

# *Defensible Strategies for Mitigation Measures and Deferral of Details*

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# Agenda

- Review requirements
- Court decisions
- Discussion
- Guiding principles



# Definition of Mitigation

## Section 15370 of the Guidelines:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.

# Other CEQA Guidelines on Mitigation

CCR §15126.4 provides guidance:

- Measures must be fully enforceable through conditions or other binding instruments
- Mitigation not required for less-than-significant effects
- Measures must comply with principles of “essential nexus” (*Nollan v. Coastal Commission* case) and “rough proportionality” (*Dolan v. City of Tigard* case)
- Should not defer formulation of mitigation until some future time, but may specify performance standards



# Typically Adequate Mitigation

- Physically modifying the project, such as design changes to avoid or substantially reduce an effect
- Limiting project activities, such as operational limits like seasonal or daily time restrictions
- Constructing improvements intended for mitigation, such as BMPs
- Compensatory actions, such as replacement of lost habitat through restoration or enhancement

# Sometimes Adequate Mitigation

- Monitoring to ensure impacts do not occur, which can be adequate as long as there is commitment to a mitigating response (adaptive management)
- Other agency's permit approvals, as long as compliance would reasonably result in mitigation, such as 404 permit
- Conservation easements to protect resources of the same type eliminated by a project. Adequate in most cases, but be aware of facts, such as whether easement-protected resources may be in harm's way or not

# Inadequate Mitigation

- Monitoring without a mitigating response
- Compliance with existing non-discretionary law, such as the Uniform Building Code
- Future study to determine if a mitigation measure is needed, or what type is required
- Non-committal verbs in the mitigation, such as “may” do this, or “should” do that

# Duty to Mitigate

If a significant effect is identified, lead agency must:

- Describe feasible mitigation measures, if available
- If more than one are available, discuss each and describe reasons for selection
- Adopt feasible mitigation to reduce the effect to a less-than-significant level
- If none (or not enough) is available, EIR must say so and adopt all mitigation that is feasible
- Can find that feasible mitigation is the jurisdiction of another agency that can/should or has adopted them



# Deferral of Mitigation Details

- Time constraints, applicant attitude, process sequences, or resource limitations can hinder mitigation specificity
- Feasibility and/or effectiveness of mitigation can be questioned when details are missing
- What is and is not allowed by CEQA? - several cases help define the rules, including most recent cases

# Sundstrom v. County of Mendocino (1988)

- ND on a commercial recreation project in Mendocino County; 5 acres; hotel, restaurant, sewage treatment plant
- Initial study was seriously flawed with conclusions, but no analysis – the classic naked checklist
- Checklist referred to the need for mitigation, but ND contained no description of measures
- Use permit approved with two conditions: hydrology study and erosion study
- Court overturned the ND and said County cannot defer environmental assessment or identification of mitigation based on some future study

# Sacramento Old City Association v. City of Sacramento (1991)

- EIR on an expansion of downtown Sacramento convention center by 130,000 s.f.



# Sacramento Old City Association v. City of Sacramento (1991) cont.

- EIR was full-scope addressing 14 environmental topics and 5 design alternatives
- Shortage of parking (2,600 spaces) cited as a significant effect and mitigation options were discussed
- City committed to adopt a transportation management plan to "reduce area parking to 90 percent occupancy," with a menu of possible implementing actions
- Court upheld EIR because City committed itself to mitigating parking impacts with performance criteria



# Gentry v. City of Murrietta (1995)

- ND tiered off community plan EIR for 198-unit single family project in Murrietta, Riverside County
- Numerous mitigation measures were among 129 conditions
- Measures included future adoption of: grading plan, drainage improvement plan, plan to avoid downstream property damage, all to meet City criteria as approved by City engineer
- Court upheld mitigation measures where the City recognized significant impacts, committed to mitigation actions, and defined performance criteria

