

NAEP/AEP Conference – Los Angeles

ASCENT  
ENVIRONMENTAL

# CEQA PRACTICUM: SUPPLEMENTAL ENVIRONMENTAL REVIEW

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# AEP CONFERENCE CEQA PRACTICUM SERIES

- ▶ **2011 Monterey**
  - **Baseline; Effective MNDs; Cumulative Effects**
- ▶ **2012 Sacramento**
  - **Art of Response to Comments; Mitigation Deferral**
- ▶ **2013 Los Angeles**
  - **Alternatives; Significance Determinations; Supplemental Review**

# DISCUSSION TOPICS

- ▶ When supplemental review is needed
- ▶ Fundamentals of supplemental review
- ▶ Checklist to determine CEQA approach
- ▶ Choices for supplemental document
- ▶ Key court cases

# WHEN IS SUPPLEMENTAL REVIEW NEEDED?

# ARE WE DEALING WITH THE SAME PROJECT?

- ▶ Previously certified EIR or adopted ND or MND
- ▶ Project is the “same” as previously considered
- ▶ Time has passed...
- ▶ Another CEQA review is needed, because:
  - A follow-up discretionary action is necessary, and
  - Circumstances have changed and/or project description has changed

# SUPPLEMENTAL REVIEW ISSUE MAY ARISE FOR RESPONSIBLE AGENCY

- ▶ If after the project is approved, any of the conditions occurs, a subsequent EIR or negative declaration shall only be prepared by *the public agency with the next discretionary approval*, if any. No *other responsible agency* shall grant an approval until the subsequent EIR has been certified or subsequent negative declaration adopted.

(CCR 15162[c])

# THIS IS A DIFFERENT SITUATION THAN:

- ▶ **Recirculation of a Draft EIR (CCR 15088.5)**
  - Prior to initial project approval
  - Criteria for recirculation are similar in concept, but not identical in the details
- ▶ **New information emerges after all discretionary approvals have occurred**
  - No CEQA purview exists without a discretionary action.

# STATUTORY AND GUIDELINES PROVISIONS

STATUTORY FOUNDATION

FUNDAMENTALS IN THE GUIDELINES



# STATUTORY FOUNDATION

## PRC 21166 Subsequent or Supplemental Impact Report; Conditions

- ▶ When an EIR has been prepared for a project pursuant to this division, no subsequent or supplemental EIR shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:
  - (a) Substantial changes are proposed in the project which will require major revisions of the EIR.
  - (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the EIR.
  - (c) New information, which was not known and could not have been known at the time the EIR was certified as complete, becomes available.

# GUIDELINES FUNDAMENTALS

- ▶ If an EIR certified or ND approved for a project, no new EIR or ND may be prepared unless the project requires a discretionary action and a change in project or circumstances occurs that could:
  - Add new significant impacts or
  - Substantially increase the severity of previously identified significant impacts, or
  - Add new information of substantial importance
- ▶ If no new discretionary approvals required by lead or responsible agencies and conditions above occur, no need to conduct additional CEQA.

(CCR 15162 [a] and [c])

# WHAT ARE “PROJECT CHANGES” AFTER EIR CERTIFIED OR ND APPROVED?

1. Substantial changes are proposed in the project and the changes will result in new significant impacts or change the severity of previously identified significant impacts

(CCR 15162[a][1])

# EXAMPLE #1

School approved with MND on 5-acre site adjacent to a wetland. Proposal addition of community gym to the school, project size increase to 8 acres, and wetland needs to be filled (biological resource impacts increased).

- New discretionary action?
- Project changed?
- New or substantially more severe significant impact?

# WHAT ARE “CHANGED CIRCUMSTANCES” AFTER EIR CERTIFIED OR ND APPROVED?

2. Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or ND due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects

(CCR 15162[a][2])

## EXAMPLE #2

Specific Plan with mixed-use community approved with EIR. Nearby airport master plan approved later with a new flight pattern over a the specific plan area. Because of recession, developer seeks to change Specific Plan land use map to fit current economics, but no increase in units or square feet.

- New discretionary action?
- Circumstances changed or project changed?
- New or substantially more severe significant impacts?

