

COURT CLARIFIES MITIGATION REQUIREMENTS FOR IMPACTS TO HISTORICAL RESOURCES, REAFFIRMS USE OF EXISTING CONDITIONS AS ANALYTICAL BASELINE

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The Court of Appeal for the Fifth Appellate District of California held this month that the Environmental Impact Report for the Tesoro Viejo mixed use development project in southeastern Madera County failed to comply with the California Environmental Quality Act. The court's opinion articulates a new standard for analysis and mitigation of impacts to archeological sites that are historical resources. It also adopts the Sixth Appellate District's recent holding that agencies do not have discretion to use predicted future conditions as the baseline for analysis of project impacts. Finally, the opinion reiterates that an EIR must contain a full disclosure of uncertainties affecting a project's water supply.

Two nonprofit organizations and the Dumna Tribe challenged the County's December 2008 certification of the Tesoro Viejo EIR, alleging a number of inadequacies under CEQA. The trial court granted the petition for a writ of mandamus on the ground that the project's water supply assessment ("WSA") was inadequate, but denied the other claims. The Court of Appeal affirmed the trial court's finding as to the WSA but reversed the trial court's findings that the EIR's treatment of historical resources and traffic satisfied CEQA. *Madera Oversight Coalition, Inc., v. County of Madera*, No. MCV045353 (5th Dist. 2011).

Mitigation in Place Is Required for Impacts to Archeological Historical Resources Unless Another Method Is 'Superior'

The EIR contained a discussion of prehistoric archeological sites that were determined to be "historical resources" for purposes of CEQA. But one of the mitigation measures in the EIR provided for subsequent "verification" that the sites qualified as historical resources. The Court of Appeal held that this verification process violated CEQA because it could reverse the EIR's determination that the sites were historical resources. The court held that the determination whether a site is a historical resource must be made before certification of the EIR, and neither CEQA itself nor the CEQA Guidelines authorizes any procedure for "undoing" that determination after certification.

Petitioners also challenged the EIR's selection of mitigation measures for impacts to historical sites. They argued that Guidelines section 15126.4(b)(3), which states that "[p]reservation in place is the preferred manner of mitigating impacts to archeological sites," *requires* preservation in place for such sites unless infeasible. The court rejected this interpretation as reading too much into the term "preferred." Nonetheless, the court held that preservation in place must be adopted to mitigate impacts to archeological sites, if feasible, unless the lead agency determines that another form of mitigation is available and provides "superior mitigation" that better "serves the interests protected by CEQA."

Agencies Do Not Have Discretion to Use Predicted Future Conditions as the Baseline for Analysis

Petitioners also attacked the EIR's analysis of traffic impacts on the ground that the EIR used predicted future conditions as the baseline for analysis, rather than the existing physical conditions. The County argued that, under Guidelines section 15125(a), it had the discretion to use a different baseline so long as the EIR described the existing physical conditions. The court rejected that view, adopting the analysis from the Sixth Appellate District's recent decision in

Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council, 190 Cal. App.4th 1351 (6th Dist. 2010).

According to the court, the baseline used in an EIR must reflect existing physical conditions, and lead agencies do not have the discretion to adopt a baseline that uses conditions predicted to occur on a date subsequent to certification of the EIR. However, lead agencies do have the discretion to determine existing physical conditions based on a point in time other than the time the notice of preparation is published or the analysis is commenced (the two points specified in the Guidelines), provided that the time predates certification of the EIR. Because it was unclear from the EIR whether or not the County had actually used existing conditions as the baseline for evaluating the project's traffic impacts, the court found the EIR's traffic analysis inadequate under CEQA.

Water Supply Assessment Must Disclose Uncertainties Affecting Water Sources

The EIR included a WSA, as required by CEQA and section 10910 of the Water Code, which stated that the project would rely on water obtained through a contract with the U.S. Bureau of Reclamation ("Bureau"). But the EIR failed to disclose relevant information that called into question the reliability and availability of water supplied through that contract. This information included a letter from the Bureau stating that the Bureau would object to use of contract water for municipal supply or commercial use. It also included a recent Superior Court decision (the *Farm Bureau* decision) finding the County's WSA for a separate project to be legally inadequate on the ground that Bureau water supply contracts do not provide a right to divert water from the San Joaquin River.

The EIR included a legal opinion letter that countered the positions taken in the Bureau letter and the *Farm Bureau* decision, but neither the EIR nor the WSA itself disclosed the letter or the decision or explained why they would not affect the adequacy of the project's water supply. The court therefore held that the EIR

was inadequate under CEQA because it failed to make a "full disclosure of the uncertainties related to the project's water supply."

Some commenters have characterized this portion of the court's opinion as imposing a heightened obligation on lead agencies to resolve uncertainty surrounding future water supplies. But the opinion does not focus on the actual uncertainty created by the Bureau letter and *Farm Bureau* decision, or any failure to resolve that uncertainty. Instead, it focuses on the County's failure to disclose those sources of uncertainty in the EIR. As such, it merely affirms well-established disclosure requirements under CEQA and does not appear to set a new standard for certainty of project water supplies.

Conclusion

Although the Court of Appeal's opinion articulates a new legal standard for choosing mitigation for impacts to archeological sites, its impact may be limited. The standard appears to require no more than a finding, supported by substantial evidence, that a mitigation measure other than preservation in place is the "superior" method of serving the interests protected by CEQA. The court's "baseline" holding also serves mainly to reinforce existing law, although it highlights the need for lead agencies to clearly and explicitly define the baseline used for analysis. Finally, the court's rejection of the WSA in this case reflects CEQA's fundamental requirement of full public disclosure more than any new demand for certainty regarding water supplies.

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