstances such as illegal uses. The situation at Lawson's Landing is analogous to the *Fat v. County of Sacramento* case, in that the County views the Master Plan as an opportunity to bring the development under County supervision for the first time and the "abnormal" circumstance of historic unauthorized use is a justification, not a prohibition, for including existing uses in the baseline. Whether HCD's permit approved the existing uses is not relevant. The only relevant information is the state of the environment when environmental review begins. The *Riverwatch v. County of San Diego* case provides that preparation of an EIR is not the appropriate forum for determining the nature and consequences of prior conduct of an applicant.

- Concern over interfering with enforcement (as cited in the *Riverwatch decision*) is not the only reason to make the existing environment the appropriate baseline. The court in *Fat* noted that the *Riverwatch* decision was also concerned with the practical problems presented by mixing review with enforcement. The fact that the County is responsible for enforcing zoning violations does not alter the legal proposition that the proper baseline is the environment as it currently exists. The court in *Carmel-by-the-Sea* held that what is possible under a Use Permit and what is possible under zoning bears no relationship to real conditions on the ground. The proper baseline for the Master Plan is the environment as it exists at the time of environmental review, i.e., including all unauthorized uses.

(Each of the appellate cases cited in Mr. Remy's opinion have been included as attachment #6, should the Commission wish to further review the basis for his conclusions or the details of the issues addressed by the court decisions).

#### Existing baseline conditions

Mr. Remy based his opinion on a brief agreed upon statement of facts. Among these facts are that existing uses of the site include 233 trailers, 1000 vehicle campsites and 200 vehicle day uses.

As noted in the legal opinion above, whether the HCD Permit to Operate authorized this level of use is not really relevant. The existence of this permit only documents and provides one explanation for a level of operation (use) that exists on the site. The applicants have stated they have undertaken this level of use at least since the time of the permit in 1992. They have stated that they reach this level of use (as a maximum limit) approximately four to eight times in a given year. They have taken gate counts for a number of years. In 1999, they began a self-imposed limit of 200-day use vehicles a day. They began requiring camping reservations in 2003. Gate counts for existing uses were reviewed by County staff and EIR consultants at the start of the EIR to confirm use levels. Use levels were found to fluctuate throughout the year, with significantly lower occupancy than peak usage (which usually occurs on holiday weekends) characterizing the overall level of existing use.

#### Alternate Baseline Conditions

Concerns have been expressed that the baseline in the EIR relies on a level of existing uses that do not reflect the actual existing uses on the ground at any given time, or that an average level of existing uses that occur on the site would more realistically reflect the level of operations that regularly occur on the site. It has been suggested that the baseline be revised to only count actual uses, or to count a calculated average of actual existing uses.

Attempting to exclude some of the existing uses, or level of uses, would be speculative. The existing use levels fluctuate throughout the year and vary day to day, season to season, year to year. It is not practical to determine which day, season or year accurately represents actual use or at which times existing use levels should be included or excluded in the counts. The Baseline existing use levels used in the EIR do represent existing use levels on the ground at peak conditions. This provides certainty, accuracy and administrative convenience to the preparation of the EIR. Use of a hypothetical "actual" or "average" baseline use level would exaggerate impacts and minimize benefits of the proposed Master Plan. The EIR is not the proper forum to try to limit the levels of existing use by identifying an alternate baseline in order to address perceived impacts or illegal conduct. Doing so results in all of the practical problems associated with mixing environmental review with enforcement.

Although not cited in Remy's legal opinion, in *Fairview neighbors v. County of Ventura*, (1999) Cal App. 4<sup>th</sup> 238, 82 Cal Rptr. 2d 436, the appellate court upheld the County's baseline for a mining project as the level of allowable

truck traffic under an existing permit, rather than the actual, fluctuating daily traffic which was considerably lower. The Court held that “discussing the possible environmental effects of the project based on actual traffic counts would have been misleading and illusory”. The permitted operations represent the current existing environment, rather than the actual (lower) fluctuating operations at any given time. The permitted operations document the maximum that can be expected and that have occurred to create existing site conditions. This is similar to the situation at Lawson’s Landing, in as much as the baseline is the level of existing uses that are documented by the HCD Permit to Operate (authorization of uses not-with-standing) and are also not the actual (lower) fluctuating uses at any given time. (A copy of the Fairview case is included in attachment #6).

It should be understood that including these existing uses, or levels of use, in the EIR baseline does not confer any authorization or approval of these uses to Lawson’s Landing and does not “grandfather” the uses into the proposed Master Plan. Nor will any findings or conclusions in the EIR prevent any action deemed necessary from being taken on the proposed Master Plan or the enforcement of the County’s land use regulations as they apply to the property. The Planning commission will have an opportunity to recommend action for approval, approval with conditions or disapproval of all of these uses and levels of use when the merits consideration of the Master Plan is scheduled for hearing by the Commission after the EIR is completed.