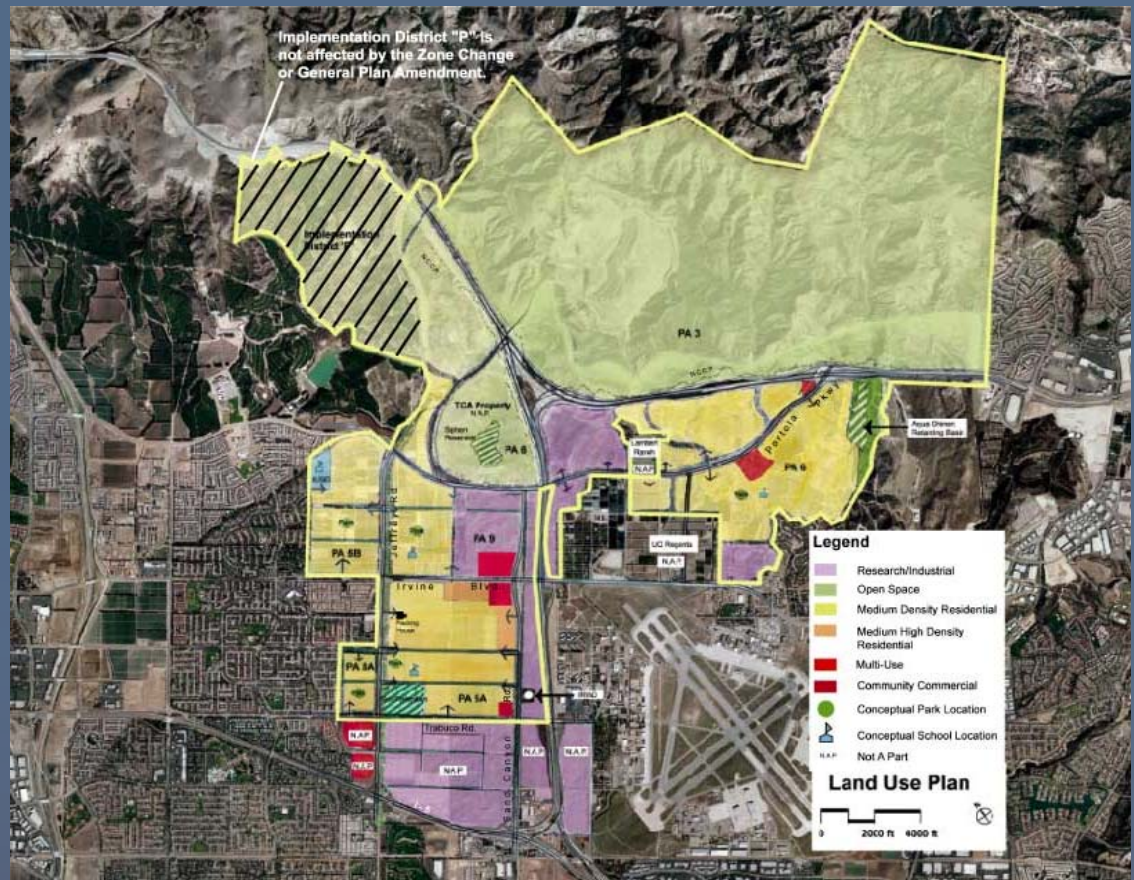


# Riverwatch v. County of San Diego (2000)

- EIR for a rock quarry on Rosemary's Mountain, San Diego Co., next to SR 76
- SR 76 widening required for project; it was a Caltrans project, not proposed by applicant
- EIR identified significant encroachment on floodplain of San Luis Rey River from SR 76, described bank protection mitigation, with future HEC-2 modeling to define details
- Court allowed deferral of HEC-2 and mitigation design details, saw HEC-2 as a design refinement model
- Do not need “entire extent and precise detail” of the mitigation, if details can't be known, but success can still be reasonably concluded

# Defend the Bay v. City of Irvine (2004)

- Program EIR for 7,743-acre GP amendment in Irvine, mixed use, 17,000+ jobs, 12,000+ homes (North Sphere area).



# Defend the Bay v. City of Irvine (2004) cont.

- Approved HCP/NCCP covered the plan.
- Significant effects noted in EIR to least Bell's vireo habitat, two colonies of foothill Mariposa lily, suitable habitat for western spadefoot toad (actual presence unknown)
- Conditions adopted requiring, prior to tentative map approval, mitigation plans acceptable to DFG/USFWS for vireo and lily, consistent with adopted HCP/NCCP
- Conditions adopted requiring pre-construction survey of ponds during breeding season to confirm if toads are present, and if so, construction of replacement breeding pools on nearby protected land
- Deferral of actual mitigation plans and details of potential breeding pond replacement was acceptable



# Ocean View Estates Homeowners Assoc. v. Montecito Water Distr. (2004)

- MND on cover over a drinking water reservoir
- When addressing a related mitigation question, the court offered this statement:

“Mitigation measures stated in an MND need not specify precise details of design. Having recognized a significant environmental impact and having determined that mitigation measures reduce the impact to insignificance, the MND may leave the details to engineers.”

