

It Looks Like Mitigation. It Sounds Like Mitigation. But Can It Be Part of the Project?

Lotus v. Department of Transportation - A Practitioner's View

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Preface

In January 2014, the First District Court of Appeal reversed a Humboldt County Superior Court ruling and determined that the California Department of Transportation (Caltrans) did not adequately analyze the significance of a proposed highway realignment's impacts to the root systems of old-growth redwood trees in Richardson Grove State Park. Missing from the environmental impact report (EIR) were the identification of a threshold of significance regarding root zone damage and an analysis of impact significance, even though disturbance in and around the root zone of the trees was specifically described and mapped.

Confounding the omission was the inclusion in the project description of environmental protection measures the court viewed as mitigation, rather than as part of the project, which created improper short-circuiting of California Environmental Quality Act (CEQA) analytical and disclosure and requirements. The EIR described these features as "avoidance, minimization and/or mitigation measures" that "have been incorporated into the project to avoid and minimize impacts, as well as to mitigate expected impacts." However, the EIR neither addressed the significance of impacts to the root systems nor specified that the impact-reducing features were actually mitigation commitments proposed in response to a significant effect.

A few months have passed since this decision. During this time, discussion has ensued in practitioner circles about whether the decision somehow impedes the use of impact minimization and avoidance features in a project description, which has been a long-used, venerable, and effective environmental planning practice. We explore the premise further in this paper, and express the opinion that, when properly carried out, the practice of including environmentally protective features in a project description can continue, but with important caveats.

Introduction

For many years, experienced lead agencies and project applicants have incorporated "environmental protection features," or the like, into project descriptions prior to conducting CEQA impact analysis. These measures have been typically included as part of the project description and are intended to result in fewer or less severe environmental impacts. This approach may be pursued because it is good environmental planning, an expression of an agency's environmentally sensitive mission, a means to streamline the CEQA process, or all of the above. One example would be a project with a potentially significant effect caused by filling wetland habitat. During project planning or preliminary lead agency review, the proponent may, under this principle, commit to a modified project design that avoids or minimizes the filled area or to wetland habitat restoration or replacement with a specified acreage ratio and habitat quality character to compensate for unavoidable fill. Not only can the significant environmental impact be avoided when considering environmental protection features as part of the project, the cost and time necessary to prepare an EIR or mitigated negative declaration (MND) may also be reduced or avoided. At the least, under this principle, mitigation monitoring and reporting requirements can be streamlined or eliminated if, rather than

proposing mitigation measures in response to the impact analysis, identical measures are incorporated into the project description.

The Questions from *Lotus*

The 2014 decision, *Lotus v. Department of Transportation*, 223 Cal. App.4th 645, now makes us ask several questions: Is this practice permissible? If so, under what conditions? Can project descriptions be modified to avoid significant impacts, and thereby reduce CEQA documentation requirements? Can you reduce project impacts by design changes before analyzing them in a CEQA document?

There has been scant guidance on this issue up to now. Not surprisingly, then, where there is a void, the State courts are asked to fill it. In the setting of the majestic coast redwoods of Richardson Grove State Park, *Lotus v. Department of Transportation* provides some answers.

Key Facts

Caltrans proposed to realign a winding, one-mile stretch of U.S. Highway 101 to improve truck traffic safety where the highway passes through the redwood forest in the park. The park is home to old growth redwoods, some of which stand 300 feet tall and are thousands of years old. The project would not require removal of any of the old growth redwoods (although some younger trees would be removed), but would result in construction within the root zones of 74 trees ranging in diameter from 18 inches to 15 feet. According to the EIR, “About 41 redwood trees thirty inches or greater in diameter within the park would have fill placed within the structural root zone. The maximum depth of fill on these redwoods would be three and a half feet.” The EIR also described the physical details of construction disturbance within the structural root zone of various sized trees in the park. The project description included design features, such as use of light-weight cement, that were intended to reduce potential environmental impacts to these majestic trees, along with non-design, impact-reducing or offsetting features. The non-design actions included use of special hand-construction techniques in the root zones, commitment to restore habitat, and implementation of invasive plant removal.

