

CHATTEN-BROWN & CARSTENS LLP

TELEPHONE: (310) 798-2400
FACSIMILE: (310) 798-2402

2200 PACIFIC COAST HIGHWAY, STE. 318
HERMOSA BEACH, CA 90254
www.cbcearthlaw.com

E-MAIL:
ACM@CBCEARTHLAW.COM

August 11, 2015

Planning Commission
Napa County
1195 Third Street, Suite 210
Napa, CA 94559

Re: Syar Expansion Project

Honorable Commissioners:

On behalf of Stop Syar Expansion, we provide the following comments regarding the legal inadequacies of the environmental impact report (EIR) prepared to analyze the impacts of the Syar Industries Napa Quarry expansion project (the “Project”) and of the associated Project approvals. We also join in the comments of other community members and organizations that have submitted objections to the Project and critiques of the EIR.

I. The EIR Should Be Recirculated.

“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 [CEQA Guidelines] Section 15087 but before certification.” (CEQA Guidelines § 15088.5.) New information includes changes to the project, changes to the environmental setting, new data regarding the project’s impacts, and information regarding new alternatives or mitigation measures. Recirculation is required to ensure the public has “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.” (*Ibid.*)

Here, there are several bases upon which recirculation of the EIR is required. First, less than two weeks before the scheduled hearing to approve the Project, the County has provided the public with a substantial amount of new information regarding a new alternative to the Project—the Hybrid Alternative—that would reduce the Project’s footprint and production level. This is inadequate time for the public to have a meaningful opportunity to evaluate this new alternative and the County’s conclusion regarding this alternative’s ability to reduce the Project’s impacts. The EIR should be

recirculated with supporting data regarding this alternative, data which is not included in the staff report packet for the public hearing on the Project.

Additionally, the staff report packet for the August 12, 2015 public hearing also includes new conclusions regarding Project related truck trips and trip length, again without data to support the new numbers. The EIR should be recirculated to reanalyze the Project and all of the alternatives based on the new information and should include evidentiary support for the new conclusions.

Further, after the draft EIR was circulated in 2013, the Sustainable Groundwater Management Act was signed into law by Governor Brown. This legislation requires local agencies to adopt regulations for identifying local groundwater basin's boundaries and to ensure the sustainability of groundwater basins. The Project relies upon groundwater as its sole water supply. The EIR should be recirculated to analyze the Project's ability to comply with and achieve the goals of this new groundwater legislation.

II. Analysis of the No Project Alternative Is Inconsistent, Inaccurate and Inadequate.

The EIR includes a misleading analysis of the environmentally superior No Project Alternative. The EIR and subsequent staff reports attempt to downplay the significant impact reductions of this alternative by failing to acknowledge many of the Project's significant adverse impacts, relying on speculation as to future activities and using contradictory conclusions regarding reserves and local market for aggregate.

A. The EIR's Analysis of the No Project Alternative's Impacts Is Not Supported By Substantial Evidence.

As discussed in Stop Syar Expansion's previous comment letters and the analysis experts have provided to the County on its behalf, the EIR fails to acknowledge or adequately analyze the Project's significant traffic, noise, air quality, water supply, water quality and biological impacts. When the full extent of the Project's impacts is disclosed, the No Project Alternative's ability to substantially lessen those impacts should be analyzed.

Additionally, the one-page of discussion of the potential impacts under the No Project Alternative lacks the required substantial evidentiary support. The EIR states that the No Project Alternative could have potentially significant off-site air quality, traffic, and greenhouse gas impacts above those of the Project after the Quarry has ceased to

operate under existing entitlements, because the demand for aggregate in Napa County would continue and would need to be met by quarries outside of the County. (DEIR 5-4 to 5-5.) This speculative statement is not substantial evidence. (CEQA Guidelines § 15384 [“Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence.”].)

The EIR would require substantial evidence regarding the existing aggregate reserves and the amount of local demand for aggregate in order to evaluate the No Project Alternative’s impacts. It has neither. Instead, the record contains unsupported and conflicting statements regarding the reserves and the local demand. The Project applicant has stated at some points that there is only three to five years left of aggregate at the Project site under current entitlements. However, the County states that without the new mining permit, which would require mining to cease in 35 years, mining would continue indefinitely at the site, identifying this as a basis for rejecting the No Project Alternative. These conflicting statements make it entirely unclear what the remaining reserves are and how long mining would continue under the No Project Alternative. The only “evidence” to support these claims are conclusory and self-serving statements made by the Project applicant. The County has admitted that it has not independently evaluated or received data to analyze the reserves.