# Endangered Habitats League v. County of Orange (2005)

- EIR on 162-unit subdivision in Santa Ana Mountains of eastern Orange County
- Argued improper deferral of many measures
- Court upheld all except noise mitigation deferral
- Mitigation called for acoustical analysis before grading permit approval with recommendations to be followed and a second report on proposed structures
- EIR lacked description of performance standards and examples of noise mitigation options available
- Other deferrals had adequate performance standards



# Woodward Park Homeowners Assoc. v. City of Fresno (2007)

- EIR on 39-acre office and shopping center project one block from SR 41/Friant Road



# Woodward Park Homeowners Assoc. v. City of Fresno (2007) cont.

- Required general plan, community plan, and zoning amendments to permit the shopping center part
- EIR found PM peak hour trips would significantly affect SR 41 and two interchanges
- Dispute arose over cost-share estimate for mitigation. Caltrans: \$445,000 City: \$31,000
- City refused to require mitigation, because Caltrans did not provide requested nexus study for fee

# Woodward Park Homeowners Assoc. v. City of Fresno (2007) cont.

- City also argued project peak hour trips were less than build-out under current zoning (600,000 s.f.)
- Applicant, sensing trouble, volunteered to pay \$45,000 fee, but it did not get approved in resolution
- Court found the City's actions to be illegal.
- Cannot refuse to mitigate because another agency did not provide information.
- Cannot justify refusing mitigation by comparing to a potential future buildout scenario with current zoning

# San Joaquin Raptor Rescue Center v. County of Merced (2007)

- EIR on aggregate mine expansion near Le Grand
- Vernal pools, with *presumption* that special-status plants and fairy shrimp species were present in and near pools and swales
- Mitigation: provisional 300-foot buffer, pre-construction protocol survey, and future preparation of a management plan (if presence confirmed) with agency concurrence.
- Goal of management plan: “maintain integrity and mosaic of vernal pool habitats”



# San Joaquin Raptor Rescue Center v. County of Merced (2007) cont.

- Generalized goal fell short of specific standards and performance criteria needed for adequacy
- No explanation why protocol survey and management plan were impractical to do for EIR
- No potential alternative mitigation approaches presented in the management plan
- EIR approach “leaves the reader in the dark” about land management steps and criteria they needed to address
- Conclusion: EIR “improperly deferred formulation of significant aspects of mitigation”



# San Joaquin Raptor Rescue Center Take Home Messages

- Explain why deferred action is not practical during the EIR process
- Include “specific criteria or standard of performance”
- Describe alternative (i.e., candidate) actions and why they would effectively mitigate the significant impact

# Gray v. County of Madera (2008)

- EIR for Madera Ranch Quarry Project



# Gray v. County of Madera (2008) cont.

- 125 ac. hard rock quarry, 30 ac. asphalt batch plant on ranch with Williamson Act
- Issue: adequacy of mitigation for water impact, i.e., water level decline in wells
- BOS changed a measure in findings to an approach not discussed in the EIR: conduct hydrology study first; build water system, if needed.



# Gray v. County of Madera (2008)

## cont.

- Court: no substantial evidence about viability and feasibility of measures
- Mitigation adequacy issues:
  - Will deepened wells yield enough water?
  - Viability of bottled or tanks to meet needs
  - Project water not potable, needs treatment
  - Hydrology study defers mitigation
  - “Replace water” not a performance standard
  - Full water system not studied at all in EIR



# CNPS v. City of Rancho Cordova (2009)

- EIR on “The Preserve” in Rancho Cordova
- 530-ac. planned community located in vernal pool habitat area
- 14.1 ac VP fairy shrimp, 15.65 ac VP tadpole shrimp habitat lost. Also, indirect impacts.
- VP mitigation: no net loss of habitat (ac. and function), adopt a mitigation and monitoring plan, but no specific location of off-site mitigation

# CNPS v. City of Rancho Cordova (2009) cont.

- Court upheld EIR approach; no need to specify off-site VP locations, ala SOCA not specifying parking locations
- City adequately identified types of actions and supported feasibility
- CNPS pointed to disagreements about effectiveness from USFWS and DFG as reason no substantial evidence existed. Court: disagreement is not enough to overturn.