# WHAT IS “NEW INFORMATION OF SUBSTANTIAL IMPORTANCE”?

3. New information of substantial importance “which was not known or could not have been known with the exercise of reasonable diligence” when prior EIR or ND prepared shows one of three outcomes:

- New or substantially more severe significant effect
- Mitigation or alternative found not to be feasible is, in fact, feasible
- New mitigation or alternative considerably different from those analyzed previously EIR

(CCR 15162[a][3])

# NEW OR SUBSTANTIALLY MORE SEVERE SIGNIFICANT IMPACTS

- ▶ Project will result in new significant impacts or substantially increase the severity of previously identified significant impacts
  - New impacts may seem easy to discern, but were they known or could have been known with reasonable due diligence? (e.g., GHG)
  - “Substantially” more severe leaves room for interpretation



# MITIGATION OR ALTERNATIVE PREVIOUSLY DETERMINED INFEASIBLE IS FEASIBLE

- ▶ Mitigation or alternatives found not to be feasible (previously), but in fact are feasible and would substantially reduce one or more significant impacts, are found to be feasible, and *project proponents decline to adopt them*.
  - Only involves mitigation or alternatives previously considered in first EIR or ND/MND
  - Previously found infeasible, but not any longer
  - Effective in substantially reducing the impact
  - If proponent accepts the “now-feasible” mitigation or alternative, no need for supplemental review

# NEW AND CONSIDERABLY DIFFERENT MITIGATION OR ALTERNATIVE

- ▶ Mitigation or alternatives that are considerably different from those analyzed previously would substantially reduce one or more significant effects, *but the project proponent declines to adopt them.*
  - Must be considerably different from those previously analyzed
  - Effective in substantially reducing the impact
  - Again, if proponent accepts the different mitigation or alternative, no need for supplemental review

## EXAMPLE #3

After approval of an elementary school site next to a wetland with MND, citizen biologist finds red-legged frog (ESA - threatened) in wetland. New information is brought to school district's attention before award of construction contract.

- Discretionary action needed?
- Is this significant new information?
- Can EIR be avoided?

# DETERMINING THE PROPER SUPPLEMENTAL REVIEW APPROACH

ASSESSING CHANGES

USE OF TAILORED CHECKLIST

# UPDATED PROJECT DESCRIPTION

- ▶ First, define and describe the changes to the project, if any
- ▶ Revised site plan, if relevant
- ▶ Updated description, highlighting differences, with references to original environmental document
- ▶ Quantified comparisons can be useful (e.g., comparing acres, d.u., or s.f.) to assess magnitude of change

# COMPARISON TABLE

**Table 2-2: Changes from the Previous Master Plan to the Proposed Grady Ranch Precise Development Plan**

Project Element	Previous Master Plan	Proposed Precise Development Plan
<b>Bridges</b>	Four bridges proposed. Vehicles would continue to drive through creeks and tributaries	Eight clear span bridges and one bridge with a center abutment proposed. Vehicles would not travel through creeks or tributaries.
<b>Bridges</b>	No bridges across Grady Creek	Bridge 3 spans Grady Creek so emergency vehicles do not travel through creek
<b>Creeks</b>	Loma Alta Creek conveyed under Lucas Valley Road by culvert	Loma Alta Creek to be bridged and creek would retain a natural bottom
<b>Creeks and tributaries</b>	Tributary to Grady Creek near Main Building to be enclosed within culvert along north side of building	Tributary to Grady Creek to be realigned along west side of building and natural bottom to be retained and enhanced
<b>Creeks</b>	Creek channel beds remain at existing elevations	Creek channel beds raised to historic levels with approximately 52,700 cubic yards of material.

# SUMMARY OF CHANGED CIRCUMSTANCES

- ▶ Identify and describe environmental circumstances that have changed
- ▶ Consider each environmental topic area in the Appendix G Checklist
- ▶ Include both physical conditions and relevant regulatory circumstances

# ASSESSMENT OF NEW INFORMATION

- ▶ Does new information exist (i.e., not previously known by the lead agency)?
- ▶ Could it have been known with reasonable due diligence?
- ▶ Does it possess “substantial importance?”



# USING A TAILORED CHECKLIST

- ▶ Appendix G Environmental Checklist includes all environmental topics
- ▶ But... the questions/responses do not relate to changed projects, changed circumstances, and new information
- ▶ So... modify the questions/responses to assess changed conditions!

