C O M M U N I T Y M A R I N

October 1, 2012

Steve Kinsey, President
Marin County Board of supervisors\3501 Civic Center Drive
San Rafael, CA 94903

SUBJECT: LOCAL COASTAL PROGRAM AMENDMENTS (LCPA) – **Agriculture and Biological Resources**

Dear President Kinsey and Supervisors:

The following comments on the Draft LCPA are submitted on behalf of "Community Marin," a consensus document written by major environmental non-profit organizations in 1991, and currently completing its 3rd update. Because "Community Marin" is broad in its coverage, and not intended to address specific policies in the LCPA, our comments are necessarily limited to recommendations that can be supported by the document. Participating organizations may also submit individual comments on the subject LCPA.

We wish to commend CDA staff for their efforts over the past several years to reach out to all interested parties and their thorough analysis of outstanding issues and points of view. Staff has presented for your consideration a number of suggested alternatives to the Planning Commission-approved Draft LCPA. To facilitate your review of public comments, our recommendations are arranged to "track" with the **October 2, 2012, Staff Report, Attachment # 2,** with limited reference to **Attachment #4**.

I. **Agricultural Operations**

The issue concerns whether "grading, intensification and structures associated with on-going agricultural operations" should require a coastal permit. That is, under what circumstances would such activities be of a scale or character that meets the definition of "development," such as grading and terracing of land and installation of irrigation facilities? The Planning Commission separated viticulture from the list of routine agricultural activities and designated it as a permitted use, requiring a coastal permit as well as a separate permit under County Viticulture ordinance. The draft LCPA does not consider <u>other</u> conversions of agricultural operations to more intense use as "development," however, and therefore such conversions would not require a coastal permit. On the other hand, CCC staff has suggested that grading and intensification of agricultural operations might require coastal permits.

This subject is revisited in Staff Report, Section *VI.* ***Uses in ESHA and Site Assessments*** (page 28), again questioning whether crop conversion requiring grading, intensification, and structures . . .associated with ongoing agricultural operations qualifies as "development."

Response:
Community Marin has long held that changes in intensity of agricultural use and new agricultural uses, such as change from livestock grazing to row crops, should be subject to review, in this case to a coastal permit. (Note that this requirement would not apply to conversion from one type of row crop to another

unless such conversion involved significant new grading or intensity in use of water.) Community Marin's argument is based in part on the definition of "Development" (Article VIII, Chapter 22.130 – Definitions), which includes ". . .grading. . .; and, change in the intensity of use of water or of access thereto. . ." Staff argues that due to the pervasive lack of water in the coastal agricultural zone, requests for conversion to viticulture, for example, are rare. We contend that any conversion of agriculture that requires new grading, cultivation, and/or irrigation can affect surface and/or groundwater resources as well as alter sediment regimes in water courses, and therefore, should be subject to Coastal Permit.

Recommendations (double underline):

Policy C-AG-2: Viticulture is a permitted use. Other conversions of agriculture to a more intensive use, such as grazing to row crops requiring significant grading, terracing, and/or installation of irrigation facilities, are permitted uses (not principally permitted uses) requiring a Coastal Permit.

22.68.030 – Coastal Permit Required Development is defined in Article VIII of this Development Code and is interpreted to include . . .significant alteration of landforms . . and change in the intensity of use of water, or of access thereto. Ongoing agricultural operations including cultivation, crop and animal management and grazing are not considered to be . . .~~a significant alteration of land forms~~ development. Conversion of grazing land to cultivated land, requiring significant grading, terracing, and/or installation of irrigation facilities is considered "development," and therefore requires a Coastal Permit.

II. Diversified Agriculture

III. Intergenerational Housing

Community Marin makes no recommendations specific to intergenerational housing, but in general terms recommends that *". . .any residential development be secondary and subordinate to the primary agricultural use of sites*." Several other recommendations in the document limit the number of additional homes and total square footage for residences and call for clustering of non-agricultural buildings on agricultural sites. Community Marin participants also have raised doubts concerning the enforceability of restrictive covenants on intergenerational homes.