# CBE v. City of Richmond (2010)

- Upgrade Chevron refinery to refine more grades of crude oil



# CBE v. City of Richmond (2010) cont.

- Added/upgraded: hydrogen plant, power plant, catalytic reformer, others
- Issue: deferral of GHG mitigation
- Unlucky timing: NOP 2005, AB 32 2006, DEIR 2007, AG sues SB County 2007
- 898,000 MT CO<sub>2</sub>, in DEIR and FEIR, significance “too speculative,” because of “no significance criterion”



# CBE v. City of Richmond (2010) cont.

- Mitigation proposed in a May 2008 revised EIR after the FEIR:
  - GHG reduction plan within 1 year of approval
  - Reduce GHG emissions to baseline
  - “Handful” of candidate actions, e.g., heat exchangers, sequestration, engine replacement, “transportation smart” development

# CBE v. City of Richmond (2010)

## cont.

- Inadequacies the Court found:
  - Public could not review mitigation
  - Formulation of actions delayed 1 year
  - “No net increase” is just a general goal
  - No evidence of mitigation effectiveness
- Court wants:
  - Impact analysis and mitigation must be defined early in process for public review
  - Specific, “objective criteria” to judge success
  - Evidence to assure mitigation would be both “feasible and efficacious”

# CBE v. City of Richmond (2010)

## Take Home Messages

- Significant impact conclusion and mitigation must be defined early in process to allow for public review
- Must have specific, “objective criteria” to judge success (e.g., here, quantified estimates of reductions for each potential measure)
- EIR must include evidence for “assurance” that mitigation would be both “feasible and efficacious” (raised the bar!)

# Oakland Heritage Alliance v. City of Oakland (2011)

- Revised EIR, in response to Superior Court writ, on 64-ac. mixed use project
- Complaint: improper deferred formulation of seismic impact mitigation
- Mitigation:
  - Conduct site-specific geotechnical investigations
  - Comply with site-specific geotechnical recommendations during detailed design
  - Comply with building code seismic features



# Oakland Heritage Alliance v. City of Oakland (2011) cont.

- Compliance with regulations is proper where reasonable to expect mitigation
- City's Building code was rigorous, prescriptive, with specific performance standards and authorities of city staff
- Revised EIR contained extensive descriptions of requirements and how they achieve seismic safety

# Oakland Heritage

## Take Home Messages

- Compliance with rigorous regulatory process backed by specific performance criteria can be acceptable
- Acceptable to defer studies, if they are related to details of design
- Provide evidence to support why compliance would feasibly mitigate impacts

# SCOPE v. City of Santa Clarita (2011)

- Hospital campus expansion, nearly doubling from 340,000 sf to 667,000 sf.
- 2005 DEIR, 2007 FEIR, 2008 revised DEIR with GHG analysis, 2008 recirculated DEIR, 2008 FEIR
- Complaint: Unavoidable significant conclusion for transportation GHG not supported by a “scintilla” of evidence

# SCOPE v. City of Santa Clarita (2011) cont.

- SCOPE contended EIR did not address AG's list of 50 GHG mitigation measures (submitted by SCOPE as a comment)
- Court called AG's list "general" measures, not specifically directed at this project; need not evaluate all possible mitigation
- City did include several measures and quantification of estimates.



# Madera Oversight Coalition v. County of Madera (2011)

- EIR on Tesoro Viejo development, 1,579 ac. mixed use project
- Issue: deferral of mitigation related to archaeological resources
- 4 prehistoric, 3 historic sites – 5 determined to be Register-eligible
- Mitigation called for verifying Register eligibility of previously recovered artifacts from one site, before mitigation actions are defined
- Subsequent verification violates CEQA; it either defers mitigation, at best, or undoes EIR conclusion

# San Diego v. Board of Trustees, CSU (2011)

- SDSU expansion plan EIR, adding buildings for 10,000 students over time



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# San Diego v. Board of Trustees, CSU (2011) cont.