Environmental Issue Area	Where Impact Was Analyzed in 1996 Master Plan FEIR.	Do Proposed Changes Involve New or Substantially More Severe Significant Impacts?	Do Any New Circumstances Involve New or Substantially More Severe Significant Impacts?	Any Substantially Important New Information Requiring New Analysis or Verification?	Do 1996 Master Plan FEIR Mitigation Measures Address/Resolve Impacts?
<b>1. Aesthetics. Would the Project:</b>					
a. Have a substantial adverse effect on a scenic vista?	Not analyzed	No	No	No	N/A
a. Substantially damage scenic resources, including but not limited to, trees, rock outcroppings, and historic buildings within a state scenic highway?	Not analyzed	No	No	No	N/A
a. Substantially degrade the existing visual character or quality of the site and its surroundings?	1996 FEIR; Impacts 5.5-1, 5.5-2, 5.5-4, 5.5-5, and 5.5-8; pages 5.5-26 through 5.5-35	No	No	Yes, but no significant impact would occur	Yes
a. Create a new source of substantial light or glare which would adversely affect day or nighttime views in the area?	1996 FEIR; Impact 5.5-3, page 5.5-28	No	No	No	Yes

Environmental Issue Area	Where Impact Was Analyzed in 1996 Master Plan FEIR.	Do Proposed Changes Involve New Significant Impacts or Substantially More Severe Impacts?	Any New Circumstances Involving New Significant Impacts or Substantially More Severe Impacts?	Any New Information Requiring New Analysis or Verification?	Do 1996 Master Plan FEIR Mitigation Measures Address/Resolve Impacts?
<b>4. Biological Resources. Would the project:</b>					
a. Have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the California Department of Fish and Game or U.S. Fish and Wildlife Service?	1996 FEIR; Section 5.3; pages 5.3-35-5.3-39	No	Yes	Yes	No
a. Have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, and regulations or by the California Department of Fish and Game or US Fish and Wildlife Service?	1996 FEIR; Section 5.3; pages 5.3-22-5.3-31, 5.3-39-5.3-41	No	No	Yes, but new or more severe significant effects would not occur	Yes, with modifications /updates

Environmental Issue Area	Where Impact Was Analyzed in 1996 Master Plan FEIR.	Do Proposed Changes Involve New Significant Impacts or Substantially More Severe Impacts?	Any New Circumstances Involving New Significant Impacts or Substantially More Severe Impacts?	Any New Information Requiring New Analysis or Verification?	Do 1996 Master Plan FEIR Mitigation Measures Address/Resolve Impacts?
<b>8. Greenhouse Gas Emissions. Would the project:</b>					
a. Generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment?	N/A	No	Yes	Yes	No
a. Conflict with an applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases?	N/A	No	Yes	Yes	No

# ADVANTAGES OF THE CHECKLIST

- ▶ **Thoroughly covers environmental issues**
- ▶ **Forces consideration of the questions about changed conditions**
- ▶ **Provides substantial evidence to support the selection of a CEQA document**

# CHOICES FOR SUPPLEMENTAL DOCUMENT

SUBSEQUENT EIR

SUPPLEMENT TO AN EIR

NEGATIVE DECLARATION

ADDENDUM

# POTENTIAL APPROACHES WHEN ANOTHER EIR IS NEEDED

- ▶ If Section 15162 provisions require a new EIR, prepare either a “subsequent EIR” or a “supplement to an EIR”
- ▶ Pay attention to both content differences and process questions

## SUBSEQUENT V. SUPPLEMENT TO EIR

- ▶ General practice rule of thumb: if changes are sufficient for a broad range of revisions in the EIR, prepare a subsequent EIR.
- ▶ If “only minor additions or changes” in documentation needed, such as one or two impact issue areas, a supplement to an EIR would be enough.
- ▶ Judgment needed. No bright line test.