Our comments address two main concerns:

(1) the level of review for a "first" intergenerational home, compared to that for a second intergenerational home; and

(2) the enforceability of a covenant that restricts intergenerational homes to "immediate family".

Regarding level of review, **C-AG-2 (CPZ)** in the LCPA lists accessory structures or uses, such as one intergenerational home, agricultural product sales and processing, and homestay facilities,. . . as "necessary to the operation of agricultural uses" and, therefore, in the C-APZ as principal permitted uses. CCC staff does not agree and would like to see intergenerational homes and homestays categorized as residential, visitor-serving. . .uses as appropriate. . .and that such uses be required to adhere to strict development standards.

In Section III. *Intergenerational Housing*, the CDA staff report states that "all intergenerational homes would be subject to a Coastal Permit approval. The second intergenerational home . . . would also require a Use Permit approval. Accordingly, the siting and design of such homes would be subject to all LCP policies as well as the standards for intergenerational homes contained in (various sections cited in

the Code)". It appears that the first intergenerational home would receive a lesser level of review than a second intergenerational home.

Regarding restrictive covenants, CDA Staff concludes that a covenant that restricts intergenerational homes to "family members" is enforceable because the likelihood of abuse is limited and the number of homes that could be permitted on any given property is also limited. Further, staff states that restrictive covenants and deed restrictions are commonly used by the County.

Response:
The "first" intergenerational home should not be included as a principally permitted use under the definition of "agriculture." Rather, it should be subject to strict development standards, as recommended by CCC staff. This would mean that the "first" intergenerational home would be a permitted use, subject to both a Coastal Permit and a Use Permit, and the second intergenerational home would be a conditional use, subject to full environmental review.

Although Staff argues that restrictive covenants are commonly used by the County, such covenants are placed typically on physical conditions such as parking, public access, open space, etc., that can be easily monitored and enforced. A covenant that restricts occupancy of intergenerational homes to "immediate family" would be intrusive and difficult to monitor, and would raise numerous issues especially for future generations as families expand and become more complex. In our view, it could not be practically enforced by the County.

Recommendation:

C-AG-9 In the C-APZ zone, the principally permitted use shall be agriculture . . . as follows:
6. delete "~~one intergenerational home~~" (as a principally permitted use)

22.62.060 – Coastal Agricultural and Resource-Related District
1. C-APZ – Delete from principally permitted use of lands in the C-APZ "~~one intergenerational home~~

Community Marin also recommends that additional dwellings (other than the "farm house") should be clustered (not "grouped") on a maximum of 5 percent of the total acreage. The total square footage of homes, including garages, should not exceed 7,000 sq. ft. As a further means of limiting the opportunity for estate-size homes in agricultural districts, the total maximum floor area for a residence and associated non-agricultural accessory structures such as garage and home office should not exceed 4,000 sq. ft.

IV. Conservation Easements No comments

V. Types of ESHA and ESHA Definition

The Staff Report acknowledges the importance of terrestrial habitats and the species they support by designating them ESHAs (in addition to wetlands, streams, lakes, etc.). The Staff Report also cites several sensitive terrestrial habitats that are identified in the California Natural Diversity Data Base (CNDDB) and listed in the current LCP. The Alternative **C-BIO-1 2.** revises the list of terrestrial habitats that qualify as ESHA to include ". . . non-aquatic habitats that support rare and endangered species, coastal dunes as referenced in C-BIO-7 (Coastal Dunes), and roosting and nesting habitats as referenced in C-BIO-10 (Roosting and Nesting Habitats). The ESHA policies of C-BIO-2 (ESHA Protection) and C-BIO-3

(ESHA Buffers) apply to all categories of ESHA, except where modified by the more specific policies of the LCP." *Note that C-BIO-3 was deleted from the LCPA on 12/1/11, so is no longer relevant.*

The staff-recommended Alternative Definition in Code Section 22.130.30 differs somewhat from C-BIO-1 1., instead listing ". . .special-status species of plants and animals (i.e., listed under federal or California Endangered Species Acts or CNPS 1b or 2 categories". Missing from both list and definition are central dune scrub, coastal terrace prairie, serpentine bunchgrass, and Northern maritime chaparral, as found in the current LCP.