- Substantial traffic impacts; deemed unavoidable, because neither CSU nor City could assure improvements
- Issue: deferred mitigation to develop a traffic reduction plan
- Mitigation: Develop, in consultation with SANDAG and MTS, a campus TDM program to implement by 2012 to have “balanced approach to mobility” and goal of “reducing vehicular trips.”



# San Diego v. Board of Trustees, CSU (2011) cont.

- Mitigation “does no more than require a report.” “At best, an amorphous measure.”
- Flaws:
  - No specific actions, no performance criteria
  - Only generalized goal to reduce trips
  - No chance for public to review specific measures
- Court: should defer project approval until mitigation is fully developed and reviewed

# Key Questions

- Are details feasible to know now?
- Level of commitment: To study? To consult? To define later? To implement?
- Performance standards: What is too general? What is specific enough?
- How much can you rely on regulatory mandates and future permits?

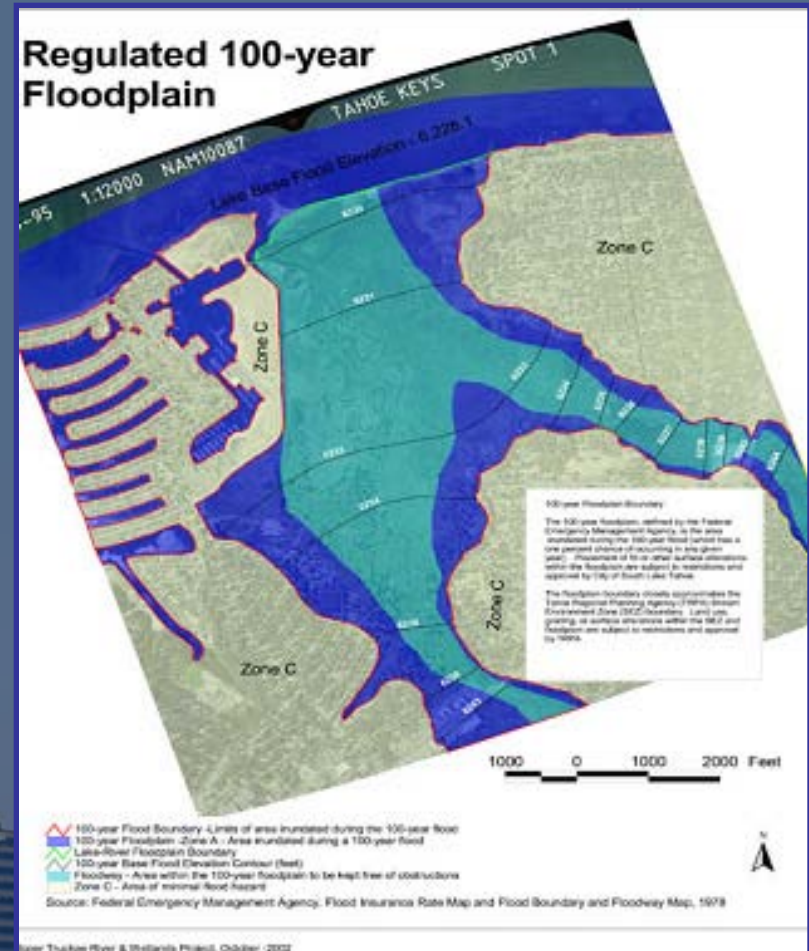
# Adequate Mitigation Exercise

Project: New subdivision in watershed, near 100-yr floodplain

Impact: Increased runoff volume and flow rate into floodplain

Which are adequate mitigation?

1. Design and construct onsite detention basin
2. Design basin and set financial bond
3. Commit to design and build as a condition of approval
4. Recognize effect and commit to assess magnitude of runoff and to design an appropriate basin before grading approval
5. Recognize effect and defer to flood district mandate to solve
6. Recognize potential effect and commit to study to determine severity and mitigation



# Mitigation Deferral Principles to Live By

- **Don't:** Defer adoption of mitigation or formulation of the significant aspects of mitigation until future study
- **Don't:** Rely just on general goals of mitigation
- **Do:** Recognize significant effect, commit to actions
- **Do:** Explain why details are not practical to describe now
- **Do:** Be specific about performance criteria (quantified, if feasible and appropriate)
- **Do:** Offer alternative approaches as candidate actions
- **Do:** Defer design and engineering detail, if necessary
- **Do:** Ensure that the public has a chance to review deferred mitigation approaches



# Thank You!

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