The record also lacks evidence regarding the amount of local Napa County demand for aggregate. The EIR states that a majority of the aggregate is trucked to American Canyon and then distributed throughout the Bay Area, thus it is not local demand driving the need for increased production. The August 12, 2015 staff report attempts to revise this conclusion, but lacks evidentiary support beyond the unsupported claims of the Project applicant regarding the percentages of aggregate that were sold in the County in the past three years.

Further, the EIR fails to separately analyze the reduction in impacts for the No Project Alternative that would be associated with the elimination of the reclaimed asphalt plant.

B. An Alternative Need Not Fully Meet All Project Objectives.

The EIR repeatedly states that the main objective of the mine expansion Project is to provide a locally available source of aggregate for Napa County. (DEIR 3-2.) It appears the County is rejecting the No Project Alternative in part for its failure to fully

meet these project objectives. As an initial matter, under CEQA, an alternative does not need to fully meet every Project objective. It is well settled that “[i]f there are feasible alternatives or feasible mitigation measures that would accomplish *most of the objectives* of a project and substantially lessen the significant environmental effects of a project subject to CEQA, the project may not be approved without incorporating those measures.” (*Center for Biological Diversity, supra*, 166 Cal.App.4th at 1371 fn 19, citation to Pub. Resources Code §§ 21000(g), 21002, Guidelines § 15091.)

Additionally, as set forth above, without substantial evidence regarding the local demand for aggregate and the amount of reserves under the existing entitlements, the County cannot make a finding that the No Project Alternative fails to meet this objective.

III. The EIR Fails to Compare the Project to Existing Baseline Conditions.

“To decide whether a given project's environmental effects are likely to be significant, the agency must use some measure of the environment's state absent the project, a measure sometimes referred to as the 'baseline' for environmental analysis.” (*Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 315.) Without an accurate baseline description, “analysis of impacts, mitigation measures and project alternatives becomes impossible.” (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 953.)

Although there is no “uniform, inflexible rule for determination of the existing conditions baseline”, it “must ordinarily be the *actually* existing physical conditions.” (*Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439, 448-49.) The normal baseline is the real conditions on the ground. Despite this, the EIR instead relies on models conducted at other sites to analyze the baseline air quality impacts. It also relies on the standard trip length from the County’s traffic model to analyze the baseline traffic conditions. The EIR provides no basis for relying on these modeled conditions as the baseline instead of measuring the “*actually* existing physical conditions”, in violation of CEQA.

The EIR also fails to disclose existing water usage at the Project site, making it impossible to assess whether the Project would have significant water supply impacts as compared to the baseline conditions. The conditions of approval disclose that data for water usage and groundwater levels will not be collected until *after* Project approval. (Conditions of Approval p. 4.) This data must be gathered and assessed now to allow for an accurate evaluation of the Project as compared to existing conditions and usage.

IV. The EIR Fails to Include Feasible Mitigation Measures.

CEQA prohibits approval of projects with adverse environmental impacts if there are feasible mitigation measures that would substantially reduce a project's significant impacts. (Pub. Res. Code § 21002; CEQA Guidelines § 15021(a)(2).) The CEQA Guidelines require an agency to "Disclose to the public the reasons why a governmental agency approved the project in the manner the agency chose if significant environmental effects are involved." In order to implement this policy, the CEQA Guidelines specify that:

A public agency may approve a project even though the project would cause a significant effect on the environment if the agency makes a fully informed and publicly disclosed decision that:

(a) There is no feasible way to lessen or avoid the significant effect..."

(CEQA Guidelines § 15043, emphasis added.)

Feasible is defined as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Public Resources Code § 21061.1)

The Project would have significant air quality and greenhouse gas emission impacts. Thus, the County cannot approve the Project if there are feasible mitigation measures that would eliminate or substantially lessen these impacts. The Project's significant impacts are due in part to the reliance upon outdated equipment that is now operating at a Tier 0 or Tier 1 levels of emissions controls. As proposed, the Project would be allowed to continue to operate 39 percent of its equipment at Tier 0 levels, the equipment with the dirtiest level of emissions. (Mitigation Monitoring and Reporting Program.) While the Project would need to upgrade 72 percent of its operations to Tier 2 to increase production above 1,100,000 tons per year, only 5 percent would need to upgrade to Tier 3. As facilities throughout the state have upgraded well beyond these levels of pollution control, it is clearly feasible to require mitigation in form of upgrading all equipment to Tier 2 and 3 levels and to upgrade a majority of the equipment to Tier 3 levels.