Response:
Community Marin does not use the term ESHA but contains numerous recommendations for protection of both wetland and upland habitats and sensitive species. Therefore, we find it a serious omission not to include other sensitive terrestrial habitats in the ESHA definition, whether or not they support listed rare and endangered species. These include coastal dunes, and roosting and nesting habitats, as listed in the alternative C-BIO-1, and habitats listed by the CNDDB (and cited in the current LCP) that are critical to maintaining overall biological diversity of agricultural lands. These latter include coastal dune scrub, terrace prairie, serpentine bunchgrass, and Northern maritime chaparral.

Recommendation:

To be consistent, both **C-BIO-1** and Code Section **22.130.030** should be revised to include as ESHAs: federal and State-listed listed rare and endangered species; CNPS-listed 1b and 2 plant species; coastal dunes, roosting and nesting habitats; as well as coastal dune scrub, terrace prairie, serpentine bunchgrass, and Northern maritime chaparral.

VI. **Uses in ESHA and Site Assessments**

The staff analysis lays out the objectives for C-BIO-1 and C-BIO-2 as they relate to allowable uses in ESHAs. These are to: reflect the language of the Coastal Act; carry forward policies from LCP Units I and II regarding habitat protection; fully protect ESHAs while avoiding "takings"; and establish standards and procedures for reviewing such proposals through site assessment.

Basically, the intent of staff in presenting an Alternative for Board consideration is to give highest priority to avoidance of ESHAs; maintain ESHAs in natural condition with exceptions in the Coastal Act for resource-dependent uses; and clarify development standards and the purpose of site assessments in evaluating and protecting ESHAs.

Response:
As stated above under V. *Types of ESHA and ESHA Definition,* Community Marin contains general recommendations aimed at protecting a variety of sensitive habitats and species, although it does not specifically reference the term ESHA. Accordingly, in most respects, the Alternative for Board Consideration, for both C-BIO-2, and Section 22.64.050 – Biological Resources, is a significant improvement over the PC-approved version of the LCPA. The reorganization of material and new language do a better job of protecting ESHAs and clarify procedures for determining the presence of ESHA and the parameters for avoidance and mitigation.

We have five questions or concerns:

- In C-BIO-2, ESHA Protection, 1. what is meant by "Prioritize avoidance of land use and development impacts to ESHA"? What criteria will be used to "prioritize"? Will these be developed in the first screening by staff to determine the presence of an ESHA? In a subsequent site assessment? Will such a "prioritization" determine the level of mitigation if disturbance to an ESHA cannot be avoided?
- In (Altenative) C-BIO-2 2. we agree with Marin Audubon Society that public access in ESHA should be controlled to avoid (not minimize) disturbance. This is best accomplished by locating any pathways away from ESHA and ESHA buffers. We do not agree that recreational trails in an ESHA are resource-dependent, as suggested in staff analysis on page 29.
- Under Alternative Section 22.64.050.A 1.b we agree that a "site assessment shall be prepared by a qualified biologist hired by the county and paid by the applicant." All such assessments must be prepared under County guidance, not by the applicant.
- Under the same Section, A. 1. c. 1) 6), the determination of ESHA buffer requirements deletes an important factor, which is behavior and movement of habitat dependent wildlife. These are important indicators of wildlife response to disturbance, going well beyond "migratory patterns of affected species", added by staff to 1) in the list of considerations for buffer requirements.
- Under the same section, A. 1. D, we are concerned that habitat mitigation ratios might be adjusted as determined through the site assessment.