As stated in *Lotus*:

The EIR also describes “avoidance, and minimization and/or mitigation measures” that “have been incorporated into the project to avoid and minimize impacts as well as to mitigate expected impacts.” These include, “M-1: Restorative planting of 0.56 acre of former US 101 roadbed alignment...[¶] M-2: To offset the impacts to the trees where construction occurs within the structural root zone, mitigation will be provided to increase amount of invasive plant removal. A contract with the California Conservation Corps will be established to provide 300 hours a year for four years ... Crew to be directed at the direction of the California Department of Parks and Recreation” ... “[1] An arborist shall be present to monitor any ground disturbing construction activities. [2] All excavation below the finished grade within the setback equal to three times the diameter of any redwood tree shall be done with shovels, pickaxes, or pneumatic excavator or other methods approved by the construction engineer to minimize disturbance to or damage to the roots...”

The EIR describes, in tabular form, the type of construction activity that could occur in the root zone of each of the affected redwood trees, but does not analyze consequences to the trees or determine impact significance. Instead, the EIR relies on the incorporation of the environmental protection features into the project description to conclude that any potential impacts of the project on the trees would be less than significant (without the need for other mitigation). Importantly, the EIR includes no standards/thresholds of significance for impacts to redwoods. This is critical; without a significance threshold, there is no means by which to conclude whether impacts would or would not be significant, and findings under CEQA Section

21081 cannot be properly made (i.e., whether significant impacts are reduced to a less-than-significant level and, if so, how). The court makes it clear that thresholds were available. The court cites, for instance, the California State Parks Natural Resources Handbook (available to Caltrans during the EIR process), which describes the probability of root damage by depth and type of activity, risk to tree health, etc. The Handbook states: “Construction activities in close proximity to trees can wound or destroy tree roots, the closer the activity to the tree trunk, the higher the probability that the tree will suffer injury. This includes soil disturbance from 0 to 3 foot depth...” No thresholds of significance were included in the EIR, notwithstanding the availability of the Handbook or other criteria.

The Decision

Omitting analysis of the significance of impacts on the root zone of the redwood trees was fatal, which was the initial reason the court decided to overturn the EIR. This was the fundamental flaw of the environmental document, as demonstrated by the title of this section of the decision: *“The EIR fails to comply with CEQA insofar as it fails to evaluate the significance of the project’s impacts on the root systems of old growth redwood trees adjacent to the roadway.”*

In addition, the decision goes on to explain that a compounding error was the reliance on measures that were included in the project description, but should have been presented as mitigation measures in response to the identification of significant environmental effects. The court describes what constitutes mitigation under CEQA (i.e., avoiding, minimizing, rectifying, reducing, and compensating for a significant impact). In a key statement, the court says:

As the trial court held, the “avoidance, minimization and/or mitigation measures,” as they are characterized in the EIR, are not “part of the project.” They are mitigation measures designed to reduce or eliminate the damage to the redwoods anticipated from disturbing the structural root zone of the trees by excavation and placement of impermeable materials over the root zones. By compressing the analysis of impacts and mitigation measures into a single issue, the EIR disregards the requirements of CEQA.

According to the court, this “short-cutting of CEQA requirements...precludes both identification of potential environmental consequences arising from the project and also thoughtful analysis of the sufficiency of measures to mitigate those consequences.” CEQA requires a lead agency to consider a proposed project, evaluate its environmental impacts and, if significant impacts are identified, to describe feasible mitigation measures to reduce the impacts. The court explained: “Simply stating there will be no significant impacts because the project incorporates ‘special construction techniques’ is not adequate or permissible.”

What Does this Mean?

Does this mean the proposed project, as initially described, cannot be refined to reduce impacts prior to the required CEQA analysis and significance findings? Has the court thrown good environmental planning out the window? Not at all. In fact, the court, in an instructive footnote, acknowledged some protective features that legitimately can be part of the project description, but stated that the line between project design and mitigation is not always clear. In this case, the use of certain lighter weight pavement base materials, which were proposed as a design feature to minimize excavation depth, reduced potential impacts to the root zone of the redwoods. The court indicated it would have been “nonsensical to analyze the impact of using some other composition of paving and then to consider the use of this particular composition as a mitigation measure.” In other words, pavement material proposed to reduce excavation impacts of highway construction was a legitimate element of the project description in this circumstance.