V. The EIR Fails to Include Fully Enforceable Mitigation Measures.

CEQA requires that mitigation measures “be fully enforceable through permit conditions, agreements, or other legally-binding instruments.” (CEQA Guidelines § 15126.4(a)(2); see also *Lincoln Place Tenants Ass'n v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1508 [“Mitigating conditions are not mere expressions of hope.”]) “The purpose of these requirements is to ensure that feasible mitigation measures will actually be implemented...and not merely adopted and then neglected or disregarded.” (*Federation of Hillside and Canyon Association v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261, italics omitted.)

Additionally, a project applications previous compliance record is relevant to the likelihood of future compliance with mitigation measures and conditions placed upon it and to the sufficiency of such measures. (*Laurel Heights Imp Ass'n v. Regents of the University of California* (1988) 47 Cal. 3d 376, 420 [“Because an EIR cannot be meaningfully considered in a vacuum devoid of reality, a project proponent's prior environmental record is properly a subject of close consideration in determining the sufficiency of the proponent's promises in an EIR.”].)

Here, the EIR fails to include the required fully enforceable mitigation measures, particularly in light of the Project applicants abysmal record of compliance with previous and existing conditions intended to reduce environmental impacts. As discussed in letters previously submitted by Stop Syar Expansion and other community members, the Project applicant has repeatedly violated the Clean Water Act, County noise limits and air emission standards.

For many of the Project’s potentially significant impacts, the EIR finds the impacts to be mitigated to a less than significant level based solely on mitigation measures requiring the Project applicant’s self-monitoring and reporting. For example, the Mitigation Monitoring and Reporting Program requires only self-monitoring and reporting for the following potentially significant impacts: water usage, groundwater levels, hours of use of NOx producing equipment, particulate matter emissions, health risks associated with air emission and noise levels.

Despite relying on production level limits and shortened trip length for local use of the majority of aggregate to support a finding that air quality, greenhouse gas and traffic impacts will be less than significant, the EIR fails to include any enforceable mitigation measures to ensure these product limits will be abided by and or requirement for additional mitigation if trip lengths exceed analyzed length.

Additionally, the Project applicant is allowed to operate the asphalt plant 7 days a week, 24 hours a day if the applicant deems it is necessary to do so and the applicant determines it would not unduly disrupt the surrounding sensitive receptors. This is not a fully enforceable measure for reducing the significant air quality, health, noise and traffic impacts associated with operation of the asphalt plant. Any other maintenance or repair work at the Project is allowed at any time if reported by the applicant to be under acceptable noise limits. Relying on self-reporting is particularly problematic given the applicant's history of non-compliance.

VI. The EIR Improperly Defers Development of Mitigation Measures.

“Impermissible deferral of mitigation occurs when an EIR puts off analysis or orders a report without either setting standards or demonstrating how the impact can be mitigated in the manner described in the EIR.” (*Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 236; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.) When mitigation is deferred, the public and decisionmakers are deprived of the opportunity to evaluate its effectiveness or desirability prior to project approval. (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92 [EIR inadequate when mitigation depends “upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR.”].)

The EIR includes several improperly deferred mitigation measures, including, but not limited to:

- Due to the failure to assess existing water usage and groundwater levels until after Project approval, the conditions of approval improperly defer the development of mitigation for potential water supply impacts until after Project approval. (COA p. 5.)
- A Mine Reclamation Plan will not be prepared until after Project approval. (COA p. 2.)
- The required Invasive Species Management Plan will not be prepared until after Project approval. (Mitigation Measures p.11.)

Conclusion

For all of the reasons set forth above, and as set forth in Stop Syar Expansion's previous comment letters and the comment letters of other community members, groups and agencies requesting additional analysis and mitigation of the proposed Project, we

Napa County Planning Commission

August 11, 2015

Page 8 of 8

urge the County deny the application for the expansion of mining and asphalt production.

We also request you deny certification of the EIR for the Project until it has been revised and recirculated to comply with the requirements of the California Environmental Quality Act.

Thank you for your time and consideration in this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Amy Minter".

Amy Minter