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## Mitigation Measures, Which Included Provision For Quarry Owner To Provide Bottled Or Potable Water To Neighbors Affected By Quarry Project, Were Inadequate Under The California Environmental Quality Act

In *Gray v. County of Madera*, (--- Cal.Rptr.3d ---, Cal.App. 5 Dist., Oct. 24, 2008), a California Court of Appeal addressed the issue of whether the County erred in certifying an environmental impact report ("EIR") in connection with a quarry project. The Court of Appeal held that the Mitigation Measures in the EIR were inadequate in the areas of the project's impacts on water and traffic and that the EIR failed to properly consider the cumulative impact of the project on noise and the cumulative impacts of the project in general. The Court of Appeal found that the lower court erred in dismissing the lawsuit challenging the County's certification of the EIR.

### Facts

Madera Ranch Quarry, Inc. and W. Jaxon Baker (collectively, "Baker") purchased property in Madera County and applied for a Conditional Use Permit ("CUP") for hard rock mining. Baker planned to develop the property as a hard rock quarry to provide a local source of aggregate for Madera County. Baker later sought a CUP for a hot mix asphalt batch plant.

After the Final EIR was complete, the County's Planning Commission ("Commission") held its first public hearing. Sheryl and Bruce Gray ("Petitioners") submitted an opinion letter from their expert on the inadequacy of the hydrology/water portion of the draft and final EIRs prior to the meeting. The Commission voted to approve the CUPs and recommended that the Board of Supervisors ("Board") approve the other measures necessary to start the project. Petitioners appealed the Commission's decision to the Board and submitted a noise study report for its consideration. The Board rejected the hydrology/water and noise reports as untimely, approved the Project, and certified the EIR.

The Petitioners filed a lawsuit challenging the County's decision to issue the CUPS, to approve a rezoning, and certify the EIR. The trial court found in favor of the County and dismissed Petitioner's lawsuit. Petitioners appealed the trial court's decision.

### Decision

Petitioners alleged on appeal that the EIR failed to fulfill the requirements of the California Environmental Quality Act ("CEQA") because it did not adequately analyze the Project's impacts on, among other things, water supply and quantity, noise, and traffic. The Court of Appeal held that the trial court erred in dismissing Petitioners' lawsuit because the County erred in certifying the EIR.

Petitioners contend that the final EIR failed to adequately respond to the comments submitted by the public and governmental agencies in response to the draft EIR. However, Petitioners failure to respond argument is based in part on comments that were submitted after the 45-day comment period for a draft EIR. A "lead agency may, but is not required, to respond to late comments." The Board did not have a legal duty to respond to the late comments. Therefore, any inadequacy in its response to "late comments is not sufficient to render approval of the CEQA Project ineffective or contrary to law."

The primary area in which the EIR was not adequate relates to Mitigation Measures for the Project's impacts on surface water and groundwater. The EIR identified three potentially significant impacts to surface and groundwater and two less than significant impacts. The EIR set out Mitigation Measures for these impacts.

Mitigation measure 3.9-1 "requires semi-annual

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monitoring of water levels and, if an impact is found, replacement of water for non-consumptive use from existing wells” on the ranch where the project will be located. Mitigation measure 3.9-1a, provides that, if the Project has an adverse impact on water levels of neighboring private wells, Baker may rehabilitate or deepen the private wells or provide a connection to the Project’s water system. Water for consumptive use “would have to come from the remaining production” of a private well, or if inadequate, from Mitigation Measure 3.9-1b, which requires Baker to provide affected parties “with bottled water or potable water from some other source that is verified to meet State and Federal drinking water standards.”

The final EIR concluded that many of the RWQCB’s concerns about the Project’s impacts on the aquifers were unfounded and that the provision of replacement water was an effective Mitigation Measure. The RWQCB informed the County that providing replacement water is not an effective or acceptable Mitigation Measure.

The Court found that the Mitigation Measures are inadequate because “there is no substantial evidence that the measures are feasible or effective,” the “impacts associated with the implementation of the measures themselves were not analyzed in the EIR;” and the Mitigation Measures improperly defer “formulation of specific mitigation strategies until after Project approval.”

The court found that the Mitigation Measures do not provide residents affected by the Project “with the ability to use water in substantially the same manner that they were accustomed to doing if the Project had not existed and caused a decline in the water levels of their wells.” The court found that Mitigation Measure 3.9-1 is not viable because it does not replace the water that will be lost from the neighbor’s “private wells with a substantially similar quality of water.” A problem that could arise from the implementation of the Mitigation Measures provided in the EIR involves a situation where neighboring landowners would need to comply with regulatory oversight because they are required to use non-potable water for the landscape irrigation. In short, the

Mitigation Measures could cause new impacts on the environment and those impacts were not analyzed by the County.

Mitigation Measure 3.9-1b, which calls for replacement water by providing bottled water, is not an effective or viable Mitigation Measure because the EIR does not explain how and in what amount the bottled water will be delivered. Fluctuating water usage is not addressed by the EIR. It also does not address how the water bottles will be recycled or replaced.

The court also concluded that the County improperly deferred the specifics of the Mitigation Measures until after the Project’s approval. Although CEQA allows “a lead agency to defer specifically detailing Mitigation Measures as long as the lead agency commits itself to mitigation and to specific performance standards,” the court concluded that the County failed to commit itself to a specific performance standard. The court found that the County committed itself to a specific goal, replacing the water lost because of the quarry project, but this goal does not amount to a specific performance standard. A specific performance standard would have created a supply mechanism that put the neighbors in a substantially similar situation as they would have had prior to the decline in water levels in their wells.

Furthermore, while the County could have adopted a statement of overriding considerations to address the significant and unavoidable impacts on water, it did not do so. Instead, the County merely “concluded that the proposed Mitigation Measures rendered the water issues less than significant.” The court rejected the County’s conclusion on the water issues because the Mitigation Measures are not viable or effective.

The court held that the County erred when it failed to recirculate the EIR after it amended the Mitigation Measures prior to approval of the Final EIR. The court also held that the EIR failed to adequately analyze the Project’s impacts on traffic because the County improperly deferred the Mitigation Measures relating to traffic.

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The errors in the EIR process were prejudicial. Accordingly, the Court of Appeal reversed the decision of the trial court in favor of the County.

### **Questions**

If you have any questions concerning the content of this Legal Alert, please contact the following from our office, or the attorney with whom you normally consult.

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