Can environmental protection features, then, still be included in the project description for purposes of good environmental planning and impact reduction or avoidance? We believe, based on a careful reading of this decision, that a project *can* include environmental protection features in a project description, but with certain qualifications.

First, including environmental protection features in a project description does not relieve the lead agency of the obligation to adequately analyze the potential significant environmental impacts of the project, even related to the issue that a protection feature is intended to address. The CEQA document—EIR, MND, or ND—should analyze the impact, identify the relevant threshold of significance, address whether the threshold would be exceeded and why, and describe how the “environmental protection feature” would, based on substantial evidence, maintain the effect at a less-than-significant level. Also, based on the court’s decision in *Lotus*, it would be important to discuss whether additional or other more effective, feasible measures would be available.

Second, an environmental protection feature must be credible as a true component of the project plan or design, rather than a mitigating action that is separate from the project itself, and responsive to the project’s impacts. The distinction between project design features that protect the environment and measures that should be considered mitigation is, at times, difficult to tease out. Returning to the example of a project that includes wetland impacts, if the project plan is refined before release of a CEQA document to avoid impacts by locating all facilities outside the footprint of the wetlands, would the site plan revision be a part of the project or considered to be mitigation? We believe, in this example, the project site plan layout can legitimately be considered part of the project description. This is good project site planning. If it avoids wetland fill, the environmental analysis would conclude that the proposed project, as designed, would not adversely affect the wetland. Alternatively, what if the wetland is occupied by an endangered species that relies on both the wetland and surrounding upland, but impacts to the species could be avoided by monitoring construction activities, installing a barrier, capturing and relocating individuals of the species, or restoring nearby habitat? Our view is that these are special actions that meet the definition of mitigation measures and are arguably not a part of the basic project. Unlike facility location, layout, or design, these measures involve more than adhering to a site plan or project design; they are special actions needed to limit the degree and magnitude of the project impacts or compensate for them. Further, these measures would each need to be analyzed for effectiveness in reducing the impact and a mitigation monitoring or reporting plan would need to be adopted.

Other Circumstances Not Covered In *Lotus*

The *Lotus* decision addressed a specific set of facts, but it did not answer all the questions about the practice of employing environmental protection features in a project description. Between the ends of the conceptual spectrum of (1) a clearly legitimate component of a project plan or design and (2) an obvious mitigation measure, such as a compensatory action or special impact-reducing action in response to a significant impact, is the gray area of other concepts and fact-situations. For instance, highly standardized, environmentally protective, construction practices are often included as part of project implementation, i.e., “best management practices,” or “BMPs.” BMPs are often prescriptive and sufficiently standardized to be generally applicable, not requiring special tailoring to a project situation. Another common example of the use of environmental protection features in a project description is the “self-mitigating” community or resource management plan, e.g., a city or county general plan, state park general plan, or wildlife area land management plan. They can contain environmentally protective refinements in planning policies and implementing actions that are included to avoid significant effects.

These are important examples of common practices that are not specifically addressed by *Lotus*. We believe that there may be room to include standardized measures required by law or regulation in the project description and environmentally protective policies and actions in a proposed plan; however, we do not

believe this eliminates the obligation to evaluate potential environmental effects and whether the project measures effectively reduce significance impacts.

Perhaps, these are lingering voids in CEQA guidance to be filled by the court another day...

Practice Pointers

In short, if an environmental protection feature modifies physical elements of a project, as expressed in its site plan or design, we believe it is permissible (and good environmental planning) to include the feature as part of the project description. Therefore, the significance determination would take into account the environmental protection afforded by that feature.

In response to the *Lotus v. Department of Transportation* decision, if an environmental protection action is not a feature described in the project plan or design and it meets the definition of a mitigation measure, it likely is one. The environmental analysis of a significant impact of a proposed project would not, then, assume the mitigation measure is already part of the project description. The mitigation measure's impact-reducing influence would be considered after an initial conclusion describing the proposed project's significant or potentially significant effect on the environment.

Regardless, the relevant environmental impact needs to be evaluated and disclosed. The analysis needs to include a threshold or standard of significance and the identified project description feature or mitigation measure (whichever it may be) must be evaluated for its effectiveness in reducing the impact.

As it has been said, "if it looks like a duck, and quacks like a duck, it is a duck."

If you have any questions about this paper, please feel free to contact either of the authors:

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