

Environmental Management Office

Significance and Mitigation under the California Environmental Quality Act

November 2016

INTRODUCTION

This document provides general guidance to ensure that significance determinations under the California Environmental Quality Act (CEQA) are made without consideration of mitigation measures, and that minimization, avoidance, and mitigation measures are consistently and properly labeled and categorized throughout environmental documents. Toward that end, this guidance discusses the distinctions between (1) mitigation measures, which relate to *significant* impacts; (2) avoidance and minimization measures for impacts determined to be not significant; and (3) elements of a project or project features.

This guidance has been developed in light of *Lotus vs. Department of Transportation* (2014) 223 Cal.App.4th 645 (*Lotus*), where the court found that an EIR violated CEQA by incorporating proposed mitigation measures into the description of the project, and then basing its conclusion of less-than-significant impacts in part on those mitigation measures. The court found that this improperly compressed the analysis of impacts and mitigation measures into a single issue.

Notably, the *Lotus* court acknowledged that the distinction between elements of a project and measures designed to mitigate impacts of a project may not always be clear. The purpose of this guidance is to identify and define those distinctions where feasible and practical, while recognizing that the distinction may not always be straightforward, and to clarify which measures should be taken into consideration before making significance determinations and what label to apply to which measures.

BASIC STEPS

Significance determinations must be made without consideration of avoidance, minimization, and/or mitigation measures. Measures should be labeled “mitigation measures” only if they are to reduce impacts determined to be significant. The environmental document must also explain why the impact is or is not significant before mitigation and AFTER mitigation. If measures are included to reduce or avoid impacts which are not significant, they should be labeled as avoidance or minimization measures, not mitigation measures. Additional measures which do not address an impact may be considered enhancement measures intended to create a net benefit as compared to an existing condition. Finally, the document must clearly identify project features or “elements of a project” in the project description and state that these features or elements have been or will be considered *prior* to any significance determinations.

MITIGATION OF SIGNIFICANT IMPACTS

A “mitigation measure” is a measure designed to minimize a project’s **significant** environmental impacts. [Pub. Res. Code § 21002.1(a).]

CEQA broadly defines mitigation measures as including the following kinds of measures:

1. Avoiding the impact altogether by not taking a certain action or parts of an action.
2. Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
3. Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.
4. Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
5. Compensating for the impact by replacing or providing substitute resources or environments. [CEQA Guidelines § 15370.]

While this definition includes measures which “avoid” or “minimize” significant impacts, such measures are not technically “mitigation” under CEQA unless they are incorporated to avoid or minimize “significant” impacts. [Pub. Res. Code § 21100(b)(3).] Accordingly, for clarity, the term “mitigation” should only be used for measures that are to reduce an impact that has been determined to be significant. *Measures used to avoid or minimize impacts which have NOT been determined to be significant should not be considered or labeled “mitigation.”*

AVOIDANCE AND MINIMIZATION MEASURES FOR LESS-THAN-SIGNIFICANT IMPACTS

Avoidance Measures

Avoidance measures are utilized to avoid potential adverse environmental effects which are otherwise not significant under CEQA. Examples of commonly used avoidance measures, which are typically temporal or spatial, include:

- Work windows for tree or vegetation removal, in-stream work, species avoidance.
- Clearing vegetation prior to nesting season to avoid impacts to nesting birds.
- Avoiding wetlands, Environmentally Sensitive Habitat Areas (ESHAs), or other resources through the establishment of Environmentally Sensitive Areas (ESAs).

- Pre-construction surveys.
- Measures intended to prevent the spread of invasive species.
- Bird and bat exclusion.
- Post-review discovery action plan for cultural resources.

Minimization Measures

Minimization measures reduce known or anticipated environmental effects that—even without incorporation of the measures—are *not significant*. These measures can apply to any resource where there will be less-than-significant impacts that Caltrans nonetheless wishes to minimize. Examples include:

- Aesthetic treatments to minimize visual impacts.
- Minimizing tree and vegetation removals.
- Re-vegetation.
- Traffic/transportation management plans during construction.
- Construction dust-control measures/Best Management Practices (BMPs).
- Construction noise minimization measures.

It is important to note that some avoidance and minimization measures such as ESAs, bird protection, traffic control measures, dust control measures, archaeological monitoring and/or pre-approved and standard procedures to follow in the event of the discovery of archaeological resources or human remains during construction are included in the Standard Plans and Specifications and can be considered project features in most instances.

Conversely, those avoidance and minimization measures that cannot be considered project features may be properly termed mitigation when they are intended to avoid or minimize an effect determined to be significant under CEQA.

PROJECT FEATURES

A “project” is defined as including “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. [CEQA Guidelines § 15378(a).] Unlike mitigation measures, project features are taken into account prior to making a significance determination.

Typical project features, which are not generally considered mitigation, include:

- Features directly related to the Purpose and Need of the project.
- Features or improvements included as part of the project description such as repaving, drainage improvements, culvert work, lighting, signage, etc.
- Features required to meet design standards, such as slopes, seismic design standards, guardrail type, or shoulder widths.
- Certain features generally applied to most or all Caltrans projects, where Caltrans lacks the discretion in the context of a particular project to consider alternative measures, or where a range of other measures has already been considered, such as the Standard Plans and Specifications or as a Standard Special Provision, water quality BMPs, ESAs, bird protection, traffic control, dust control, erosion control, health and safety plans.
- Features required by a non-project specific permit, such as our statewide NPDES permit and standard Stormwater BMPs.