**RECOMMENDATION:**

Possible Baseline Action

After review and discussion of the relevant legal and other issues of concern, the Commission will be in a position to consider possible action pursuant to State CEQA Guidelines Section 15088.5 (a)(4) recommending that the baseline used in the Draft EIR is incorrect and another baseline involving actual or average levels of existing uses as specified by the Commission should be evaluated in a revised draft EIR. In this case, the existing uses proposed in the Master Plan would be measured against a defined actual or average baseline of existing uses to determine the impacts of the project. This action would be based on a finding that the Draft EIR, as presently written, is fundamentally and basically inadequate and conclusory such that meaningful public comment is precluded as a result of the original baseline used. Recirculation of a new, revised Draft EIR for public review and comment would be required. In this case the Commission would need to give direction to staff and the EIR consultants on the specific baseline uses or levels of use required to be evaluated in the document in order to proceed with preparation of the revised Draft EIR.

Preparation of the Final EIR

The other issues of concern for possible flaws and deficiencies of the EIR require factual resolution to determine how they must be addressed in the EIR and whether recirculation of the EIR is required. It is not practical or possible to resolve all of the issues raised in comments before they are analyzed in a response to comments prepared by the EIR consultant technical experts. The Commission is requested to discuss their issues of primary concern and direct staff and the consultants to prepare the Final EIR Response to Comments and return it to the Commission for consideration and recommendation for action.

- Attachments:
1. Portions of CEQA Guidelines Section 15088.5 and County Guidelines Section VI-I.
  2. 1970 Memo from County Counsel
  3. Letter dated October 23, 2000, from John Silver, Attorney, California Law Project
  4. Letter dated March 14, 2001 from Leah Goldberg, Attorney, (formerly) Hanson and Bridges
  5. Memorandum Dated September 17, 2002 from Michael Remy< Attorney, Remy Thomas and Moose
  6. Appellate Court Cases

State CEQA Guidelines Section 15088.5 Recirculation Of An EIR Prior To Certification:

- (a) A lead agency is required to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under Section 15087 but before certification. As used in this section, the term "information" can include changes in the project or environmental setting as well as additional data or other information. New information added to an EIR is not "significant" unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement. "Significant new information" requiring recirculation include, for example, a disclosure showing that:
- (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
  - (2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance.
  - (3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the environmental impacts of the project, but the project's proponents decline to adopt it.
  - (4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded. (*Mountain Lion Coalition v. Fish and Game Com* (1989) 214 Cal.App.3d 1043)
- (b) Recirculation is not required where the new information added to the EIR merely clarifies or amplifies or makes insignificant modifications in an adequate EIR.
- (f) The lead agency shall evaluate and respond to comments as provided in Section 15088. Recirculating an EIR can result in the lead agency receiving more than one set of comments from reviewers. The following are two ways in which the lead agency may identify a set of comments to which it will respond. This dual approach avoids confusion over whether the lead agency must respond to comments which are duplicates or which are no longer pertinent due to revisions to the EIR. In no case shall the lead agency fail to respond to pertinent comments on significant environmental issues.
- (1) When an EIR is substantially revised and the entire document is recirculated, the lead agency may require reviewers to submit new comments and, in such cases, need not respond to those comments received during the earlier circulation period. The lead agency shall advise reviewers, either in the text of the revised EIR or by an attachment to the revised EIR, that although part of the administrative record, the previous comments do not require a written response in the final EIR, and the new comments must be submitted for the revised EIR. The lead agency need only respond to those comments submitted in response to the recirculated revised EIR.
  - (2) When the EIR is revised only in part and the lead agency is recirculating only the revised chapters or portions of the EIR, the lead agency may request that reviewers limit their comments to the revised chapters or portions of the recirculated EIR. The lead agency need only respond to (i), comments received during the initial circulation period that relate to chapters or portions of the document that were not revised and recirculated, and (ii), comments received during the recirculation period that relate to the chapters or portions

of the earlier EIR that were revised and recirculated. The lead agency's request that reviewers limit the scope of their comments shall be included either within the text of the revised EIR or by an attachment to the revised EIR.

Marin County EIR Guidelines Section VI- I Certification Review:

G...At the conclusion of the public hearing on the Draft EIR, the Planning Commission or other decision making body shall direct staff and/or the EIR consultant to prepare the Final EIR Response to Comments in accord with State CEQA Guidelines Sections 15088, 15089, 15132 and these procedures.

I(2) ...A minimum 10-day period shall be provided for review of the Final EIR prior to any action to certify it. The review of a Final EIR shall exclusively focus on the adequacy of the response to comments on the Draft EIR. A separate public hearing to receive testimony on the recommendation to certify or certification of a Final EIR shall not be required. Written comments received on the Final EIR response to comments within the review period deadline shall be considered together with any written or oral response from the staff or the EIR preparer, at the time action is taken by the certifying or recommending body to certify the Final EIR.

I(4). When the Planning Commission acts as the certifying body and is satisfied, at time of hearing, that the Draft EIR plus the comments received and the responses thereto adequately fulfill the intent and requirements of CEQA, the State CEQA Guidelines and these procedures, the Commission shall certify the document and any attachments thereto as the Final EIR, pursuant to State CEQA Guidelines Section 15090. If the Board of Supervisors or other decision-making body is the certifying body, the Commission shall forward a recommendation for certification of the EIR to the appropriate body. If the Planning Commission is not satisfied that the Final EIR is adequate, the Commission may return it to the Lead Department for revision and resubmittal to the Commission, or forward it to the appropriate decision making body without recommendation for certification. In forwarding the document, the Commission should state the reasons for its finding of inadequacy.