VII. **ESHA Buffers**

The Staff Report attempts to satisfy the need to be consistent with provisions of the Coastal Act that protect ESHAs but do not specify a standard buffer width, and at the same time, establish workable and relatively stable standards. Notably, non-aquatic ESHAs present a greater problem than wetlands or streams, for which specific buffer widths have been set. The Staff Report suggests that, given the diversity and abundance of sensitive resources in the Coastal Zone, the LCP should avoid establishing arbitrary standards for individual species or habitats. CCC staff, quoted on page 35 of the Staff report, recommends otherwise: "*Regarding other terrestrial ESHA buffers, policies requiring buffer widths less than 50 feet should be reviewed and in most cases increased to 50 feet. In some cases, 100 feet or wider will be warranted."*

Response:

Community Marin does not recommend a specific width for buffers for terrestrial ESHAs as it does for streams and wetlands (See below). On the basis of general protection of sensitive habitats and species, however, a buffer of 50 feet would be considered an absolute minimum, subject only to upward adjustments based on biological site assessment. We note that an important factor for determining buffer needs as well as sensitivity to disturbance, that is ". . . the behavior and movement of habitat-dependent wildlife. . ." , has been deleted from C-BIO-3 3. a. as a factor to be considered in a biological site assessment.

Recommendation:

Add the following to C-BIO-3 3. ". . .Generally buffers for terrestrial ESHA shall be 50 feet, a distance that may be adjusted upward to 100 feet or more by the County as appropriate to protect the habitat. . ."

Add the following to C-BIO-3 3.: ". . .adjustments shall be made on the basis of a biological site assessment supported by evidence that includes but is not limited to: b. Habitat requirements of the ESHA, including behavior and movement of habitat dependent wildlife and migratory patterns of affected species and tendency to return each season to the same nest or breeding colony. . .

VIII. **Wetlands,** and **VI. Grazing in Wetlands (Attachment #4)**

The analysis of C-BIO-14 is presented in two separate sections of the Staff Report. This policy has undergone much discussion and several revisions. The first issue (in Attachment #4, Page 20 ff.) relates to a policy carried over from the existing LCP Unit II that caused confusion in Planning Commission hearings as to the meaning of prohibiting grazing "except in those areas presently used for such activities." After several discussions concerning the pros and cons of managed grazing in wetlands, and unsuccessful attempts to locate where grazing or other agricultural uses occurred in Marin prior to 1981 certification of the LCP that would be excepted from this policy, the staff now recommends returning to language in Unit II with a slight shift in words to clarify the date on which the first LCP was certified.

The second issue relates to ranchers' concern that wetlands may be formed in the course of agricultural activities and would thus become subject to regulation as such and create the requirement for buffers.

Response:

Community Marin contains numerous recommendations for protection and buffering of wetlands. Although none of them refers specifically to grazing in wetlands, Community Marin recommends prohibiting agricultural practices that would harm these (wetland and riparian) resources and sensitive wildlife habitat. "There should be no agricultural activity or any development within 100 feet of a wetland or riparian habitat."

We are also aware of research that shows that wetlands can benefit from grazing but they can also be damaged, depending on a host of variables. Only site by site investigation could enable an informed response.

The second issue raises several questions as to underlying conditions that might cause a wetland to develop during agricultural activities. We refer the Board to the comments of Marin Audubon Society on this subject. As that letter points out, artificial ponds are often placed in locations where pre-existing conditions (springs, natural ponds, diked formerly tidal areas, etc.) provide the "natural" conditions for formation of an "artificial" impoundment or other wetland feature. Further, ditches are often dug in order to drain pre-existing wetlands. If they remain in place, they can convert wetland vegetation to non-native species (e.g., Lawson's Landing).

Recommendation:

As a general rule, Community Marin supports the recommended wording in C-BIO-14 3. (Page 22, Attachment #4).

We accept the staff recommended addition of C-BIO-14 4., with the understanding, however, that if an "artificial" water feature has replaced historic wetlands in the course of agricultural activities, the replacement should be considered "wetland" regardless of perceived origin.

IX. **Streams**

The staff analysis in this section attempts to clarify two issues: the difference between a riparian area and a stream buffer, and how the buffer for each should be measured; and what level of watercourse (stream) qualifies for regulatory protection. The report concludes that the stream buffer includes the riparian area, whereas the buffer for the riparian area extends landward of the resource itself. To resolve the problem, the LCPA establishes a two-part buffer calculation of 50 feet landward from the

outer edge of riparian vegetation, and a buffer of no less than 100 feet from the top of stream bank, including riparian vegetation.