# PROCESS DIFFERENCES

- ▶ **Subsequent (CCR 15162)**
  - Include all sections of EIR (including cumulative, alternatives, etc.)
  - Relevant information can be incorporated by reference to prior EIR (including cumulative, alternatives, etc.)
- ▶ **Supplement (CCR 15163)**
  - Include only information needed to make previous EIR adequate
  - Need not circulate prior EIR, but prior EIR is part of record, including when making findings
- ▶ **Applies to both**
  - Same notice (NOA) and review period as the original Draft EIR
  - Guidelines “silent” on need for NOP. Recommendation: reissue an NOP, especially for subsequent EIR (CCR 15082: after decision to prepare an EIR, “lead agency shall send” an NOP)
  - Some believe prior NOP can be reused for supplement to an EIR
  - Make previous EIR available

# SUBSEQUENT NEGATIVE DECLARATION

- ▶ Probably a rare document, because criteria involves new or substantially more severe significant effects
- ▶ Process: same notice (NOI) and public review period as a “regular” ND or MND
- ▶ Can we mitigate our way from a Subsequent EIR to a Subsequent MND?

# ADDENDUM

- ▶ Addendum is for minor changes or additions after certification of EIR or approval of ND, and new discretionary action needed.
  - No new or substantially more severe significant impacts
- ▶ Include brief explanation why an EIR or subsequent ND is not needed, supported by substantial evidence (CCR 15164[e])
- ▶ No public review required
- ▶ Make addendum available to public according to lead agency regulations or ordinances (e.g., with normal staff report procedures, if lead agency is holding a public meeting)
- ▶ Agency considers addendum together with previous EIR or ND before acting

# MITIGATION TO AVOID SUBSEQUENT EIR?

## RULES ARE UNCLEAR

- ▶ Guideline discussions of substantial changes in the project or circumstances, leading to new or more severe significant effects, do not discuss mitigation. (CCR 15162[a][1, 2])
- ▶ Guideline discussions of new information, leading to new or more severe significant effects reference mitigation and alternatives (if they could reduce the impact but are not adopted, then prepare a subsequent EIR or supplement to an EIR). (CCR 15162[a][3])

## WHAT DO COURTS SAY?

- ▶ Issue has not been directly challenged
- ▶ In some cases, lead agencies have mitigated new impacts and not prepared supplemental EIR documents (*River Valley v. Metropolitan Transit, 1995; STOP v. San Francisco, 1999*)
- ▶ In other cases, Courts have suggested new mitigation measures require recirculation to public (*Mira Monte Homeowners v. County of Ventura, 1985*)
- ▶ By analogy, cannot add mitigation to qualify for a cat ex (*SPAWN v. County of Marin, 2005*)

# UNSETTLED LEGAL ISSUE

- ▶ Because the issue has not been settled, no firm guidance.
- ▶ In practice, many addenda have included new mitigation.
- ▶ But proceed at your own risk...until the issue is challenged directly on point and resolved in court.

# **SUMMARY OF RELEVANT COURT DECISIONS**

# KEY RELEVANT COURT DECISIONS

<i>Citizens of Goleta Valley v. BOS; 1990</i>	Further review prohibited unless...
<i>Moss v. Co. of Humboldt; 2008</i>	Addendum decision, “substantial evidence”
<i>SD Navy Broadway Complex Coalition v. City of SD; 2010</i>	SEIR not required, if discretionary action not related to impact
<i>Benton v. Board of Supervisors; 1991</i>	Only the increment of changed impact needs to be analyzed



# KEY RELEVANT COURT DECISIONS

<i>STOP v. City and County of SF; 1999</i>	No SEIR, even with major project change
<i>River Valley Preservation Project v. MTDB</i>	No substantial severity increase, if well studied
<i>Mani Brothers Real Estate Group v. City of Los Angeles; 2007</i>	SEIR not required with large s.f. increase; no significant impacts
<i>Eller Media Co. v. Community Redevelopment Agency; 2003</i>	Proposal for billboards was substantial new information; historic/ aesthetic impacts

# CASE STUDIES

# CHANGED CIRCUMSTANCES: CASE STUDY #1

EIR certified and project approved by lead agency. No biological impacts were identified. Project is initiated and burrowing owls (species of special concern, but not listed by CESA or ESA) are found on a site during construction. No permits needed from CDFG or USFWS.

Is supplemental environmental review and documentation needed?

## CHANGED CIRCUMSTANCES: CASE STUDY #2

EIR certified and project approved by lead agency. No biological impacts were identified. Active Swainson's hawk nests (CESA – threatened) are found on the site prior to award of construction contract. A take permit is needed from CDFG.

Is supplemental review and documentation needed?



**THANK YOU!**

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