Standardized or pre-existing project features afford little discretion regarding implementation, as they are not specific to the circumstances of a single project. As a feature becomes more specialized (targeted to protect a specific species, for example), it becomes more likely that it could be considered a mitigation measure to address specific significant project impacts.

Certain avoidance measures can be more aptly characterized as an integral part of the overall project (and therefore not “mitigation”) even where impacts would be significant but for their existence. For instance, if a project is re-designed to avoid a wetland, such an approach does not constitute a “mitigation” measure because it has become part of the project itself, and is not a “subsequent action proposed to mitigate or offset the alleged adverse environmental impacts” of the project. [*Berkeley Hillside Preservation v. City of Berkeley* (2015) 241 Cal.App.4th 943, 961.]

MEASURES REQUIRED BY PERMITS/AGREEMENTS

Incorporating measures into a project does not always mean they are not “mitigation,” though, because CEQA provides that “the discussion of mitigation measures shall distinguish between the measures which are proposed... to be included in the project and other measures proposed by the lead, responsible or trustee agency... if required as conditions of approving the project.” [CEQA Guidelines § 15126.4(a)(1)(A).]

For instance, conditions imposed on permits by regulatory agencies will often be mandatory and essentially part of the project, but they are still fairly characterized as mitigation measures if the impacts would be significant without them. In those instances, the significance determination should be made without consideration of the

permit conditions. This is the case, even though Caltrans would lack the discretion to consider alternative mitigation measures.

MAKING THE DISTINCTION

As the *Lotus* court cautioned, “the distinction between elements of a project and measures designed to mitigate impacts of the project may not always be clear.” When that is the case, factors to consider include:

- The extent of discretion that Caltrans has with respect to considering a range of mitigation measures, or whether to implement the measures in the first place. The *Lotus* court explained that the chief purpose of the distinction between elements of a project and mitigation measures is to enable the determination of whether other more effective mitigation measures than those proposed should be considered. If Caltrans lacks the discretion to make such determinations in the context of a particular project and feature/measure, it is more likely it can be labeled as part of the project. The exception to this general rule would be mandatory permit/regulatory conditions, without which the impact would be significant.
- Project features are generally not features or actions developed in response to a project-specific impact. In *Lotus*, for example, the court noted that the use of lighter weight pavement base materials, used as a design feature to minimize excavation depth near the root zone of the redwoods, was in fact, a legitimate project feature because “it would be 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.”
- Whether or not the measure or feature can be considered a “subsequent” action, or is instead a “common and typical concern” for that type of project. In *Berkeley Hillside Preservation*, the court rejected the plaintiff’s argument that traffic control measures during construction were “mitigation” that precluded the use of a categorical exemption (CE). The court stated that managing traffic during project construction “is a common and typical concern in any urban area” and therefore does not constitute mitigation. Similarly, in *Citizens for Environmental Responsibility v. State ex rel. 14th Agricultural Association* (2015) 242 Cal.App.4th 555, the court rejected arguments that a manure management plan implemented to prevent water pollution during a proposed rodeo constituted mitigation. In this case, the court found that the plan was a preexisting measure adopted and implemented as part of the normal operations of the fairground.

CONCLUSIONS

The following basic considerations should assist planners in performing their CEQA analyses:

1. The environmental document should very clearly state that project features are considered to be an integral part of the project and have been or will be considered *prior* to any significance determinations.
2. The project description should include all elements or components of a project that are considered project features. This includes environmentally beneficial elements such as BMPs and any measures found in the Standard Plans and Specifications. If there are any unusual and or project-specific measures, their inclusion as project features should be explained. The length of the explanation will depend on the degree to which the measure differs from a standard measure that Caltrans applies to all (or most) projects.
3. The Project Development Team, in close coordination with and giving deference to the recommendations of the Environmental Planner/Generalist and technical specialists, should then make all significance determinations *without* consideration or inclusion of any avoidance, minimization, or mitigation measures AND explain why the impact is or is not significant. If the impact is significant, any mitigation measures should be applied and then the environmental document must explain if the impact remains significant or if the mitigation has reduced the impact to “less-than-significant with mitigation incorporated.”
4. Measures should be labeled “mitigation measures” only if they are to reduce impacts determined to be *significant*. Conversely, if measures are included to reduce or avoid impacts *which are not significant*, they should be labeled as avoidance or minimization measures, not mitigation measures. Measures which do not address an impact, whether it is significant or not, can also be considered as enhancement measures intended to create a net benefit as compared to an existing condition.
5. If an effect is determined to be significant, any additional measure (i.e., those measures that are not project features) intended to reduce, avoid, compensate, or eliminate that effect (even if the measure does not reduce the impact to “less than significant”) should be considered mitigation.
6. The inclusion of environmentally beneficial project features, avoidance measures, and/or minimization measures to lessen effects that clearly have no potential to be significant, does not preclude the use of a CE under CEQA.