The analysis of jurisdictional boundary for streams concludes that, although ephemeral streams receive protection in the 2007 Countywide Plan (if they are vegetated or support listed special status species), they should not receive jurisdictional protection in the Coastal Zone.

Response:
Community Marin contains numerous recommendations for protecting streams and their buffers (i.e., Stream Conservation Areas). It calls for strengthening protection policies to protect all ephemeral, intermittent, and perennial streams, whether solid or dashed blue line streams on USGS Quad maps. Recommendations also call for minimum 50 to 100-foot buffers from top of bank, even where little or no riparian vegetation currently exists. This level of protection acknowledges the importance of watershed-based planning and management of water resources. Ephemeral streams, even where not vegetated, play an important role in filtering water and controlling the rate, volume, and quality of runoff into perennial streams and downstream waters such as Tomales Bay.

The calculation of buffers, represented in C-BIO-24.3 of the LCPA adequately incorporates protection for both stream and the riparian area, but we do not support the provisions that allow for stream alterations (C-BIO-24.1), including dams, channelizations, or other substantial alterations to coastal stream for "necessary water supply projects." No criteria are offered to define "necessary water supply." We are also concerned that the Alternative for Board consideration weakens current stream and watershed protections by entirely eliminating ephemeral streams from the definition of streams (Coastal) in Code Section 22.130.30. As noted above, ephemeral streams play a critical role in a healthy watershed.

Recommendation:
The Alternative definition of Stream (coastal) in Code Section 22.130.030 should reinstate the deleted language: "In addition, those ephemeral streams that are not mapped by the U.S.G.S. if the stream (a.) supports riparian vegetation for a length of 100 feet or more, etc. . ."

X. **Buffer Adjustments**

The staff analysis concludes that occasions may arise when conditions of a site or nature of development merit consideration of adjustments to standard buffers for wetlands, stream, and riparian areas. The suggested Alternative considers granting adjustments in certain limited circumstances . . . for projects that are "undertaken in the least environmentally damaging manner, contingent on demonstration by the applicant that the 100-foot buffer is unnecessary to protect the resource.

Response:
The proposed language in C-BIO-20 and 25 would greatly weaken the protections that have been set up in policies like C-BIO-19 (Wetland buffers) or C-BIO-24 (Stream buffers). The language proposed is unacceptable on two counts: (1) it appears to rely on the applicant to demonstrate that the prescribed buffer is unnecessary; and (2) it deletes a clear set of exceptions (e.g., there is no feasible less environmentally damaging alternative, etc.) and substitutes ill-defined bases for adjustment. In both cases, the reduction from a standard of 100 feet to 50 feet is arbitrary and would not afford adequate protection.

Recommendation:
Language in C-BIO-20 1. and C-BIO-25 1. that would allow a wetland buffer to be adjusted to a minimum of 50 feet should be stricken from both policies. As stated by Marin Audubon Society (September 27, 2012), a 100-foot buffer to protect wetlands and streams (adjusted in the eastern urban corridor) has been standard in Marin County through the last two countywide plans and should not be weakened for wetlands in the Coastal Zone. Further, under no circumstances should it be up to the applicant to demonstrate whether a 100-foot buffer is unnecessary to protect the resource. . .

Community Marin appreciates the opportunity to comment on the LCPA in these final months of a long process, and again acknowledges the painstaking work down by Staff. Our ongoing concern is that important protections afforded to biological resources in the Coastal Zone over the past 30 years are in danger of being weakened in the Amendment. In the long run, maintaining a healthy ecosystem also benefits the long-term agricultural productivity of the region. Our recommendations are offered in that spirit.

Sincerely,

Nona Dennis
for Community Marin

cc. Marin Audubon Society
eac of West Marin
Marin Bayland Advocates
Sierra Club Marin Group
Marin Conservation League
SPAWN